



Cornell Law School Library

Cornell University Library

KF 801.E46

v.1

Commentaries on the law of contracts :be



3 1924 018 827 315

law



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

COMMENTARIES

ON THE

LAW OF CONTRACTS

BEING A CONSIDERATION
OF THE NATURE AND GENERAL PRINCIPLES OF THE
LAW OF CONTRACTS AND THEIR APPLICATION
IN VARIOUS SPECIAL RELATIONS

BY
WILLIAM F. ELLIOTT

CO-AUTHOR OF
"ROADS AND STREETS," "RAILROADS," "EVIDENCE,"

ASSISTED BY THE PUBLISHERS' EDITORIAL STAFF

IN SEVEN VOLUMES
VOLUME I

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

B 4342

COPYRIGHT 1913

BY THE BOBBS-MERRILL COMPANY

PREFACE

No branch or department of the law is of more importance in the daily intercourse and relations of life than the law of Contracts. It occupies one of the most extensive fields of the law, and no other branch of the law has had greater growth and borne more fruit in recent years. It was said by a learned writer a century ago: "Contracts comprehend the whole business of human negotiations. They are applicable to the correspondence of nations as well as to the concerns of domestic life. They include every change and relation of private property and consequently furnish the principal subject on which all legal and equitable jurisdiction is exercised." If the subject was so important a hundred years ago, what shall be said of it at the present time? In this age of commerce, with its multiplied industry and complex business relations the subject is of supreme importance. So not only have old principles been amplified and applied to new conditions but it has also been found that many of the old principles themselves were misunderstood and misapplied by some of the older writers and judges. The modern law of contracts is a very different thing from what the law of contracts was supposed to be many years ago, and the older treatises upon the subject are in many respects obsolete.

It has been the purpose in preparing this work to cover the subject of contracts fully and more in detail than in any other book on the general subject. It is believed that this work has all the advantages of both an ordinary treatise and an encyclopedia. The underlying principles are fully treated, the reasons for the rules are stated, and copious illustrations are given. The notes are unusually full and consist not merely of citations in support of general principles but also contain brief statements of the facts

in many of the cases cited and show the application of the general principles, or their exceptions, to particular states of facts.

The first three volumes constitute a complete general treatise upon the subject; the fourth and fifth volumes contain the most important topics of the law of contracts specifically treated under an alphabetical arrangement. These, in addition to showing the specific application of the general principles in detail, also contain practically all that is found in separate text-books on the different topics, and much that is not found in any text-book. The sixth volume contains forms for contracts of every description likely to be needed and the seventh volume is given over to the table of cases and index. Thus in one work we have combined everything that can well be required in the widest practice. The adjective or remedial law as well as the substantive law is fully treated, and the work may well take the place of a dozen text-books on special topics in addition to a treatise on the general law of contracts. There is certainly no other book on the subject that is so comprehensive.

The author has been assisted in this work by the editorial staff of the publishers, especially in the assembling of authorities, the verification of citations and matters of clerical detail, including the making of the table of cases and the exhaustive index. Without the assistance of this trained editorial force, it would have been impossible for one man to make an examination of the great multitude of authorities incident to the preparation of this treatise. The work of these assistants has been of the highest order and acknowledgment is here made to them for their co-operation and efficient aid.

WILLIAM F. ELLIOTT.

TABLE OF CONTENTS

VOLUME ONE.

NATURE, FORMATION AND EXECUTION.

CHAPTER I.

NATURE AND ELEMENTS.

SECTION.	PAGE.
1. Definition	1
2. Quasi contract	2
3. Statutory obligations	3
4. The agreement	4
5. The obligation	5
6. Concurrence of agreement and obligation.....	6
7. Essential elements of contract.....	7

CHAPTER II.

DEVELOPMENT AND CLASSIFICATION.

10. Importance and place of contract in the law.....	8
11. Development of the law of contract.....	9
12. Influence of past doctrines—Change in classification.....	13
13. How contracts may originate.....	14
14. Bilateral and unilateral contracts.....	15
15. Executory and executed contracts.....	16
16. Specialties and simple or parol contracts.....	18
17. Specialties or contracts under seal further considered.....	19
18. Express and implied contracts.....	20
19. Valid, void and voidable contracts.....	21

CHAPTER III.

OFFER AND ACCEPTANCE.

25. In general	24
26. Aggregatio mentium—Mutuality.....	25
27. Nature of offer—Obligation.....	27

SECTION.	PAGE.
28. Offer cannot require express refusal.....	31
29. Offer may prescribe form of acceptance.....	31
30. Offer must not be uncertain.....	32
31. Offer that may be made certain.....	33
32. Offer need not be made to a particular ascertained person.....	34
✓ 33. Revocation of offer	35
34. Time in which to accept.....	37
35. Lapse of offer and acceptance.....	42
36. When the contract is complete.....	44
37. Acceptance must be unconditional.....	44
38. Acceptance must be on terms of offer.....	45
39. Variance between offer and acceptance.....	46
40. Mistakes	48
41. Condition amounts to a rejection of offer.....	49
42. Counter offer	49
43. Manner of communicating acceptance.....	50
✓ 44. Communications by mail	51
✓ 45. Communications by telegraph.....	54
✓ 46. Communications by telephone or phonograph.....	58
47. Conduct as offer or acceptance.....	59
48. Silence does not always give consent.....	62
49. Performance or acceptance of consideration as an acceptance of the offer	63
50. Acceptance must be by an ascertained person.....	63
51. Rewards	64
52. Reward—Who may not accept.....	66
53. Tickets, receipts and the like.....	67
54. Deeds	74
55. Deeds—Subject continued	75
56. The American doctrine as to deeds and sealed instruments.....	76
57. Sales	78
58. Auction sales	80
59. Building and working contracts.....	82
60. Miscellaneous cases of offer and acceptance held sufficient.....	86
61. Miscellaneous cases of offer and acceptance held insufficient.....	88
62. Time and place of contract determined by acceptance.....	90
63. Intention to reduce the contract to writing.....	92
64. Alteration and filling blanks by consent.....	94

CHAPTER IV.

FRAUD AND MISREPRESENTATION.

70. Apparent consent may not be real.....	98
71. Fraud or misrepresentation as to inducement or collateral matter....	99
72. Fraud or misrepresentation as to essential elements of contracts....	101
73. Fraud as to contracts or substance of contracts.....	107
74. Fraud where there is a fiduciary or confidential relation.....	111

SECTION.	PAGE.
75. Constructive fraud	120
76. Fraud in execution	121
77. Negligence	122
78. Fraud of third persons	126
79. Active concealment	129
80. Misleading, partial disclosure.....	134
81. False representation	135
82. Must be as to facts.....	136
83. Promise or representations of intentions as to future.....	136
84. Opinions and predictions.....	138
85. Misrepresentations as to law.....	145
86. Materiality	147
87. Falsity	148
88. Knowledge and intention.....	149
89. Reliance on false statement.....	158
90. Must mislead	162
91. Must result in damage or injury.....	163
92. Parties in <i>pari delicto</i>	164

CHAPTER V.

MISTAKE.

100. Generally—Materiality	168
101. As to the nature of transactions.....	169
102. As to parties.....	172
103. Mistake as to subject-matter.....	174
104. Mistake as to existence of subject-matter.....	174
105. As to identity of subject-matter.....	176
106. As to nature or quality of subject-matter.....	177
106a. Mistake as to quantity.....	179
107. As to price	181
108. As to value	184
109. In execution of writing.....	185
110. Negligence	189
111. Ratification—Laches	193
112. Mutuality of mistake	195
113. Mistake as to the law.....	197
114. Mistake of fact as to interest induced by mistake of law.....	202

CHAPTER VI.

FAILURE TO DISCLOSE MATERIAL FACTS.

120. Nondisclosure as to essential elements.....	204
121. Failure to disclose matter of inducement.....	205
122. Fact peculiarly within the knowledge of one party.....	207
123. Silence where there is a duty to speak.....	208

SECTION.	PAGE.
124. Relations of trust and confidence.....	208
125. Failure to disclose changes in fact.....	209
126. Insurance cases	210
127. Suretyship	213
128. Sales	216
129. Warranties	218
130. Leases	228
131. Commercial paper	231
132. Stock subscriptions and sales.....	233
133. Compromise	234

CHAPTER VII.

DURESS AND UNDUE INFLUENCE.

140. What is meant by such terms.....	236
141. When it affects the contract.....	239
142. How it affects the contract.....	241
143. General rule as to avoidance of contract because of duress.....	242
144. Duress of goods	243
145. Duress by imprisonment	248
146. Duress by threat and oppression.....	249
147. When presumed	261
148. Relation of parties	261
149. Family relations	265
150. Guardian and ward.....	268
151. Husband and wife.....	270
152. Principal and agent.....	271
153. Attorney and client	271
154. Physician and patient.....	272
155. Religious advisers	273
156. Other confidential relations.....	273
157. Mental weakness	275
158. Inadequacy of consideration.....	277
159. Unconscionable contracts	280
160. Contract with expectant heirs, and the like.....	281
161. Ratification	284
162. In pari delicto, principle of when not applicable to contracts procured through undue influence.....	285

CHAPTER VIII.

CERTAINTY.

170. General rule	287
171. That is certain which can be made certain.....	291
172. Illustration of the maxim, "id certum est quod certum reddi potest".	292
173. Other illustrative cases.....	292

SECTION.	PAGE.
174. Reference to plans and specifications.....	294
175. Agreement to make future contract.....	295
176. Uncertainty as to time.....	297
177. Uncertainty as to place.....	305
178. Uncertainty as to subject-matter.....	306
179. Uncertainty as to description.....	308
180. Uncertainty as to amount.....	309
181. Uncertainty as to price.....	311
182. Uncertainty as to what is to be done.....	313
183. Miscellaneous instances of uncertainty.....	313
184. Miscellaneous instances of contract held sufficiently certain.....	315
185. Effect of using terms "more or less", "about" and the like.....	317
186. "Say" and "say about" and the like.....	320

CHAPTER IX.

CONSIDERATION.

195. Necessity for	323
196. When it is presumed or imported.....	324
197. Contracts in restraint of trade.....	326
198. When presumed or imported—Statutory abolition of seals.....	326
199. When presumed—Negotiable instruments.....	327
200. When presumed—Consideration declared unnecessary by statute or rule of law	329
201. When presumed—Contracts in writing.....	329
202. When presumed—Executed contracts.....	330
203. What is meant by consideration.....	331
204. Distinguished from motive.....	333
205. Concurrent, executed, executory and continuing consideration.....	334
206. Good consideration	337
207. Valuable consideration	337
208. Nudum pactum	339
209. Sufficient consideration or adequate consideration.....	340
210. Insufficient or inadequate consideration.....	343
211. Moral consideration	345
212. New promise—Equitable consideration.....	348
213. Past or antecedent consideration.....	359
214. Exceptions to rule that past consideration will not support a subse- quent promise	362
215. Doing what one is legally bound to do.....	366
216. The same—Refusal to perform without further recompense.....	369
217. Part payment of liquidated liability.....	374
218. The rule against satisfaction by payment of a lesser sum strictly construed	377
219. Other consideration—Receiving property in addition to the sum paid.	378
220. Other consideration—Payment of debt before due, or at different place	378

SECTION.	PAGE.
221. Other consideration—Additional security.....	379
222. Miscellaneous exceptions	380
223. Rule deducible from the authorities.....	381
224. Impossible consideration	381
225. Physical and legal impossibility.....	382
226. Illegal consideration	383
227. Voluntary subscription	384
228. Voluntary subscription valid when supported by a consideration.....	384
229. Mutual promises as a consideration therefor.....	386
230. Obligation to apply the funds in a certain way as a consideration...	386
231. Promise for promise.....	387
232. Mutuality, options	394
233. Abandonment of legal right.....	397
234. Forbearance	402
235. Forbearance to sue—Time	403
236. Extension of time	408
237. Compromise of disputed claims.....	413
238. Delivery of property in trust.....	417
239. Incurring liabilities or obligations.....	417
240. Services	418
241. Marriage	422
242. Name and change of name.....	426
243. Contracts and contractual rights generally.....	428
244. Rights to personal property.....	430
245. Interests in real property.....	430
246. Blood or natural affection.....	431
247. Evidence of consideration	433
248. Entire or indivisible consideration.....	436
249. Divisible considerations or promises.....	438
250. From whom consideration must move.....	440
251. At whose instance the consideration must move.....	441
252. To whom consideration must move.....	442
253. Want of consideration	442
254. Failure of consideration	444

CHAPTER X.

PARTIES.

260. Must have capacity to contract.....	448
261. Capacity is generally presumed.....	448
262. How incapacity may arise or be caused.....	449
263. United States or state as a party.....	449
264. Foreign governments and representatives.....	455
265. Aliens	456
266. Convicts	460
267. Effect of laws requiring license or the like.....	461
268. Youth or lack of age.....	466

SECT. DN.	PAGE.
269. Mental incapacity	468
270. Deaf mutes	470
271. Coverture	471
272. Artificial persons and corporations.....	474
273. Agents and representatives	475
274. Drunken persons	476
275. Where incapacity is such as to make contracts void.....	477
276. Where incapacity is such as to make contracts voidable.....	479
277. Ratification	480

CHAPTER XI.

INFANTS.

285. Infants—When infants become of age.....	483
286. Infants—Contracts may be void, voidable or valid.....	484
287. Former rule for determining whether void, voidable, or valid.....	484
288. Present rule	486
289. Effect of emancipation	487
290. Valid contracts generally	488
291. Valid contracts generally—Contracts authorized by statute or the common law	488
292. Contracts authorized by statute—Contracts of enlistment.....	489
293. Marriage contracts	490
294. Contract by infant to do what he is legally bound to do.....	491
295. Valid contracts—Necessities	491
296. What are necessities?.....	493
297. Necessities—Food, wearing apparel, lodging and the like.....	494
298. Necessities—Education	495
299. Necessities—Services of an attorney.....	496
300. Necessities—Miscellaneous	497
301. What are not necessities.....	498
302. Voidable contracts generally.....	505
303. Conveyances, transfers and mortgages of property.....	506
304. Bills and notes.....	509
305. Contracts for service, work and labor.....	511
306. Awards and compromise	514
307. Suretyship	516
308. Partnership	517
309. Corporation stock and membership.....	519
310. Other illustrative cases—Marriage settlement.....	521
311. Other illustrative cases—Mechanic's lien.....	522
312. Other illustrative cases—Assignment for benefit of creditors.....	523
313. Other illustrative cases—Leases made by guardian extending beyond the term of guardianship.....	523
314. Other illustrative cases—Apprenticeship.....	523
315. Effect of concealment or misrepresentation.....	524
316. Active concealment, estoppel.....	525

SECTION.	PAGE.
317. Active concealment—Action in tort.....	528
318. Action to compel a reconveyance.....	530
319. Active misrepresentation, liability for false pretense.....	530
320. Summary	531
321. Ratification	532
322. Ratification—What amounts to.....	533
323. Express ratification	534
324. When ratification must be in writing.....	536
325. Ratification by conduct—Retention of property.....	537
326. Ratification by conduct—Sale or conversion of property.....	539
327. Ratification by conduct—Receiving agreed consideration.....	540
328. Ratification by conduct—Miscellaneous.....	540
329. Ratification by laches	541
330. Laches—Statute of limitations.....	543
331. Ratification need not be supported by an additional consideration... 545	
332. Ratification—Knowledge as to legal liability	545
333. Ratification—Effect	547
334. Disaffirmance and avoidance	548
335. Who may disaffirm or avoid.....	548
336. Time and manner of disaffirmance—Personal contracts and contracts concerning personalty	550
337. Time of disaffirmance—Contracts concerning an interest in real estate 552	
338. Time of disaffirmance—Executory contracts.....	553
339. Disaffirmance after majority.....	554
340. Disaffirmance—Delay greater than that permitted by statute of limi- tations	555
341. Disaffirmance—How indicated	557
342. What amounts to disaffirmance.....	557
343. Cannot disaffirm in part and ratify in part.....	558
344. What amounts to disaffirmance—Illustrations.....	559
345. Disaffirmance of contract concerning an interest in real estate..... 560	
346. Restoration of consideration.....	562
347. Restoration of consideration—Cannot use privilege as a sword in- stead of a shield.....	564
348. Restoration of consideration—Contract fair and reasonable.....	566
349. Restoration of consideration as a condition precedent.....	566
350. Restoration of consideration—Statutory modification of common- law rule	568
351. Restoration of consideration—Both parties infants.....	569
352. Effect and result of disaffirmance.....	569
353. Disaffirmance—Liability in tort.....	570
354. Disaffirmance—Effect—Miscellaneous instances	571
355. Finality of disaffirmance.....	571

CHAPTER XII.

INSANE PERSONS.

SECTION.	PAGE.
365. When one person is of such unsound mind as to be incapable of contracting	573
366. Insanity must bear directly on the agreement.....	575
367. Contracts of insane persons generally voidable.....	576
368. Contracts of insane persons—When void.....	577
369. Proceeding to commit to an asylum and to appoint guardian—Distinction between	578
370. Rule holding contract of insane persons void strictly construed.....	579
371. Voidable contracts of an insane person.....	580
372. Valid contracts of insane persons.....	581
373. Contracts for necessities.....	583
374. What are necessities	583
375. Effect of inquisition and adjudication of insanity.....	586
376. Adjudication covering period of time prior to finding.....	586
377. Adjudication—Collateral attack	587
378. Contracts after office found.....	588
379. Effect of knowledge of the other party.....	589
380. Effect of want of knowledge.....	590
381. Ratification and avoidance.....	590
382. Who may affirm or avoid.....	592
383. Acts showing a disaffirmance.....	593
384. Restoration of consideration.....	594
385. Illustrations of the rule.....	595
386. Restoration as a condition precedent.....	597
387. Liability for benefits received, subrogation, insanity a question of fact	598

CHAPTER XIII.

MARRIED WOMEN.

390. Incapable of contracting at common law.....	599
391. Contracts void at common law.....	600
392. Contracts in cases of necessity.....	600
393. Contracts in equity—Separate estate—Origin.....	601
394. Equitable separate estate—Powers over.....	602
395. Equitable separate estate—Limitations on powers over.....	603
396. Must intend to bind her separate estate.....	604
397. Intention to bind separate estate—Rule in equity.....	605
398. Rule that intention to bind must expressly appear.....	606
399. Feme covert cannot bind herself personally.....	607
400. Liability attaches to property in her control at time liability assumed.....	607
401. Conveyances directly to husband.....	608
402. Contracts under modern statutes.....	608

SECTION.	PAGE.
403. Contract must be in form prescribed by law.....	610
404. Contracts as to separate estate under statutes.....	611
405. Power conferred to contract with reference to statutory separate estate as to feme sole.....	614
406. Other statutes conferring limited capacity.....	615
407. Statutes requiring husband to join or consent.....	617
408. Statutes requiring written contracts.....	620
409. Statutes giving power to contract as a feme sole.....	621
410. Contracts as sole trader.....	623
411. Contracts of suretyship.....	624
412. Securing husband's debt.....	626
413. Contracts with husband.....	628
414. Contract with husband must not contravene public policy.....	631
415. Consideration need not proceed from husband.....	633
416. Contracts of agency.....	633
417. May appoint husband her agent.....	634
418. Evidence of husband's agency.....	635
419. Wife may act as husband's agent.....	636
420. Power to pledge credit of husband.....	636
421. Power to take and hold lands as trustee.....	637
422. Ratification or confirmation.....	637
423. Restoration	638
424. Estoppel	639
425. May be estopped by agreement within limit of her capacity to contract	640
426. Illustration of the rule.....	641
427. Estoppel by silence or acquiescence.....	643
428. Estoppel—When abandoned by husband.....	644
429. Coverture a personal defense and must be pleaded.....	644
430. Conflict of laws—Lex loci contractus.....	646
431. Lex loci contractus—Exceptions.....	647
432. Lex fori controls as to remedy.....	648

CHAPTER XIV.

DRUNKEN PERSONS.

440. Effect of intoxication on contracts generally.....	650
441. Extent or degree of intoxication.....	651
442. Contracts voidable when intoxication is such as to render the party incapable of understanding.....	653
443. Intoxication coupled with fraud and unfair conduct.....	654
444. Ratification and disaffirmance.....	656
445. Restoration of consideration.....	657
446. Habitual drunkards—Effect of adjudication.....	658
447. Contracts for necessities.....	660
448. Drugs and drug habit.....	660

CHAPTER XV.

AGENTS.

SECTION.	PAGE.
450. Introduction	663
451. Capacity to appoint or be an agent.....	663
452. Authority of agents—How conferred.....	665
453. Authority of agents—Extent.....	668
454. Estoppel	671
455. Ratification	675
456. Ratification—Who may ratify as principal.....	678
457. Ratification—What acts may be ratified.....	680
458. Ratification—What amounts to.....	681
459. Implied ratification	683
460. Termination of agent's authority—By lapse of time.....	687
461. Revocation by act of the parties.....	687
462. Liability of principal.....	690
463. Liability of agent.....	692
464. When personally liable	693
465. Rights and liabilities of parties where principal is named.....	695
466. Rights and liabilities of parties where principal is not disclosed— Rights of principal.....	697
467. Rights and liabilities of parties when principal not disclosed—Lia- bility of agent	698
468. Rights and liabilities of parties when principal not disclosed—Rights of third persons	699
469. Rights and remedies of principal	701
470. Rights and remedies of agent.....	701

CHAPTER XVI.

PARTNERS.

475. Introductory	703
476. Definition and nature of partnership.....	703
477. Tests by which to determine existence of partnership—Mutual agency and profit sharing.....	705
478. Profit sharing abandoned as an exclusive test.....	706
479. Modified statement of profit sharing test.....	709
480. Question of law or fact—Intention.....	710
481. Profit sharing evidence of a partnership—Estoppel.....	713
482. Limited partnership	715
483. Who may be partners	716
484. How relation is formed	718
485. Illustrative cases of partnership.....	719
486. Cases in which relation was not created.....	721
487. Scope of partnership—Purpose and subject-matter generally.....	722

SECTION.	PAGE.
488. Dealing in real estate—Verbal agreement—Statute of frauds.....	724
489. Illegal purpose or business.....	726
490. Scope of partnership and authority of partners.....	726

CHAPTER XVII.

FIDUCIARIES.

500. Introductory	730
501. Trustees generally	731
502. Creation of trusts	731
503. When trust must be in writing.....	732
504. Constructive implied trusts	733
505. Resulting implied trusts.....	735
506. Rights, powers and liabilities of trustees.....	735
507. Rule against personal gain given a strict construction.....	737
508. Trustee entitled to recover money advanced and to a reasonable compensation	738
509. Powers of trustee	740
510. When trustee's contract binds estate or cestui que trust.....	741
510a. When trustee's contract binds estate or cestui que trust.....	742
511. When trustee is personally liable.....	744
512. Executors and administrators—Authority generally.....	747
513. Power to bind the estate by contract—Illustrative cases.....	748
514. Order of court—When it adds nothing to power of administrator...	750
515. Ratifications of administrators' acts—Duties of administrator.....	750
516. Statutory authority	751
517. Powers given by will.....	752
518. Liability where estate is benefited.....	753
519. Personal liability.	754
520. Joint liability of two or more executors or administrators.....	756
521. When relieved from personal liability.....	756
522. Guardians—Authority generally	757
523. When and how guardian may bind estate.....	759
524. Personal liability of guardian.....	761
525. When not personally liable.....	762
526. Statutory authority to bind estate.....	763
527. Receivers—Authority generally	764
528. Receivers' contracts under order of court.....	766
529. Receiver's certificates	767
530. Personal liability of receiver.....	770
531. Other persons occupying fiduciary relations, as parties to contract, trustees in bankruptcy.....	772
532. Other persons occupying fiduciary relations—Promoters.....	773
533. Personal liability of promoter—Right to compensation.....	776
534. Other persons occupying fiduciary relations—Directors of corpora- tion	778

CHAPTER XVIII.

PRIVATE CORPORATIONS.

SECTION.	PAGE.
540. Power of private corporations to contract generally.....	780
541. Express power	782
542. Incidental and implied powers.....	783
543. Implied contracts	789
544. Seal	789
545. Power to take and hold land.....	797
546. Power to take by a mortgage and to mortgage real estate.....	799
547. Power to hold and convey personal or real property.....	801
548. Power of one corporation to purchase and hold stock in another corporation	805
549. Power to appoint agents.....	808
550. Power to appoint agent—Ratification.....	810
551. Power to act as agent.....	810
552. Power to make extraterritorial contracts.....	811
553. Extraterritorial contracts—What law governs.....	812
554. Foreign corporation subject to the laws of the state in which it seeks to do business	813
555. Contracts made before incorporation.....	816
556. Ultra vires—Different meaning of term “ultra vires”.....	817
557. Recovery where ultra vires contract has been performed by parties..	820
558. Ultra vires contracts—Performance by one party.....	822
559. Executed contracts—Rule criticized.....	823
560. Contracts ultra vires—Estoppel.....	825
561. Contracts ultra vires—Cases discriminated.....	827
562. Contracts ultra vires—Ratification.....	829
563. Laches	829
564. State as proper party to raise question of ultra vires.....	830

CHAPTER XIX.

PUBLIC SERVICE CORPORATIONS.

570. Introductory	832
571. Power to such corporations to contract generally.....	834
572. Necessity for a consideration—Necessity for capacity to contract....	836
573. Parties bound to take notice of charter provision.....	837
574. Knowledge of extraneous circumstances.....	839
575. Corporations cannot contract so as to escape public duties.....	840
576. Attempt to transfer franchises.....	841
577. Attempt to transfer franchises—Transfer of property essential to operation	845
578. Contracts suppressing competition or monopoly.....	847
579. Not required to undermine own business.....	852
580. Different methods of fixing rates—Discrimination in favor of public	854

SECTION.	PAGE.
581. Contracts as to location of stations and route.....	855
582. Ultra vires contracts.....	858
583. Leases generally	859
584. Mortgages generally	862
585. Traffic agreements	865
586. Right to engage in a collateral business.....	869
587. When a carrier may refuse to perform its public duty.....	869
588. Ultra vires contracts—Street railway companies.....	870
589. Ultra vires contracts—Gas and water companies.....	872
590. Illustrative cases of doctrine to telegraph and telephone companies..	872

CHAPTER XX.

MUNICIPAL AND OTHER PUBLIC CORPORATIONS.

600. Introductory	876
601. Powers of municipal or other public corporation.....	878
602. Municipal contracts—By whom made—Extent of power—Parties chargeable with notice.....	881
603. Contracts extending beyond term of board.....	883
604. What are municipal contracts.....	886
605. Municipal contracts—Implied contracts.....	888
606. When no implied liability arises.....	890
607. Validity of contracts generally.....	893
608. Validity of contracts generally—Examples of valid contracts.....	894
609. Validity of contracts generally—Examples of invalid contracts.....	898
610. Leasing public property for private purposes.....	903
611. Leasing public property for private purposes—Enforcement of contract	905
612. Ratification	906
613. Rescission	908
614. Ultra vires	909
615. Estoppel	910
616. The borrowing of money and the issuance of negotiable papers.....	913
617. No right of action on void bonds.....	916
618. Defenses available against bona fide holders.....	917
619. Bona fide holder—Bond containing no recitals.....	917
620. Limitation of indebtedness—Limitation on power to create municipal indebtedness	918
621. Indebtedness depending on popular vote.....	920
622. Indebtedness limited by a per cent. of valuation.....	921
623. Preliminary provisions for a sinking fund.....	922
624. Aggregate indebtedness—How determined—Refunding and sinking fund bonds	923
625. Indebtedness payable annually or monthly.....	924
626. Valid indebtedness only included.....	925
627. Includes implied as well as express liability.....	926

SECTION.	PAGE.
628. Current expense not included.....	926
629. Debts payable out of special fund—Special assessment—Optional debts	927
630. Diverted money—License money—Miscellaneous	928
631. Evasion of constitutional limitations.....	929
632. Indebtedness in excess of limit not a defense when.....	931
633. Construction of constitutional provisions.....	932
634. Special statutory provisions.....	934
635. Other special provisions	935
636. Indebtedness for water and lights.....	936
637. Effect of exceeding the limit.....	937

ELLIOTT ON CONTRACTS

CHAPTER I.

NATURE AND ELEMENTS.

- | | |
|---------------------------|---|
| § 1. Definition. | § 5. The obligation. |
| 2. Quasi contract. | 6. Concurrence of agreement and obligation. |
| 3. Statutory obligations. | 7. Essential elements of contract. |
| 4. The agreement. | |

§ 1. **Definition.**—According to one of the oldest definitions, a contract is “an agreement, upon a sufficient consideration, to do or not to do a particular thing.”¹ But this, though often quoted with approval, is not entirely satisfactory. A modern writer of ability and originality has endeavored to formulate a more exact, and at the same time more comprehensive, definition as follows: “A contract is a promise from one or more persons to another or others, either made in fact or created by law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed, and not being in a form forbidden or declared inadequate by law.”² But later writers look

¹ 2 Bl. Comm. 442; 2 Kent Comm. 449. As either expressly approving this definition or giving a definition the same in substance, see *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. ed. 529; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 328; *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638; *McCormick v. Bonfils*, 9 Okla. 605, 60 Pac. 296, 299; *Ladd v. Portland*, 32 Ore. 271, 51 Pac. 654, 67 Am. St. 526, 528; *Chitty Cont.* 7; *Newland Cont.* 1; 1 *Parson Cont.* 6; 1 *Story Cont.*, § 1. See also definitions reviewed in *Justice v. Lang*, 42 N. Y.

493, 1 Am. Rep. 576. The word “contract” is derived from the words *con* and *traho* (*contrahere*), meaning a drawing or bringing together (of minds until they meet). *Hughes Cont.*, § 27; *Bouv. L. Dict. Tit. Contracts*. See also, *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034; *McNulty v. Prentise*, 25 Barb. (N. Y.) 204; *Wilcox v. Cherry*, 123 N. Car. 72, 31 S. E. 369; *Sidenham & Worlington's Case*, 2 Leon 224, 225.

² *Bish. Cont.*, § 22. A shorter definition, and, it seems, a better one, along the same lines, attempting to

at the subject from a somewhat different point of view, bringing into prominence the element of obligation and the right acquired as well as the element of agreement. In this view a contract, in the broadest sense, may be defined as an agreement whereby at least one of the parties acquires a right, either in rem or in personam, in relation to some person, thing, act or forbearance.³ In its narrower and more proper sense, however, it is executory in character and creates some obligation and confers some right in personam.⁴ A contract, as so understood, may therefore be defined as an agreement, such as is enforceable at law, between two or more persons, whereby a right is acquired by at least one of them to an act or acts, or to forbearance, on the part of the other or others.⁵

§ 2. **Quasi contracts.**—There are two classes of obligations frequently called contracts, especially by the older writers and in the earlier decisions, that do not fall within the definition given in the preceding section; but later investigation and thought have more clearly shown the nature of such obligations, and they are now more properly called “quasi contracts.” They lack the essential element of agreement which is found in all ordinary and true

state the essential elements of a contract is that given by Andrews, as follows: “A contract is an agreement between competent parties upon sufficient consideration, in accordance with the forms of law, by which some, or all, are bound to do or forbear to do a particular thing.” 1 Andrews Am. Law, 693.

³ Benj. Cont., § 2.

⁴ But in the provision of the Constitution of the United States against impairing the obligation of contracts the term is used in the wider sense and includes executed contracts, a grant from a state being within this provision. *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. 585. See also *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329; *Seattle &c. R. Co. v. Seattle*, 190 Fed. 75.

⁵ Anson Cont. 9. The definition

given in the text is substantially the same as that given by Anson. Much the same idea is conveyed or expressed in an older definition and description given by an earlier writer on the subject, as follows: “A contract, according to the common-law definition of it, is an agreement between two or more persons concerning something to be done, whereby both parties are bound to each other, or one is bound to the other. But, by the writers upon general law, it is defined to be, ‘Duorum pluriumve in idem placitum consensus, obligationis licite constituendae vel tollendae causa datus’; that is, the consent of two or more persons in the same thing, given with the intention of constituting, or dissolving lawfully some obligation. * * * ‘A contract is a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other.’” Powell Cont., § 6.

contracts. These two classes are so-called contracts of record consisting of judgments of a court, not by consent, and recognizances; and obligations created by law in order to do justice between parties where one of them has paid or received something which the other ought, in justice, to have paid or received.⁶ There is some difference of opinion as to whether judgments should be classed as contracts, but the decided tendency of the later authorities is to deny that they are true contracts,⁷ and, logically, this is the correct view. As will be shown in the next chapter, the classification of contracts and primary rights generally, under the old common law was made with reference to forms of action by which they were enforced rather than with reference to their inherent nature. But when its inherent nature is considered it is evident that a judgment without consent lacks the essential element of agreement, and possesses certain elements, or has certain effects, inconsistent with the present idea and theory of contract.⁸

§ 3. Statutory obligations.—A liability to pay money imposed by statute, is also merely quasi-contractual rather than a true contract obligation.⁹ As said in a well-considered case, "A statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party."¹⁰ But

⁶ See Keener Quasi Cont., ch. I; *Pracht v. Daniels*, 20 Colo. 100, 103, 36 Pac. 845; *People v. Speir*, 77 N. Y. 144, 150; *Columbus &c. R. Co. v. Gaffney*, 65 Ohio St. 104, 113, 61 N. E. 152. See also *Maines Ancient Law* (3rd Am. ed.) 332; *Sceva v. True*, 53 N. H. 627; *Hertzog v. Hertzog*, 29 Pa. St. 465; 1 *Addison Cont.* 55, § 31; *Sidenham & Worlington's Case*, 2 Leon. 224, 225; *Phillips v. Homfray*, 24 Ch. Div. 439; article in 2 *Harv. Law Rev.* 63, 64.

⁷ *Hilton v. Guyot*, 159 U. S. 113, 200, 201, 40 L. ed. 95, 16 Sup. Ct. 139; *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. 211; *Smith v. Harrison*, 33 Ala. 706; *Larabee v. Baldwin*, 35 Cal. 155; *Rae v. Hulbert*, 17 Ill. 572; *Olson v. Dahl*, 99 Minn. 433, 109 N. W. 1001, 116 Am. St. 435; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Gutta*

Percha &c. Mfg. Co. v. Houston, 108 N. Y. 276, 15 N. E. 402; *Wyoming Nat. Bank v. Brown*, 9 Wyo. 153, 61 Pac. 465; 1 *Black. on Judgments* 8.

⁸ Thus, when the question of the conclusiveness of a judgment is considered with its limitations, and the rules as to collateral attack are borne in mind, it will be seen that it differs from a true contract. So, too, it merges the original cause of action and liability thereafter is on the judgment; and a judgment may be enforced by execution, and, under most statutes, is a lien on real estate.

⁹ *Keener Quasi Cont.* 16; *Milford v. Commonwealth*, 144 Mass. 64, 10 N. E. 516; *Woods v. Ayres*, 39 Mich. 345; *Woodstock v. Hancock*, 62 Vt. 348, 19 Atl. 991; *Pacific S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 450, 17 L. ed. 805.

¹⁰ *McCoun v. New York Central &c. R. Co.*, 50 N. Y. 176, 180, quoted in

as the legislature may make provision in regard to the validity, effect and consequences of contracts within constitutional limits, it may provide that certain liabilities shall follow from making or entering into certain relations and kinds of contracts and when one voluntarily does so, and thus incurs the liability, it may be said to be contractual in its nature. Such is the view generally taken of the statutory liability of a stockholder in a corporation to its creditors, resulting from the statute and the ownership of the stock.¹¹

§ 4. **The agreement.**—Agreement, in the legal sense as here understood, is the union of two or more persons in a common expression of will, either by words or conduct or both, affecting their legal relations.¹² There must be a meeting of at least two minds in the same intention—an aggregatio mentium. As often said in common parlance, “it takes two to make a bargain.”¹³ And the common intention must be expressed, for a mere mental undisclosed intention or assent to an offer is insufficient and does not constitute an acceptance.¹⁴ * As said by an English writer, “An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of

Morley v. Lake Shore &c. R. Co., 146 U. S. 162, 13 Sup. Ct. 54.

¹¹ Whitman v. Oxford Nat. Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. 477; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. 263; Paine v. Stewart 33 Conn. 516; Pusey v. Love, 6 Pennew. (Del.) 80, 66 Atl. 1013, 130 Am. St. 144; Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. 194, 42 L. R. A. 804; Pacific Elevator Co. v. Whitbeck, 63 Kan. 102, 64 Pac. 984, 88 Am. St. 229; Pulsifer v. Greene, 96 Me. 438, 52 Atl. 921; Foster v. Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. 565. See also Avery & Son v. McClure, 94 Miss. 172, 47 So. 901, 22 L. R. A. (N. S.) 256; Kulp v. Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. 611. But compare Crippen v. Lighthouse, 69 N. H. 540, 44 Atl. 538, 76 Am. St. 192; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 538, 51 Am. St. 654; Knickerbocker Trust Co. v. Ise-

lin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. 863; Hancock Nat. Bank v. Farnum, 20 R. I. 466, 40 Atl. 341.

¹² Anson Cont. 3; Benj. Cont., § 1.
¹³ See Thurston v. Thornton, 1 Cush. (Mass.) 89, 93; Broom's Comm. *260, 261. “The minds of the parties must meet and they must assent to the same thing in the same sense.” Foshier v. Fetzer, — Iowa —, 134 N. W. 556.

¹⁴ White v. Corlies, 46 N. Y. 467; Averill v. Hedge, 12 Conn. 424; Trounstine v. Sellers, 35 Kan. 447, 454, 11 Pac. 441; O'Donnell v. Clinton, 145 Mass. 461, 463, 14 N. E. 747; Beckwith v. Cheever, 21 N. H. 41; Prescott v. Jones, 69 N. H. 305, 41 Atl. 352; Borland v. Guffey, 1 Grant (Pa.) 394. See also, Hebbs' Case (1867), L. R. 4 Eq. *9, and New v. Germania Fire Ins. Co., 171 Ind. 33, 40, 85 N. E. 703, as to necessity that assent should be communicated.

the others or other of them," and "such declaration may take place by (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or (b) an offer made by some or one of them, and accepted by the others or other of them."¹⁵ But, since the intention or union of wills can be known or ascertained only by such outward expression by means of words or conduct, the law imputes to each of the parties a state of mind or intention corresponding to the natural and reasonable meaning of his words and conduct, no matter what may have been his real state of mind or secret intent.¹⁶ The intention must also be with reference to the creation of legal relations and contemplate legal consequences affecting the parties themselves.¹⁷ Illustrations of these propositions and of the manner in which agreement is usually brought about or reached will be found in a subsequent chapter on offer and acceptance. It is sufficient to state here that, as already affirmed, agreement is an essential element of every true contract.¹⁸

§ 5. The obligation.—As intimated in the last preceding section, a distinguishing feature of such agreement as results in contract is that there is found, in its last analysis or effect at least, an offer and acceptance resulting in a promise, to which the law attaches or gives a binding force in the character of an obliga-

¹⁵ Pol. Cont. 1.

¹⁶ *Smith v. Hughes*, L. R. 6 Q. B. 597; *Bank v. Kennedy*, 17 Wall. (U. S.) 19, 21 L. ed. 554; *Williams v. Fletcher*, 129 Ill. 356, 21 N. E. 783; *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 197, 33 N. E. 495; *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477, 48 N. E. 620; *Hudson v. Columbian Transfer Co.*, 137 Mich. 255, 257, 100 N. W. 402; *Haubelt v. Rea & Co. Mill Co.*, 77 Mo. App. 672, 681. See also *Rodgers & Co. v. Bell*, 156 N. Car. 378, 72 S. E. 817; *Dusenberry v. Mut. Ins. Co.*, 188 Pa. St. 454, 461, 41 Atl. 736. *Leake Cont.* 8. There can be no meeting of minds unless the intention is known or is put in the way of communication. *White v. Corlies*, 46 N. Y. 467; *Brogden v. Metropolitan R. Co.*, 2 App. Cas. 666. See also *Brown v. Hare*, 3 H. & N. 484; *New v. Ger-*

mania Fire Ins. Co., 171 Ind. 33, 40, 85 N. E. 703.

¹⁷ *Anson Cont.* 3; *Clark Cont.* 7, 8; *Benj. Cont.*, § 1; *Keller v. Holderman*, 11 Mich. 248, 83 Am. Dec. 737. It is such a declared intention by the one party and accepted by the other that constitutes a promise distinguishing the agreement constituting an essential feature of contracts from other agreements.

¹⁸ This has already been shown in the preceding section on quasi contracts. But see also, as to the necessity for agreement, the following: *Sweeney v. Bienville Supply Co.*, 121 Ala. 454, 25 So. 575; *Campbell v. Haney*, 128 Cal. 109, 60 Pac. 532; *Hogue v. Mackey*, 44 Kan. 277, 24 Pac. 477; *Graves v. Dill*, 159 Mass. 74, 34 N. E. 336; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742; *Colum-*

tion.¹⁹ The very object of contract is to create an obligation between the parties. Obligation, in this sense, has been defined as "a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group."²⁰ But such obligation in the case of contract is not a mere general one consisting of a right incident to ownership or a merely public or official right, nor an indefinite one binding a party to the entire community or relating to indefinite acts or forbearances. It is "a control exercisable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value."²¹ The importance and effect of an agreement resulting in such an obligation are shown in the legal maxim "*modus et conventio vincunt legem*,"²² which is said by Broom to be the most elementary principle of law relative to contracts.²³

§ 6. **Concurrence of agreement and obligation.**—In a true contract there must be concurrence of agreement and obligation, or, in other words, there is no true contract in the absence of

bus &c. R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19; Gorringe v. Reed, 23 Utah 120, 63 Pac. 902, 90 Am. St. 692; Lawrence v. Milwaukee &c. R. Co., 84 Wis. 427, 54 N. W. 797; post, § 26.

¹⁹ See *Beverly v. Barnitz*, 55 Kan. 466, 42 Pac. 725, 49 Am. St. 257, reversed in 163 U. S. 122, 16 Sup. Ct. 1042, but not questioned as to the definition of obligation; *Chesapeake &c. Canal Co. v. Baltimore &c. R. Co.*, 4 Gill & Johns (Md.) 1; *Sturges v. Crownshield*, 4 Wheat. (U. S.) 122, 197, 4 L. ed. 529; *Anson Cont.* 5. As to the necessity for mutuality of obligation or engagement, see post, § 26; also *Hollingsworth v. Colthurst*, 78 Kan. 455, 96 Pac. 851; *Murphy & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am. St. 259; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 Am. St. 205, and note.

²⁰ *Anson Cont.* 5, § 3. Mr. Broom says "The term 'obligation' has been thus far used as equivalent to 'binding force' or '*vinculum juris*,' and as con-

sisting in the efficacy of the law which attaches to the contract, * * * but it is also used as correlative to 'right,' so that 'whatever I, by my contract, give another a right to require of me, I thereby lay myself under an obligation to give or do.'" And he adds, "a contract imposes no obligation upon parties, unless it be a contract recognized as valid by the law." *Broom's Comm.*, *248.

²¹ *Anson Cont.* 7. It is defined by Pollock as "a relation that exists between two persons of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing." *Pol. Cont.* 3 (new ed. 1885). And if it were not reducible to a pecuniary or money value it would not be easy to distinguish it from mere moral and social relations. See *Pothier Obligations*, § 1.

²² 2 Rep. 73.

²³ *Broom's Leg. Max.* *690.

either. This is clear in the case of executory contracts.²⁴ There may be an agreement and still no obligation because it has been executed and concluded as soon as the parties have expressed their assent, as in the case of a conveyance without covenants, or the like.²⁵ So, on the other hand, there may be an obligation without agreement, such as that arising from a judgment, or a tort or delict, or from a breach of contract, or from a quasi contract of any kind. As already shown in prior sections, while such agreements or obligations are sometimes called contracts, they are not true contracts where either element is wanting.

§ 7. Essential elements of contract.—The essential elements of a contract or requisites thereto are, therefore, the following: 1. Parties capable of making the contract. 2. A consideration such as the law will recognize, or its equivalent in case of a sealed instrument. 3. A subject-matter or object that is legal. 4. An agreement, by offer and acceptance, or, in other words, a communication and meeting of minds whereby the parties come together in a common expression of will as to their legal relations.²⁶ To accomplish and constitute such an agreement there must be reality of consent; and it must be in such form as the law may require, as, for instance, when the contract is within the statute of frauds a writing is required.

²⁴ See *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 656, 4 L. ed. 629; *Powell Cont.* *7.

²⁵ See *Wheeler v. Glasgow*, 97 Ala. 700, 11 So. 758; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723 (marriage relation not a true contract). Settlements of property in trust for persons unborn may be by agreement and give rise to incidental and future obligations, but they are not true contracts. See *Watkins v. Watkins*, 135 Mass. 83; *Wade v. Kalbfleisch*, 58 N. Y. 282; *Ditson v. Ditson*, 4 R. I. 87.

²⁶ In *Clark v. Great Northern Ry. Co.*, 81 Fed. 282, 283, it is said: "The

fundamentals of a legal contract are parties, subject-matter, consideration and assent. There can be no contract if any one of these elements is lacking." In *Durlacher v. Frazer*, 8 Wyo. 58, 55 Pac. 306, 309, 80 Am. St. 918, 923, it is said that the essentials of a contract are: "A person able to contract, a person able to be contracted with, a thing to be contracted for, a good and sufficient consideration, clear and explicit words to express the contract, the assent of both contracting parties." See also, *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707; *Comyn on Contracts* 2.

CHAPTER II.

DEVELOPMENT AND CLASSIFICATION.

- | | |
|---|---|
| § 10. Importance and place of contract in the law. | § 15. Executory and executed contracts. |
| 11. Development of the law of contract. | 16. Specialties and simple or parol contracts. |
| 12. Influence of past doctrines—Change in classification. | 17. Specialties or contracts under seal further considered. |
| 13. How contracts may originate. | 18. Express and implied contracts. |
| 14. Bilateral and unilateral contracts. | 19. Valid, void and voidable contracts. |

§ 10. Importance and place of contract in the law.—It has been said that “the law of contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of parties,” and that, indeed, it may be looked upon as the basis of human society. Certain it is that contracts deal with matters of almost every conceivable kind and are of almost daily occurrence in the affairs of life, and especially in modern business. With the exception of the criminal law, the whole body of the substantive law, almost, may be divided into the law of contract or of tort. And even in the criminal law and in cases of tort, contracts are sometimes involved. Contracts may affect both persons and things and create relations that would not otherwise exist. “Commercial intercourse is carried on almost entirely by contract. Persons are the actors, contracts the medium, and things the subject of traffic.”¹ Contract is recognized as the main means of acquiring or transferring property, real as well as personal. “Nearly all rights of property,” says a philosophical writer, “originate in contract, and the law of property is, therefore, in the main, but an application of the principle of contract.”² Indeed, rights that arise from contract constitute one of the two great divisions of primary rights, considered with

¹ Andrews Am. L., § 534.

² Smith's Law of Private Right 12.
See also, Bingham Real Prop. 10.

reference to their origin; and the law of contracts, relating as it does, to a large body of rights, whether of persons, things, acts, or forbearances, constitutes a great branch of the substantive private or civil law, so that, when taken in connection with the secondary or remedial rights relating thereto, it is one of the most extensive branches of the entire law.³

§ 11. Development of the law of contract.—Interesting discussions as to the early history of contracts and as to their characteristics and binding force in natural law are found in some of the reports⁴ and text-books⁵ of the law as well as in books on political economy and the like, but it is to the growth and development of the English law of contracts, especially as bearing on and accounting for some peculiarities in the treatment and classification of certain obligations and contracts, that attention is now directed. Little is known about the law of contracts in Anglo-Saxon times, and it received little consideration prior to the Norman conquest. Indeed, not until long after that date did the law of contracts in England develop to any great extent.⁶ It is said by Oliver Wendell Holmes, Jr., (now Mr. Justice Holmes) that “to explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever

³ Even before the subject of contract had reached its present magnitude, an English lecturer said: “The whole practice of our English courts of common law, if we except their criminal jurisdiction and their administration of the law of real property, to which may be added those cases which fall within the fiscal jurisdiction of the Court of Exchequer, may be distributed into two classes, Contracts and Torts. Of this you can easily satisfy yourselves by putting to your own minds any conceivable case of legal inquiry. If it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, you will find that it resolves itself into a Contract or a Tort.” Smith on the Law of Contracts, Lecture 1, 1.

⁴ See *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. ed. 606.

⁵ See Broom’s Comm. 264, 265; Bl. Comm. 45, 54. Mr. Broom says that natural law and moral duty bind men to keep faith and perform their engagements, and that all states assuming the pre-existence of the obligation of contracts—which is doubtless derived in civilized countries tacitly from the law, by reason of the manifest necessity which exists, with a view to the well-being of the community, that every man should fairly and honestly perform what he has undertaken to do—have merely super-added by municipal law the means of carrying the pre-existing obligation into effect. See also, *May v. Breed*, 7 Cush. (Mass.) 31, 54 Am. Dec. 700; *Bliss on Sovereignty*, ch. III.

⁶ See 2 Pollock & Maitland Hist. of Eng. Law (2nd ed.) 184, 194, et seq.; *Glanville Book X*; 2 Street’s Foundations of Leg. Liability, ch. I.

came to frame a future tense.”⁷ But it is not so difficult to determine, approximately at least, when a promise or agreement first became enforceable at law in Great Britain, so as to be deemed a true contract.

In comparatively uncivilized countries, and in the early stages of the law, little attention is given to enforcing agreements. The protection of life and property is naturally the first consideration as civilization advances in early stages, and “the task of enforcing promises” involves problems beyond the capacity of early law, “and coercive authority beyond its strength.”⁸ So forms and ceremonies are characteristic of primitive law, and both the early English law and the Roman law had this characteristic, as well as a very similar growth and development.⁹ A sealed writing came to be received as irrebuttable

⁷ Holmes Com. Law 251.

⁸ 2 Holdsworth, Hist. of Eng. Law, 72; 1 Pollock & Maitland, Hist. of Eng. Law, 34, 35; Esmein, Etudes sur les Contrats dans les anciens Droits Français, 8.

⁹ Professor Holdsworth gives the following description of the early law, with intimations of its effect on the later law: “Of the real contracts (so called in Roman nomenclature) the most important were sale, exchange and loan. The basis of the transaction and the ground of action is not agreement, it is the fact that one man has parted with property to another, and the fact that the other is therefore indebted to him. * * * The plaintiff claims the price or the thing as his; and we shall see, when we come to deal with the actions of debt and detinue, that this idea lived long in the law. * * * With these transactions we must class the obligation to restore a gage or pledge. The borrower or debtor gave a thing—a gage—as security, or some person was given into the power of the creditor by way of pledge. * * * In both these classes of transaction, therefore, the creditor who did not restore when the debt was paid laid himself open to the charge of retaining the debtor’s property.

“Turning to the formal principle, we find among the Franks and

Lombards undertakings guaranteed by ‘making one’s faith’—*Fides Facta*. This was symbolized or solemnized by such formal acts as the giving of a rod, the handshake, or the placing of one’s hands in those of another. * * * The obligation, for instance, between creditor and surety was made in this way. * * * The debtor, according to the Lombard law, gave the ‘festuca’ or ‘wadium’ to the creditor, who handed it to the surety. * * * The binding force is derived from the ceremony, and not, as in the case of the real contracts, from the fact that something has passed from the creditor to the debtor. * * *

“Probably these two classes of forms were the only ones known to very early law. But we soon see a development which is due chiefly to two causes. (1) The real and the formal principles tend to shade off into one another, ‘The gage was capable of becoming a symbol; an object which intrinsically was of trifling value might be given and might serve to bind the contract.’ * * * Thus the rod (festuca) may originally have been a symbol with a religious meaning. It comes to be the symbol of some gage given as a security. In the same way we get the God’s penny and the Earnest, which seem to have about them a strong

evidence, not necessarily of agreement, but that the defendant had come under a liability to the plaintiff, and that a duty was thus created, which the law would enforce, and from this it came about that "a covenant or contract under seal was no longer a a promise well proved; it was a promise of a distinct nature, for which a distinct form of action came to be provided."¹⁰ And the grantor or obligor was bound because he had so stated in such a form that he was not allowed to deny his liability. So, the action of debt likewise exerted an important influence in the development of the law of contracts. In all the early cases, however, it was duty, or the obligation of duty, arising generally from performance on one side rather than the obligation of a mere promise or agreement, that was enforced, and it was long before the doctrine of consideration was developed, or any strictly and wholly executory contract was enforced.¹¹

As may be gathered from what has been said, the development of the law of contract is closely connected with procedure and forms of action. At an early date certain writs had been adopted

element of the formal principle, and perhaps, too, some element of the real principle. * * *

"(2) The church gave a new meaning to old forms, and introduced wholly new forms and new conceptions. The older folk laws knew the oath. * * * Much use was made of it in procedure. * * * The church enforced oaths of a new model by penance, and did not nicely distinguish between the assertory and the promissory oath. * * * This will lead the church, when the system of the Canon Law has become formulated, to promote the idea of an enforceable agreement by assuming wide jurisdiction over breaches of faith. * * * Again, a man may give as security his hopes of salvation, or he may take God as his pledge, or place his faith in the hands of some bishop or sheriff to whom he gives coercive powers over him in case faith is not kept. * * * But the most important contribution of the church was the introduction of writing to validate legal acts. No doubt these writings were usually used to convey property; but at this early date it is, as we

have seen, hardly possible to distinguish accurately between contract and conveyance. * * *

"We can see but dimly the elements which will go to the making of some of the later legal ideas upon the subject of agreements and topics related thereto. We see very clearly the real element which will color the actions of debt and detinue. We see, if not in Anglo-Saxon law, at least in contemporary foreign law, the writing which will become the great formal contract of the common law. We see in the God's penny and the Earnest, conceptions which mercantile custom will add to the common law. We see in the wide jurisdiction assumed by the church the germs of that conception of *laesio fidei* which will, in later days, make the ecclesiastical courts formidable rivals to the royal courts." 2 Holdsworth's Hist. of Eng. Law, 73, 74, 75.

¹⁰Holmes Com. Law 272, 273; and see 2 Bracton 119; Salmond, Essays in Jurisprudence, 181.

¹¹3 Holdsworth's Hist. of Eng. Law, 344.

under which remedies could be had for the most obvious kinds of wrong or injury, but they did not by any means cover every case, especially as, in the progress of society, new cases of injury or wrong arose or were recognized by advanced civilization as in justice requiring a legal remedy, and the cause of action had to correspond to the original writ and no remedy could be had at law upon any state of facts not reached by one of such writs.¹² This was an obvious deficiency in the law, amounting to a denial or failure of justice in many cases, and it was sought to be remedied by the Statute of Westminster 2, 13 Edward I, ch 24, passed in 1284, which provided for new writs in similar cases (*in consimili casu*), that is, when in one case a writ was found, and in a like case falling under like law and requiring like remedy none was found, or, in other words, in analogous cases.¹³ Under this authority new writs were formed and several new forms of action were developed, including trespass upon the case for torts and assumpsit or trespass on the case in assumpsit or on promises. And from the very beginning the original writs had the effect of limiting and defining the right of action itself and primary rights and subjects were classified accordingly, as there was no enforceable right unless it fell within the scope of one of such writs.

In this way it happens not only that the law of contracts was expanded but also that many cases for which assumpsit as finally developed was the remedy, were, and still are by a few courts and writers, classed as cases of contract, even though the promise is a pure fiction of law and the element of agreement essential to a genuine contract is not present.¹⁴ But there has been a more or less gradual getting away from the old formalism, especially in procedure, so that now we look to substance rather than form and the old classification on a basis of procedure is no longer regarded by the best authorities as correct or adequate.

¹² See 2 Pollock & Maitland Hist. of Eng. Law (2d ed.) 184, 194 et seq.; Glanville, Book X; 2 Street's Foundation of Leg. Liability, ch. I.

¹³ Stephens Pl. (Andrew's ed.) 110, 111, § 64; 3 Bl. (Cooley's ed.) 50, 51.

¹⁴ See Board of Highway Com'rs v. City of Bloomington, 253 Ill. 164, 97

N. E. 280. And the custom of merchants or "law merchant," adopted or incorporated in the common law, has also exerted an important influence and given rise to certain peculiarities in that branch of the subject relating to negotiable instruments or commercial paper.

The law of contract, particularly, has become more important and has received much study, so that now we seem to have a better understanding and theory of the subject and the modern law of contract has developed into a fairly logical and systematic branch of the law.¹⁵

§ 12. Influence of past doctrines—Change in classification but subjects still treated.—For what may be called historical reasons, and because still expected and looked upon as necessary to a complete and comprehensive treatment of the general subject, classes of so-called implied contracts based on or arising from the legal fiction referred to in the last preceding section, and thus, in a sense, created by law, are included in the treatment of the subject of contracts in all text-books purporting to cover the entire law of modern contracts. Including such topics may slightly impair the symmetry of the work and may not be entirely logical; but it is expected by the profession, and, for practical purposes it is certainly not undesirable. Indeed, it also serves to show more clearly the distinction and theory of the modern law. So, too, there is a close connection between such quasi contracts and true contracts, and a change in classification does not necessarily make it improper to treat all in a comprehensive work of this character.

¹⁵ Professor Holdsworth says that during the Middle Ages the history of the law of contracts falls into three fairly well-marked periods: (1) The age of Glanville and Bracton, in which the old ideas as to contract were still prominent, although those writers were influenced considerably by the Roman law. (2) The end of the thirteenth, the fourteenth, and beginning of the fifteenth centuries, in which there was a remodeling and development under the influence of the rules regulating account, covenant and debt. (3) The latter part of the fifteenth, and the sixteenth centuries, in which the action of assumpsit grew up and was influential in reforming the whole law of contract. Holdsworth's *Hist. Eng. Law*, 320. One who desires to trace this history and development should consult, among

others, the following original authorities: Y. B. 11 Hen. IV, 33, pl. 60; Y. B. Hen. VI, 36, pl. 33; Y. B. 2 Hen. VI, Hil. pl. 10; Mich. Term 21 Hen. VIII, Keilw. 77, 78; Pecke v. Redman (1555), 2 Dyer 113a; Norwood v. Read (1557), Plowden, 180; Estrigge v. Owles (1587), 3 Leon. 200; Stranborough v. Warner (1588), 4 Leon. 3; Gower v. Capper (1597), 2 Cro. Eliz. 543; Slade's Case (1602), 4 Coke 92a, 92b; Bane's Case (1612), 9 Coke 94; Nichols v. Raynbred (1615), Hobart 88. See also Holdsworth's *Hist. of Eng. Law*, 318-349; Holland's *Jurisprudence*; Holmes' *Com. Law*; Pollock & Maitland, *Hist. of Eng. Law*; and Salmond's *Jurisprudence*. In recent times the subject has been greatly clarified by Anson, Leake and Pollock.

§ 13. **How contracts may originate.**—Before attempting to classify contracts under the modern law it may be well to further elucidate the subject and to consider how they may originate. As already stated, under the modern view, a contract involves the idea of an outstanding obligation, or, in other words, an executory and enforceable promise. There may be a promise and it may even be accepted and still there may be no enforceable promise or outstanding obligation, unless there is an instrument under seal. Such an instrument or contract under seal imports a consideration at common law or is binding because of its form, but in the case of the ordinary simple contract there is no enforceable promise and outstanding legal obligation unless there is a consideration. Thus, although an agreement may originate in an offer or a promise on one side and an acceptance on the other, as where A offers a promise and B accepts it, yet if A's promise does not require B to do or forbear a right, there being no consideration, there is no contract in the absence of a seal, and it is only because the seal imports a consideration or makes the offer irrevocable, after assent, that contract can be said to result in any event.¹⁸ Again, A may offer an act to be performed if B performs an act in return, so that B cannot accept in any other way. In such a case if B does accept by performing the act, there is then no executory promise or outstanding obligation left, so that there is in reality no contract. The transaction is often called an executed contract, but, as the effect of the agreement is concluded as soon as the parties have expressed their common assent, the transaction is closed before a contract could result, and it is in reality the agreement or transaction that is executed, although it has often been called an executed contract.

¹⁸ See *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Chicago Sash & Mfg. Co. v. Haven*, 195 Ill. 474, 63 N. E. 158; *Krell v. Codman*, 154 Mass. 454, 28 N. E. 578, 26 Am. St. 260, 14 L. R. A. 860. See also, *Kern's Estate*, 171 Pa. St. 55, 33 Atl. 129. In other words, it may be said that while the element of obligation as well as agreement must be present, it may be created or arise by or from the presence of cer-

tain formalities, such as the seal, as well as by or from a consideration. And if one makes such a formal contract, he may not unjustly be said to do so in view of the law and to voluntarily create or agree to such obligation. The seal and delivery take the place of consideration and have the same effect even if in a true sense they do not import it. Historically, of course, it is something of an anachronism to say that they import

But a true contract, even though not under seal, may originate in either of the following ways: 1. By the offer of an act for a promise, as where a carrier offers transportation by having its car, omnibus or the like standing ready and offering to carry persons to places along its line for the scheduled fare and a traveler gets in and is carried to the destination. In such a case there is an offer of an act by the carrier for a promise of the fare and the traveler who accepts thereby promises to pay such fare.¹⁷ Here there is no outstanding obligation enforceable against the carrier after performing its part, which may be necessary, indeed, to bring the contract into existence and make the promise of the other obligatory, but after such performance, there is an executory promise and outstanding obligation on the part of the traveler to pay the fare. 2. By the offer of a promise for an act, which can only be accepted by doing such act, as, for instance, where a reward is offered by A for lost property or the like, and B, knowing thereof, finds and returns the property.¹⁸ Here, too, the outstanding obligation is on one side only. 3. A promise for a promise, as where A promises B to pay him a certain sum of money on a certain day in the future for certain services if B will promise to perform such services within such time, and B makes such promise.¹⁹ Here there is an outstanding obligation on each side.

§ 14. Bilateral and unilateral contracts.—Contracts may be classified, on the basis of the outstanding obligation, that is,

consideration and make the transaction a contract on that account, as they were given this effect before consideration in fact was ever recognized as an essential element.

¹⁷ See also, *Day v. Caton*, 19th Mass. 513, 20 Am. Rep. 347; *Cicotte v. Church of St. Anne*, 60 Mich. 552, 27 N. W. 682; *Clark v. Ulster R. R. Co.*, 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. (N. S.) 104 and note; *Benj. Princ. Cont.* 18; post, § 60. Rule or custom may make necessary the payment or tender of fare in advance. See 4 *Elliott R. R.* (3rd ed.), ch. 69, 70. In *Louisville R. R. Co. v. Hutti*, 141 Ky. 511, 133 S. W. 200, 33 L. R. A. (N. S.) 867, 868, the court says: "The contract began only upon the

payment or tender of the consideration."

¹⁸ Post, §§ 32, 50, 51. See also, *Vigo Agricultural Soc. v. Brumfiel*, 102 Ind. 146, 151, 1 N. F. 382, 52 Am. Rep. 651.

¹⁹ *Earle v. Angell*, 157 Mass. 294, 32 N. E. 164; *Hodges v. O'Brien*, 113 Wis. 97, 88 N. W. 901; post, § 231. See also *New v. Germania Fire Ins. Co.*, 171 Ind. 33, 85 N. E. 703. In the first case cited, which was an action against an executor to recover on an alleged contract with defendant's testatrix in her lifetime, the plaintiff testified that the testatrix said to him: "If you will agree to come to my funeral I will give you \$500," and that he promised to come if alive and notified in time, and the court

as to whether it exists on both sides or only on one side, into bilateral contracts and unilateral contracts. Where it is executory on both sides, there being an outstanding obligation as to both, as in the case of a promise for a promise referred to in the last preceding section, the contract is a bilateral contract.²⁰ Contracts of the nature of those referred to in the preceding section where there is merely an offer of an act for a promise duly accepted or a promise for an act duly accepted, and executory only on one side, are or may be called unilateral contracts. So, contracts under seal, such as those first referred to in the preceding section, and the like, where there is merely a promise on one side and assent, so that no liability is imposed upon both except, if at all, by the law and not by the terms of the contract, if considered as in any sense true contracts, should be classified as unilateral contracts. But where there is no seal and no consideration, while an agreement or a promise so accepted by the promisee as to impose no liability upon him is often called a unilateral contract, and not generally enforceable, it is for that very reason no true contract at all.²¹

§ 15. **Executory and executed contracts.**—Contracts are also frequently classified, on the basis of performance, as executory or executed. An executory contract is one that has not been performed, or, in other words, where there yet remains an outstanding obligation, while an executed contract, so called, is one

held that the jury was warranted in finding a promise for a promise.

²⁰ See 2 Street's Foundation of Leg. Liability 52, 55, and chapters 12 and 13, for nature and history of bilateral contracts. Consult also, 3 Holdsworth's Hist. of Eng. Law, 344 et seq.

²¹ See *Hardwick v. McClurg*, 16 Colo. App. 354, 65 Pac. 405; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790. See also 23 Harv. L. Rev. 159; *Dodge v. Adams*, 19 Pick. (Mass.) 429; *Thorne v. Deas*, 4 Johns (N. Y.) 84; *Holliday v. Atkinson*, 5 Bam. & C. 501. In *High Wheel Auto Parts Co. v. Journal Co.*, — Ind. App. —, 98 N. E. 442, it is said that "A unilateral contract is a legal solecism."

In *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 216, it is said: "In suits upon unilateral contracts it is only where the defendant has had the benefit of the consideration for which he bargained that he can be bound." And a unilateral contract is often defined as a contract "where one party makes no express agreement, but his obligation is left to implication of law." See also, *Morton v. Burn* (1837), 7 Ad. & El. 19, 34 E. C. L. 18, and compare *Bowser & Co. v. Marks*, 96 Ark. 113, 131 S. W. 334, 33 L. R. A. (N. S.) 429, and note. For a contract held not void as either a unilateral contract or a mere license or privilege without consideration, see *Steltzer v. Chicago & C.*

that has been fully performed, and this term is often used as including an agreement where everything is completed at the time without any outstanding obligation. But a contract may be performed by one party and executory as to the other, or it may be partly performed by one or both. An executory contract is often defined in the very terms of the definition of a true contract, and is, in fact, the typical and normal contract, while, as already shown, an agreement that is fully executed at the time cannot properly be said to be a true contract, as there is then no outstanding enforceable obligation on either side. In a leading case in the Supreme Court of the United States, for instance, it is said: "An executory contract is one in which a party binds himself to do or not to do a particular thing. * * * A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant."²² It would seem to be better to say that where the effect of the agreement is concluded at the time it is made, so that there is no outstanding obligation, it is the agreement that is executed, rather than that there is an executed contract, or, where it is the doing of the act which makes or concludes the contract, it is the consideration that is executed.²³

R. Co., — Iowa —, 134 N. W. 573. See also, last note to next following section.

²² *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 136, 3 L. ed. 162. See also, *Farrington v. United States*, 95 U. S. 679, 683, 24 L. ed. 558; *Mettel v. Gales*, 12 S. Dak. 632, 82 N. W. 181.

²³ When the consideration is spoken of in this sense, however, as an executed consideration, it is a present rather than a past consideration, and it must not be confused with the latter, which is, at least as the term is often used, no legal or true consideration at all. The subject of consideration is fully treated in a separate chapter, but as touching also upon unilateral and executory or executed contracts, the following is quoted from the opinion in *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998, where, after stating that a promise is not a good consideration for a promise unless there is mu-

tuality of engagement, and that the promises must be concurrent and obligatory upon each at the same time in order to render either binding, the court said: "The rule above announced applies in all cases where the contract remains wholly executory, and nothing is done to divest it of its unilateral character. There are instances in which a promise, though a mere nudum pactum when made, because the promisee is not bound, may become binding on his afterward furnishing the consideration contemplated. Thus where one promises to see another paid if he will sell goods to a third person, or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand or suspend legal proceedings or the like, while the party making the promise is bound to nothing and may withdraw his promise, or more accurately speaking, proposition, at any time,

§ 16. **Specialties and simple or parol contracts.**—With reference to their form, contracts may be classified as formal contracts and simple or parol contracts. The former include contracts under a seal and contracts of record if they can properly be called contracts. Contracts under seal, such as deeds, are called specialties and contracts of record are sometimes included within the meaning of this term. All other contracts, whether in writing or not, are called simple or parol contracts.²⁴ The use of the term “parol” is apt to be misleading unless it is clearly understood that it means written contracts not under seal as well as oral contracts not in writing.²⁵ Contracts of record, so called, so far at least as is important in the modern law of contracts in this country, consist of either judgments or recognizances.²⁶

yet if the promisee, acting on the faith of the promise, within a reasonable time, does the thing which it was contemplated he should do, then the promisor is bound on the ground that the thing done is a sufficient and completed consideration; and the original promise to do something if the other party would do something is a continuing promise until that other party does the thing required of him. Or if the promisee begins to do the thing in a way which binds him to complete it, here also is a mutuality of obligation. * * * In such cases, it is not necessary that each promise should be absolute so that either party could enforce it against the other; for a promise conditional on the doing of some act may be rendered binding by the act, while it may give no right to compel the doing of it.”

²⁴ *Louisiana v. Mayor*, 109 U. S. 285, 3 Sup. Ct. 211; *De Crano v. Moore*, 50 N. Y. App. Div. 366.

²⁵ Thus, in *Beckham v. Drake*, 9 M. & W. 79, 92, it is said: “The law makes no distinction in contracts, except between contracts which are and contracts which are not under seal. I recollect one of the most learned judges who ever sat upon this or any other bench being very angry when a distinction was attempted to be taken between parol and written contracts, and saying, ‘they are all parol unless under seal.’” See also, *Rann v. Hughes*, 7 Term. R. 346n. “Parol

or simple contracts,” says Addison, “are contracts which are either made by word of mouth, or are inferred from the silent language of men’s conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered, and cannot be enforced unless they are founded upon some good or valuable consideration.” 1 Add. Cont. (Morgan’s ed.) 5, § 2.

²⁶ See for definition and characteristics, 2 Bl. Comm. 341; Anderson’s Law Dict. and Blank’s Law Dict., Lit. “Recognizance”; 3 Am. & Eng. Ency. Law (2nd ed.) 686; Lit. “Bail Bonds and Recognizances”; *Gay v. State*, 7 Kans. 394, 16 Neb. 325; *State v. Kruise*, 32 N. J. L. 313; *Irwin v. State*, 10 Nebr. 325, 6 N. W. 370; *People v. Kane*, 4 Den. (N. Y.) 530. In *People v. Barrett*, 202 Ill. 287, 297, 67 N. E. 23, 95 Am. St. 230, it is said: “A recognizance at common law was an obligation entered into before some court of record or magistrate duly authorized, with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. It was not signed by the party entering into it.” It is also distinguished from a bail bond in the case just quoted from. While in strictness a true recognizance must be of record and proved by the record, bonds for appearance or the like even though not of record are some-

§ 17. **Specialties or contracts under seal further considered.**—Contracts under seal, as already intimated, derive their validity at common law from their form rather than from consideration.²⁷ There is much learning as to the origin and history of seals, and as to their necessity and effect. But the subject will be hereafter considered, especially in treating of deeds, and it is sufficient here to say that there are comparatively few instances under modern statutes in which a private seal is required and that in many states, even when required, a mere scroll is made sufficient by statute. It may be added, however, that the chief characteristics of a contract under seal, such as a deed, are that the recitals are usually conclusive against the parties and create an estoppel; that they merge the prior simple contract, if any; that the statutes of limitations give a longer time before constituting a bar in the case of such instruments; and that no consideration is necessary. But there are some exceptions and limitations or qualifications, as, for instance, in case of contracts in restraint of trade, which even if reasonable would not be enforced without a consideration; and, in equity, consideration may be inquired into. So, even at law, if the consideration was illegal or immoral the seal would not necessarily save the contract. And in some states the distinction between sealed and unsealed instruments is abolished, while in others a seal is merely presumptive evidence of consideration which may be rebutted. As to a judgment, the chief characteristics of the obligation are that so long as it remains in force its terms admit of no dispute, and are conclusively proved by the production of the record,²⁸ that the cause

times spoken of as recognizances or in the nature of recognizances. See *Vierling v. State*, 33 Ind. 218; *In re Brown*, 35 Minn. 307, 29 N. W. 131. The subject of bonds of various kinds will be specifically treated in a subsequent volume.

²⁷ *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Leonard v. Bates*, 1 Blackf. (Ind.) 172; *Ruth v. Ford*, 9 Kans. 17; *Van Valkenburgh v. Smith*, 60 Me. 97; *Erickson v. Brandt*, 53 Minn. 10, 55 N. W. 62; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. 319; *Newark & Co. Church v. Bank*, 57 N. J.

L. 27, 29 Atl. 320; *Dorr v. Munsell*, 13 Johns. (N. Y.) 430; *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 13; *Cosgrove v. Cummings*, 195 Pa. St. 497, 46 Atl. 69; *Leake Cont.* 76; *Anson Cont.* 51.

²⁸ See *Keech v. Beatty*, 127 Cal. 177, 59 Pac. 837; *Lancaster v. Snow*, 184 Ill. 534, 56 N. E. 813; *Figge v. Rowlen*, 185 Ill. 234, 57 N. E. 195; *Bruce v. Osgood*, 154 Ind. 375, 56 N. E. 25; *Moy v. Moy*, 111 Iowa 161, 82 N. W. 481; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Allen v. Text Book Co.*, 201 Pa. St. 579, 51 Atl. 323, 88

of action on which it is based, or previously existing right with which it deals is, ordinarily, merged in it;²⁹ and that the judgment creditor has certain advantages not possessed by an ordinary creditor, as he can enforce it by execution or he can sue on the judgment.³⁰

§ 18. Express and implied contracts.—Contracts are also classified, from the manner in which they are formed, or the mode of proof, as express contracts and implied contracts. Express contracts have been defined as contracts whose terms are declared by the parties at the time of entering into the contract.³¹ But the term “implied contracts” has been used in two different senses, one of which is not only confusing but is also inapplicable to the ordinary normal contract by agreement of parties. Where it is used in this sense, that is, as meaning a contract implied or created by law, it is sometimes called a constructive contract, but, as already shown, a better term than either is “quasi contract,” because it is not strictly a contract at all such as the ordinary contract by agreement of parties.³² But the term “implied contract” is correct and useful when limited to contracts implied in fact from the acts of the parties or circumstances showing the intention of the parties and the presence of the essential elements of a contract, although not expressed in terms.³³

Am. St. 834; *Rex v. Carlile*, 2 Brad. 362, 22 E. C. L. 155; 2 *Elliott Ev.*, §§ 1521, 1522, et seq. See also as to collateral attack, note in 124 Am. St. 757, 768, and note in 15 Am. St. 142-144.

²⁹ *Price v. Bank*, 62 Kans. 735, 64 Pac. 637, 84 Am. St. 419; *Berry v. Somerset R. Co.*, 89 Me. 552, 36 Atl. 904; *Willoughby v. Atkinson Furnishing Co.*, 96 Me. 372, 52 Atl. 756; *Suydam v. Barber*, 18 N. Y. 468, 75 Am. Dec. 254; *Butler v. Rockwell*, 17 Colo. 290, 29 Pac. 458, 17 L. R. A. 611, and note; *National Foundry & Works v. Water Supply Co.*, 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. 111; *Higgen's Case*, 6 Coke 45; 1 *Freeman on Judgments*, § 215, et seq.

³⁰ *Davidson v. Nebaker*, 21 Ind. 334, 83 Am. Dec. 350, and note; *City of Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784; *Simpson v. Coch-*

ran, 23 Iowa 81, 92 Am. Dec. 410, and note; *Eldredge v. Aultman*, 35 Neb. 884, 53 N. W. 1008, 37 Am. St. 476, and note; *Gutta Percha & C. Mfg. Co. v. Houston*, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. 412; *Black on Judgments*, § 958; 2 *Freeman on Judgments*, § 432, et seq. See also note in 15 L. R. A. (N. S.) 976; note in 26 L. R. A. (N. S.) 577, et seq.

³¹ 2 *Bl. Comm.* 443; *Hertzog v. Hertzog*, 29 Pa. St. 465.

³² See *Board of Highway Com'rs v. City of Bloomington*, 253 Ill. 164, 97 N. E. 280.

³³ See 1 *Add. Cont.* (Morgan's ed.) 52-55, §§ 30, 31; *People v. Speir*, 77 N. Y. 144. Compare also, *Church v. Imp. Gaslight Co.*, 6 Ad. & Ell. 846; *Marzetti v. Williams*, 1 Barn. & Adol. 425. When the term is used in this sense it is said that the only difference between express contracts and implied

Thus, where one requests another to perform work of a sort for which compensation is customary, and the latter does perform it for him, there is an implied agreement or promise that reasonable compensation shall be paid therefor;³⁴ but if the request is made under such circumstances as to show that no compensation was intended, or if the work done is of such a character, or done under such circumstances, that no intention to pay or claim compensation can be inferred, there is no implied contract, and no liability at least in the absence of a voluntary acceptance of the benefit therefrom.³⁵ So, if a man sends to a store for food, clothing, or other merchandise there sold, or goes to an inn and takes dinner furnished by the innkeeper, a promise to pay the customary or reasonable price therefor is implied, although nothing is said concerning the price or payment.³⁶

§ 19. Valid, void and voidable contracts—Unenforcible contracts.—With regard to their validity contracts are often referred to as valid or as void or voidable. There is some confusion in the use of each and every one of these terms. A valid contract in its complete sense may well be said to be one that is enforceable by each party; but a contract may be unenforceable because it is not in writing or because it is barred by the statute of limitations, or the like, and still be valid in the sense that, although there are obstacles to its enforcement, they may not be incapable of being overcome and do not go to the existence of the contract. So, the term “void” is often used when “voidable” is

contracts is in the character of the evidence or mode of proof. *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583; *Bliss v. Hoyt's Estate*, 70 Vt. 534, 41 Atl. 1026, 1027.

³⁴ *La Fayette R. Co. v. Tucker*, 124 Ala. 514, 27 So. 447; *McFarland v. Dawson*, 125 Ala. 428, 29 So. 327; *Spearman v. Texarkana*, 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855; *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975; *Ryans v. Hospes*, 167 Mo. 372, 67 S. W. 285; *Pangborn v. Phelps*, 63 N. J. L. 346, 43 Atl. 977; *Miller v. Tracy*, 86 Wis. 330, 56 N. W. 866.

³⁵ *Hartnett v. Christopher*, 61 Mo. App. 65. See also, *White v. Masten*, 38 Ala. 147; *Saunders v. Saunders*,

90 Me. 284, 38 Atl. 172; *Cole v. Clark*, 85 Me. 336, 338, 27 Atl. 186, 21 L. R. A. 714; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88; *Boston v. District of Columbia*, 19 Ct. of Cl. 31; *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Hodge v. Hodge*, 47 Wash. 196, 91 Pac. 764, 11 L. R. A. (N. S.) 873, and note. See also, *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

³⁶ *Thompson v. Hervey*, 4 Burr. 217; *Angel v. McLellan*, 16 Mass. 28; *Van Valkenburg v. Watson*, 13 Johns. (N. Y.) 480. See also *Buggs v. Sizer*, 30 N. Y. 647; *Fogg v. Portsmouth Atheneum*, 44 N. H. 115, 82 Am. Dec. 191; *Crook v. Cowan*, 64 N. Car. 743.

really meant. And, strictly speaking, a void contract is no contract, so that it is a contradiction of terms to speak of a void contract. It would be more nearly correct to say that the agreement or transaction is void. The expression "void contract" is often used, however, and means that although the parties have gone through the form of making a contract, or attempted to do so, no real contract has resulted, because of the want of some essential element, and no legal rights have been created which either of the parties is bound to respect so long as it remains executory, and third parties may also take advantage of its invalidity where their interests would otherwise be prejudiced.³⁷ But a voidable contract is not an absolute nullity. It is one which is good unless avoided by at least one of the parties. In other words, it is a contract which, in effect, gives him the option or privilege of making it either valid or void, and if he does not choose to avoid it, no one else can do so.³⁸ So, on the other hand, third persons can acquire no rights under and by virtue of a void contract, but if it is merely voidable, innocent third persons may sometimes acquire rights under it so as to cut off the right to avoid it.³⁹ Again, a contract that is merely voidable may be ratified, and ratification will prevent subsequent disaffirmance;⁴⁰ but a void contract is incapable of ratification in the true sense.⁴¹

³⁷ *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. 446; *Denny v. McCown*, 34 Ore. 47, 54 Pac. 952; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 98 S. W. 178, 119 Am. St. 1003; *Brown v. Farmers' Bank*, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359; *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408; *Cundy v. Lindsay*, 3 App. Cas. 459.

³⁸ *Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *Mutual & C. Ins. Co. v. Minie*, 20 Mont. 20, 49 Pac. 446; *Meade v. Clarke*, 159 Pa. St. 159, 28 Atl. 214, 39 Am. St. 669; *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408.

³⁹ See *Babcock v. Lawson*, 4 Q. B. Div. 394; *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673; *Lincoln v. Quyme*, 68 Md. 299, 11 Atl. 848; *Somer v. Brewer*, 2 Pick. (Mass.) 184; *Dettra v. Kestnar*, 147 Pa. St. 566, 23 Atl.

889; *Jones v. Christian*, 86 Va. 1017, 11 S. E. 984.

⁴⁰ *Hastings v. Dollarhide*, 24 Cal. 195; *Mustard v. Wohlford's Heirs*, 15 Gratt. (Va.) 329, 76 Am. Dec. 209. See also *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Shappirio v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259; *Brown v. Brown*, 142 Ill. 409, 32 N. E. 500; *Skinner v. Scott*, 29 Okla. 364, 118 Pac. 394. And disaffirmance will, ordinarily at least, prevent subsequent ratification. *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

⁴¹ See *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Taymouth Twp. v. Koehler*, 35 Mich. 22; *Handy v. St. Paul & C. Pub. Co.*, 41 Minn. 188, 42 N. W. 872, 16 Am. St. 695; *Beland v. Anheuser-Busch Brew. Assn.*, 157 Mo. 593, 58 S. W. 1; *McFarland v. Heim*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. 629; *Alexander v. Cauldwell*,

83 N. Y. 480; *Henry Christian &c. Assn. v. Walton*, 181 Pa. St. 201, 37 Atl. 261, 59 Am. St. 636; *Eastwood v. Kenyon*, 11 Ad. & El. 438. Compare *Brown v. Farmers' Bank*, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359. In *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, the distinction is drawn as follows: "A contract is void when it is a nullity, obligatory on neither party, and unsusceptible of ratification; when either party is bound, or it may be confirmed, it is only voidable."

CHAPTER III.

OFFER AND ACCEPTANCE.

- | | |
|--|---|
| § 25. In general. | § 46. Communications by telephone or phonograph. |
| 26. Aggregatio mentium—Mutuality. | 47. Conduct as offer or acceptance. |
| 27. Nature of offer—Obligation. | 48. Silence does not always give consent. |
| 28. Offer cannot require express refusal. | 49. Performance or acceptance of consideration as an acceptance of the offer. |
| 29. Offer may prescribe form of acceptance. | 50. Acceptance must be by an ascertained person. |
| 30. Offer must not be uncertain. | 51. Rewards. |
| 31. Offer that may be made certain. | 52. Reward—Who may not accept. |
| 32. Offer need not be made to a particular ascertained person. | 53. Tickets, receipts and the like. |
| 33. Revocation of offer. | 54. Deeds. |
| 34. Time in which to accept. | 55. Deeds—Subject continued. |
| 35. Lapse of offer and acceptance. | 56. The American doctrine as to deeds and sealed instruments. |
| 36. When the contract is complete. | 57. Sales. |
| 37. Acceptance must be unconditional. | 58. Auction sales. |
| 38. Acceptance must be on terms of offer. | 59. Building and working contracts. |
| 39. Variance between offer and acceptance. | 60. Miscellaneous cases of offer and acceptance held sufficient. |
| 40. Mistakes. | 61. Miscellaneous cases of offer and acceptance held insufficient. |
| 41. Condition amounts to a rejection of offer. | 62. Time and place of contract determined by acceptance. |
| 42. Counter offer. | 63. Intention to reduce the contract to writing. |
| 43. Manner of communicating acceptance. | 64. Alteration and filling blanks by consent. |
| 44. Communications by mail. | |
| 45. Communications by telegraph. | |

§ 25. **In general.**—Without any academic discussion as to whether a contract may be formed in any other manner than by an offer and acceptance, it may be stated that an offer of terms on the one side and an assent to or acceptance of those terms on the other communicated between the parties is, in the last analysis at least, the form of every agreement. If, as has been intimated by a philosophic writer,¹ there are exceptions to this rule, they are of no practical importance and are governed by the gen-

¹ See Wald's *Pollock on Contracts* (3rd ed.), 5 and 6.

eral rules applicable to offer and acceptance. It follows that there must be an offer expressed or implied and that this offer must be accepted according to its tenor before a binding contract is formed.²

§ 26. **Aggregatio mentium—Mutuality.**—In order to supply this requisite there must be a meeting of the minds as to all essential elements. Both parties must understand the same thing in the same sense and both parties must be bound or neither.³ There must be a meeting of minds on the subject-

² *Sweeny v. Bienville Supply Co.*, 121 Ala. 454, 25 So. 575; *Campbell v. Heney*, 128 Cal. 109, 60 Pac. 532; *Strong & Co. v. H. Baars & Co.*, 60 Fla. 253, 54 So. 92; *Harris v. Amos-Keag Lumber Co.*, 97 Ga. 465, 25 S. E. 519; *Newlin v. Prevo*, 90 Ill. App. 515; *Haskell & Co. Car Co. v. Allegheny Forging Co.*, 47 Ind. App. 392, 91 N. E. 975; *Hogue v. Mackey*, 44 Kans. 277, 24 Pac. 477; *Heiland v. Ertel*, 4 Kans. App. 516, 44 Pac. 1005; *Mayer v. Sparks*, 3 Kans. App. 602, 45 Pac. 249; *Pittsburg & Co. v. Slack & Co.*, 42 La. Ann. 107, 7 So. 230; *Graves v. Dill*, 159 Mass. 74, 34 N. E. 336; *Moore v. Flint & Co. R. Co.*, 116 Mich. 196, 74 N. W. 497; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742; *Strong v. Lane*, 66 Minn. 94, 68 N. W. 765; *Ames & Co. v. Smith*, 65 Minn. 304, 67 N. W. 999; *Alexander v. Western & Co. Telegraph Co.*, 67 Miss. 386, 7 So. 280; *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474; *Sutter v. Raeder*, 149 Mo. 297, 50 S. W. 813; *Melick v. Kelley*, 53 Nebr. 509, 73 N. W. 945; *Krum v. Chamberlain*, 57 Nebr. 220, 77 N. W. 665; *McGavock v. Morton*, 57 Nebr. 385, 77 N. W. 785; *Shaw v. Woodbury Glass Works*, 52 N. J. L. 7, 18 Atl. 696; *Realty Advertising & Co. v. Lynn*, 135 N. Y. S. 581; *McCabe & Co. v. Bell*, 156 N. Car. 378, 72 S. E. 817; *State v. Board*, 81 Ohio St. 218, 90 N. E. 389; *Columbus & Co. Ry. Co. v. Gaffney*, 65 Ohio St. 104, 61 N. E. 152; *Wallingford v. Columbia & Co. R. Co.*, 26 S. Car. 258, 2 S. E. 19; *Lawrence v. Milwaukee & Co. R. Co.*, 84 Wis. 427, 54 N. W. 797; *Lewis v. Newton*, 93 Wis. 405, 67 N. W. 724. There must be at least two parties

to an agreement before it can be enforced at law. *Morley v. French*, 2 Cush. (Mass.) 130; *Walker v. City of Springfield*, 3 Ohio Dec. (Re.) 567; *Price v. Spencer*, 7 Phil. (Pa. St.) 179.

³ *Cooke v. Oxley*, 3 T. R. 653; *First Nat. Bank v. Hall*, 101 U. S. 43, 25 L. ed. 822; *Utley v. Donaldson*, 94 U. S. 29, 47, 49, 24 L. ed. 54; *Green v. Bateman*, Fed. Cas. No. 5762, 2 Woodb. & M. (U. S.) 359; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. (U. S.) 218, Fed. Cas. No. 6282; *Ellicott Mach. Co. v. United States*, 44 Ct. Cl. 127; *Harper v. Goldschmidt*, 156 Cal. 245, 104 Pac. 451; *German Savings & Loan Soc. v. McLellan*, 154 Cal. 710, 99 Pac. 194; *Peerless Glass Co. v. Pacific & Co.*, 121 Cal. 641, 54 Pac. 101; *Lamar Milling & Co. v. Craddock*, 5 Colo. App. 203, 37 Pac. 950; *Hartford & Co. R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177; *Rowland v. New York & Co. R. Co.*, 61 Conn. 103, 23 Atl. 755, 29 Am. St. 175; *Talbot v. Pettigrew*, 3 Dak. 141, 13 N. W. 576; *Cunningham Mfg. Co. v. Rotograph Co.*, 30 App. Cas. (D. C.) 524; *Patten v. Warner*, 11 App. Cas. (D. C.) 149; *Martin v. Thrower*, 3 Ga. App. 784, 60 S. E. 825; *Burchard-Hulburt Inv. Co. v. Hanson*, 143 Ill. App. 97; *Brant v. Gallup*, 5 Ill. App. 262; *Newlin v. Prevo*, 90 Ill. App. 515; *Board & Co. v. Bender*, 36 Ind. App. 164, 72 N. E. 154; *Sheldon v. Crane*, 146 Iowa 461, 125 N. W. 238; *Clay v. Ricketts*, 66 Iowa 362, 23 N. W. 755; *Hogue v. Mackey*, 44 Kans. 277, 24 Pac. 477; *Pittsburg & Co. Coal Co. v. Slack*, 42 La. Ann. 107, 7 So. 230; *Boston Ice Co. v. Potter*, 123

matter, relative to which the proposal and acceptance were in fact made and entered into.^{3a} Both parties need not actually and really mean the same precise thing, but both must actually give their assent to that proposal and acceptance, be it what it may, which de facto arise out of the terms of their communication. If the words used are words which, if read with a mind desirous of understanding them, are intelligible, a slight difference or a slight mistake may not prevent there being a contract, but where a mistake goes to the greater part of the subject-matter, then this is fatal to the idea of a contract. And it is also a principle of law well established that the terms of a proposal and acceptance may be so definite as to evince a contract and the consensus necessary

Mass. 28, 25 Am. Rep. 9; Board &c. v. De Bruyn, 138 Mich. 187, 101 N. W. 362; Luckey v. St. Louis &c. R. Co., 133 Mo. App. 589, 113 S. W. 703; Sutter v. Raeder, 149 Mo. 297, 50 S. W. 813; Green v. Cole, 103 Mo. 70, 115 S. W. 317; Brophy v. Idaho Produce &c. Co., 31 Mont. 279, 78 Pac. 493; State v. Board &c., 37 Mont. 378, 96 Pac. 736; Krum v. Chamberlain, 57 Nebr. 220, 77 N. W. 665; McGavock v. Morton, 57 Nebr. 385, 77 N. W. 785; Braentigam v. Edwards, 38 N. J. Eq. 542; Hooley v. Talcott, 113 N. Y. S. 820, 129 App. Div. 233; Fullerton v. Dalton, 58 Barb. (N. Y.) 236; Trolling v. Fleer, 157 N. Car. 81, 72 S. E. 795; Rodgers, McCabe & Co. v. Bell, 156 N. Car. 378, 72 S. E. 817; Columbus &c. R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152; Lemp Brewing Co. v. Secor, 21 Okla. 537, 96 Pac. 636. A corporation cannot ratify its void act and thus fix a liability on the other party to an agreement, since the ratification is not mutual. Pacific Mill Co. v. Inman &c. Co., 500 Ore. 22, 90 Pac. 1099; Clary v. Wolf, — R. I. —, 83 Atl. 115; Kelly v. Wheeler, 22 S. Dak. 611, 119 N. W. 994; Harris Millinery Co. v. Bryan, — Tex. Civ. App. —, 125 S. W. 999; Bland v. Brookshire, 3 Willson (Tex.) Civ. App. Cas. 446; San Antonio &c Co. v. Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

^{3a}If the minds of the parties do not meet there can be no contract either express or implied. Ford-

tran v. Stowers, 52 Tex. Civ. App. 226, 113 S. W. 631. The very existence of a contract demands that the minds of the parties meet. Gorringer v. Reed, 23 Utah 120, 63 Pac. 902, 90 Am. St. 692; Creecy v. Grief, 108 Va. 320, 61 S. E. 769; Zitske v. Grohn, 128 Wis. 159, 107 N. W. 20. Where the plaintiff testified "I don't know what he intended to sell me. I know what I believe he intended to sell me," it was held that there was no contract. The minds of the parties did not meet. German Saving &c. Soc. v. McLellan, 154 Cal. 710, 99 Pac. 194. The parties must formulate their contract and agree to its terms. Courts do not make contracts, but merely construe and enforce them. McFarlane v. York, 90 Ark. 88, 117 S. W. 773. See also, Koenigsberg v. Blan, 127 N. Y. S. 602. "The question of whether or not a contract was made is to be solved by ascertaining the mutual intention of the parties." H. C. Lindsly & Son v. Kansas City &c R. Co., 152 Mo. App. 221, 133 S. W. 389. The due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement. Jules Levy & Bro. v. A. Mantz & Co., 16 Cal. App. 666, 117 Pac. 936. The word "consent" means concurrence of wills. Wilkinson v. Misner, 158 Mo. App. 551, 138 S. W. 931. See also Consideration, Promise for Promise, Mutuality Options.

to make a contract may perfectly exist, even although the parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare. The proposal and acceptance, as discovered from the acts or correspondence of the parties, may show a complete contract or consensus, such as a court of equity would specifically enforce, although the contract might be imperfect and incomplete as regards form.⁴

§ 27. Nature of offer—Obligation.—Not only must there be an offer but the offer must be made in such a manner and under such circumstances as to manifest an intention to create and change legal relations. For it is evident that an offer made in jest and accepted in that spirit is not binding; under these circumstances it is obvious that the parties did not contemplate the formation of a contract.⁵ Social engagements have by eminent

⁴ *Bonnewell v. Jenkins*, L. R. 8 Ch. Div. 70. Thus in the case of *Preston v. Luck*, L. R. 27 Ch. Div. 497, a negotiation took place as to the sale by L to P of a British patent and certain foreign patents for the same inventions, and ultimately an offer was made for sale at £500 and accepted by letter, but it was not quite clear whether the offer and acceptance related to all the patents, or to the British patent only. P brought his action for specific performance, treating the contract as including all the patents, and moved for an injunction to restrain L from parting with them. At the hearing of the motion he asked leave to amend his writ, and for an injunction as to the British patent only. Held, that as L had understood that he was negotiating about the British patent only, and P that he was negotiating as to all the patents, there never was the consensus *ad idem* which is necessary to make a contract; and there was, therefore no contract which P could enforce, and an injunction must be refused. *Kennedy v. Lee*, 3 Mer. 440; *Preston v. Luck*, L. R. 27 Ch. Div. 497; *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638; *Brogden v. Metropolitan R. Co.*, L. R. 2 App. Cas. 666; *Pacific & Co. v. Riverside*

&c. R. Co., 90 Cal. 627, 27 Pac. 525; *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; *Allen v. Chouteau*, 102 Mo. 309, 321, 14 S. W. 869. The parties must mutually assent to the terms of the contract. *Atwood v. Rose*, 32 Okla. 355, 122 Pac. 929. But the mere fact that one of the parties did not disclose his purpose and intention in entering into the contract will not affect the rights and duties of the parties when such intention remains undisclosed and is in no way embodied in the agreement. *Delaware &c. R. Co. v. Monroe Power &c. Co.*, 227 Pa. 639, 76 Atl. 425. The mere fact that one of the parties secretly cherishes an intention inconsistent with the terms of the agreement does not invalidate the agreement expressed by the words or acts of the parties. *Embry v. Hargadine &c. Co.*, 127 Mo. App. 383, 105 S. W. 777. See also, *J. Weil & Co. v. Quidnick Mfg. Co.*, 33 R. I. 58, 80 Atl. 447.

⁵ *Nyulasy v. Rowan*, 17 Vict. L. R. 663; *Gray v. Toledo &c. R. Co.*, 143 Mo. App. 251, 128 S. W. 227. Mock marriage. *McClurg v. Terry*, 21 N. J. Eq. 225; *Theiss v. Weiss*, 166 Pa. St. 9, 31 Atl. 63; *Armstrong v. McGhee*, Add. (Pa.) 261; *Bruce v. Bishop*, 43 Vt. 161. Where one in a spirit of fun gives a check for \$300 on a bank

writers been placed on the same footing. From their nature they do not admit of being regarded as business transactions. The acceptance of an invitation may cause the acceptor to incur expense in the fulfilment of the engagement and the damages resulting from a breach may be ascertainable, but "the court would probably hold that as no legal consequences were contemplated by the parties" no contract was formed.⁶ Nor does the mere expression of an intention constitute a binding promise. It is not such an offer as can be accepted and recovered on by the party to whom it was made.⁷ Thus a writing which purports to be a promissory note and which reads, "This is to show that I allow to give B two hundred and fifty dollars," etc., is a statement of a mere intention and will not support an action.⁸ Statements to the effect that one intends to recompense another by will for services rendered,⁹ or a statement by a prospective husband that he intends to keep control of certain property for certain purposes,¹⁰

in which he had no deposit for an old silver watch which was worth \$15, the circumstances show that no purchase or sale are intended. *Keller v. Holderman*, 11 Mich. 248, 83 Am. Dec. 437. An exclamation to the effect that I would give \$1,000 if such an event were to happen, cannot be considered as an offer. *Stamper v. Temple*, 6 Humph. (Tenn.) 113. A statement made in anger and so understood will not be treated as an offer. *Higgins v. Lessig*, 49 Ill. App. 459. In an action on a contract for the purchase of oil stock the agreement was held to have been entered into in jest, consequently there could be no recovery on it. *Smith v. Richardson*, 31 Ky. L. 1082, 104 S. W. 705. But one who makes a bona fide acceptance of an offer given in jest may enforce it. The circumstances may be such that the promisor will be estopped to deny the promise. *Plate v. Durst*, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404. Nor can one who has made a bad bargain claim that he was jesting when his conduct will not lead a reasonable man so to believe. *McKinzie v. Stretch*, 53 Ill. App. 184.

⁶ *Anson on Contracts*, 4th ed. 19; *Wald's Pollock on Contracts*, 3.

⁷ *Week v. Tibold*, 1 Rolle Abr. p. 6;

Randall v. Morgan, 12 Ves. 67; *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444; *Pollok v. San Diego*, 118 Cal. 593, 50 Pac. 769; *Slaughter v. McManigal*, 138 Iowa 643, 116 N. W. 726; *Phillips v. Van Schaick*, 37 Iowa 229; *Wellington v. Aphthorp*, 145 Mass. 69, 13 N. E. 10; *Tucker v. Haughton*, 9 Cush. (Mass.) 350; *State v. Noyes*, 25 Nev. 31, 56 Pac. 946; *Hartman's Appeal*, 3 Grant. Cas. (Pa.) 271.

⁸ *Harmon v. James*, 7 Ind. 263. In answer to a letter of inquiry in regard to the payment of a certain bill owing plaintiff by a contractor the defendant answered that it "expects to settle all bills" of its contractor, and it was held that this did not necessarily mean payment. *Cleveland & C. R. Co. v. Shea*, 174 Ind. 303, 91 N. E. 1081.

⁹ *Louder v. Hart*, 52 Mo. App. 377; *McTague v. Finnegun*, 54 N. J. Eq. 454, 35 Atl. 542; *Murphy v. Corrigan*, 161 Pa. St. 59, 28 Atl. 947; *Miller's Estate*, 136 Pa. St. 239, 20 Atl. 796; *Callum v. Rice*, 35 S. Car. 551, 15 S. E. 268; to same effect, *Joyce v. Hamilton*, 111 Ind. 163, 12 N. E. 294; *Ulrich v. Arnold*, 120 Pa. St. 170, 13 Atl. 831.

¹⁰ *Adams v. Adams*, 17 Ore. 247, 20 Pac. 633.

or a statement by the owner of a gas well that he would rather reduce the rent than have the well discontinued, are none of them enforceable.¹¹

Likewise, great care should also be taken not to construe the conduct, declarations or letters of a party as proposals when they are intended only as preliminary negotiations. The question in such cases is, did the offerer mean to submit a proposition or was he only settling the terms of an agreement on which he proposed to enter, after all its particulars are adjusted? If it is intended merely to start negotiations which may subsequently result in a contract or is intended to call forth an offer from the one to whom it is addressed, its acceptance does not consummate a contract.¹² The fact that the parties do intend a subsequent agreement to be made is strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance.¹³ An agreement to be finally settled must comprise all the terms which the parties intended to introduce into the agreement and until the terms of a proposal are settled, the proposer is at liberty to retire from the bargain. This is particularly applicable to letters and advertisements intended to get trade. Communications couched in general language proper to be addressed to all who are interested in a particular trade or business are usually mere advertisements and not proposals.¹⁴ An advertisement, how-

¹¹ *McClane v. People's &c. Co.*, 178 Pa. St. 424, 35 Atl. 812.

¹² *Harvey v. Facey*, App. Cas. (1893) 552; *Hussey v. Horne*, Payne L. R. 4 App. Cas. 311, 48 L. J. Ch. Div. 846; *McClay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Cornwells v. Krengel*, 41 Ill. 394; *Allen v. Roberts*, 2 Bibb. (Ky.) 98; *Lyman v. Robinson*, 14 Allen (Mass.) 242; *Dow v. Johnson*, 170 Mass. 540, 49 N. E. 919; *Plank's &c. Co. v. Burkhard*, 87 Mich. 182, 49 N. W. 562; *Anderson v. Public Schools*, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707; *Olds v. East &c. Marble Co.* (Tenn. Ch. App.), 48 S. W. 333; *Fenno v. Weston*, 31 Vt. 345; *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516.

¹³ *Irish v. Pulfiam*, 32 Nehr. 24, 48 N. W. 963; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Bryant v. Ondrack*,

87 Hun (N. Y.) 477, 34 N. Y. S. 384. See Post, intention to reduce the contract to writing.

¹⁴ *Harvey v. Facey*, App. Cas. (1893) 552; *Crocker v. New London &c. R. Co.*, 24 Conn. 249, 261; *Chytraus v. Smith*, 141 Ill. 231, 30 N. E. 450; *Chicago &c. R. Co. v. Jones*, 53 Ill. App. 431; *Howard v. Maine Industrial School*, 78 Maine 230, 3 Atl. 657; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Lyman v. Robinson*, 14 Allen (Mass.) 242, 254; *May v. Ward*, 134 Mass. 127; *Peek v. Detroit Novelty Works*, 29 Mich. 313; *Ahearn v. Ayres*, 38 Mich. 692; *Hill v. Webb*, 43 Minn. 545, 45 N. W. 1133; *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155, 159; *Pearce v. Spalding*, 12 Mo. App. 141; *Coquard v. Joplin School Dist.*, 46 Mo. App. 6; *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep.

ever, may be in such form as to become a contract. Whether or not it is a proposal is a question of construction of the terms of the offer as explained by admissible evidence.¹⁵ But even though the offer is made with the intention that its acceptance will create mutual obligations it will not accomplish this purpose unless its terms are sufficiently complete. It must be so complete that its acceptance will form an agreement containing all the terms necessary and intended by the parties,¹⁶ for it is obvious that there can be no agreement until its terms are settled,¹⁷ and that an offer which is not complete is merely a step in the negotiations.¹⁸

400; *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516; *Hussey v. Horne-Payne*, L. R. 4 App. Cas. 311, 48 L. J. Ch. Div. 846; *King-horne v. Montreal Tel. Co.*, 18 U. C. (Q. B.) 60. Ordinarily an advertisement is not an offer to contract but an offer to receive proposals for a contract. *Anderson v. Board &c. Public Schools*, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.

¹⁵ *Molten v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516. In the above case it was held that a letter which read: "We are authorized to offer Michigan fine salt in full car load lots in 80 to 95 barrels delivered in your city at 85 cents per barrel," to which was replied, "Your letter of yesterday received and noted. You may ship me 2,000 barrels of Michigan fine salt as offered in your letter," was clearly in the nature of an advertisement or business circular to attract the attention of those interested in that business, to the effect that good bargains in salt could be had by applying to them, and not an offer by which they were to be bound, if accepted for any amount the person to whom it was addressed might see fit to order.

¹⁶ *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Strobridge Lithographing Co. v. Randall*, 73 Fed. 619, 19 C. C. A. 611; *Rector Provision Co. v. Sauer*, 69 Miss. 235, 13 So. 623; *Commercial Telegram Co. v. Smith*, 47 Hun (N. Y.) 494, 15 N. Y. St. 19. A telegram which read "You may come on at once at salary of two thousand, conditional only upon satisfactory dis-

charge of business," is insufficient as a contract since it fails to designate the kind of employment or its duration. *Palmer v. Marquette &c. Rolling Mill Co.*, 32 Mich. 274. A telegram asking that a doctor be sent without fail is not a contract to pay for his services. *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

¹⁷ *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Lyman v. Robinson*, 14 Allen (Mass.) 242; *Brown v. New York &c. R. Co.*, 44 N. Y. 79.

¹⁸ *Ocala Cooperage Co. v. Florida Cooperage Co.*, 59 Fla. 390, 52 So. 13. A letter which read "We (citizens of a town) have had a meeting * * * and are resolved to make her this proposition. We will guarantee to her the sum of \$400.00 for one year," was also held merely to propose a basis upon which the plaintiff might treat for a contract. *Wilie v. Price*, 5 Rich. Eq. 91. An offer which read, "I think I might purchase your horse at \$200, the price you ask me. * * * I would like to get it at once, if it will do me, which I am quite certain it will," was not conclusive of the trade. The defendant was entitled to determine whether the horse would suit him. *Stagg v. Compton*, 81 Ind. 171. In answer to a request for the price of certain lots the defendant wrote, "The lots are so incumbered it would be difficult to make title at once. Price, \$1,700 and \$1,500, net, and cheap." Plaintiff immediately sent his acceptance. Defendant refused to sell. In a suit at law to recover damages for the breach of the contract it was held that the corre-

§ 28. **Offer cannot require express refusal.**—But while the offer must be made in such manner and under such circumstances as to manifest an intention to create a legal obligation, yet the offerer cannot ordinarily require an express refusal of his offer. It cannot be made in such terms that an acceptance will be assumed without communication. Where a letter was sent offering to buy a horse, and stating that if the writer received no answer he would assume that his offer was accepted, it was held that there was no contract. The court said that a person in making an offer to another has no right to put on him the burden of the choice of writing a letter of refusal or being bound by the agreement proposed.¹⁹ If it were otherwise, the one making the offer could fix a contract on the person addressed in case the proposition was not rejected within a specified time. Accordingly, where a letter was issued by a company to the shareholders, stating that the new shares were allotted and the certificates enclosed, with a receipt to be signed and returned, it was held that a shareholder who had taken no notice of the communication was not bound to accept the share, and could not be charged as a shareholder.²⁰ However, if it is agreed between the parties that silence on the part of the one to whom the offer is made shall be an acceptance, a binding contract is formed. Such an agreement may be established by the conduct of the parties, such, it seems, as the retention of a letter subscribing for stock.²¹

§ 29. **Offer may prescribe form of acceptance.**—Although the one making the offer cannot require an express refusal he

spondence amounted simply to negotiations and no contract was formed. *Knight v. Cooley*, 34 Iowa 218. A contract of employment which did not state the character of the work to be done nor how long the services were to continue was not binding although the employer's offer had been accepted. *Havens v. American Fire Ins. Co.*, 11 Ind. App. 315, 39 N. E. 40. See also, *Smith v. Kelley*, *Maus*

& Co., 115 Mich. 411, 73 N. W. 385; *Elks v. North State Life Ins. Co.* (N. Car.), 75 S. E. 808.

¹⁹ *Felthouse v. Bindley*, 11 C. B. (N. S.) 869.

²⁰ *Somerville's Case*, L. R. 6 Ch. App. Cas. 266, 40 L. J. Ch. 431.

²¹ *In re Bultfontein &c. Mine*, 75 Law Times (N. S.) 669. See also, *Robertson v. Tapley*, 48 Mo. App. 239.

may prescribe the time,²² place,²³ and manner²⁴ of acceptance. The offerer in such a case, cannot be bound by an acceptance in any other form unless he acquiesces in the change.²⁵

§ 30. Offer must not be uncertain.—Furthermore, the offer must not be uncertain and ambiguous. It must be reasonably certain and definite in its terms so that the court may be able to determine who the parties were, what the subject-matter was and whether the contract had been performed or not.²⁶ The Supreme Court of Alabama has stated the rule as follows: "When no breach of a contract can be assigned which could be compensated by a criterion of damages furnished by the contract itself, the contract is void for uncertainty."²⁷ Thus, a mere statement of the price at which certain property is held is not such an offer as can be accepted by the one to whom the statement is made. The seller may wish to choose his purchaser.²⁸ Where the offerer merely asks if he may not be permitted to relinquish his stock to the amount of his liabilities, it is not a definite proposal upon which an acceptance can operate.²⁹ And likewise a statement made to a

²² *Felthouse v. Bindley*, 11 C. B. (N. S.) 869; *Adams v. Lindsell*, 1 B. & Ald. 681; *Strong & Co. v. H. Baars & Co.*, 60 Fla. 253, 54 So. 92; *Gibney & Co. v. Arlington Brewery Co.*, 112 Va. 117, 70 S. E. 485, (limiting time of shipment). See post, § 34.

²³ *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225, 4 L. ed. 556.

²⁴ Acceptance to be sent by messenger. *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225, 4 L. ed. 556. Acceptance to be made "by wire or otherwise." *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. Acceptance required to be in writing. *Wiswell v. Bresnahan*, 84 Maine 397, 24 Atl. 885; *Briggs v. Sizer*, 30 N. Y. 647; *Bosshardt & Co. v. Crescent Oil Co.*, 171 Pa. St. 109, 32 Atl. 1120. So where acceptance can be made only by the payment of a specified sum of money. *Rickard v. Taylor*, 122 Fed. 931, 59 C. C. A. 455; *Lockman v. Anderson*, 116 Iowa 236, 89 N. W. 1072. The conditions of the offer must be complied with. *McCormick v. Bonfils*, 9 Okla. 605, 60 Pac. 296. "The party making the offer may prescribe the mode of acceptance." *Breen v.*

Mayne, 141 Iowa 399, 118 N. W. 441.

²⁶ *Wiswell v. Bresnahan*, 84 Maine 397, 24 Atl. 885; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

²⁷ *Hart v. Georgia Ry.*, 101 Ga. 188, 28 S. E. 637; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *Des Moines v. Des Moines Waterworks Co.*, 95 La. 348, 64 N. W. 269; *Peet v. Meyer*, 42 La. Ann. 1034, 8 So. 534; *State v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *State v. Board & Co.*, 37 Mont. 378, 96 Pac. 736; *Vreeland v. Vreeland*, 53 N. J. Eq. 387, 32 Atl. 3; *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288; *Manufacturing Co. v. Hobbs*, 128 N. Car. 46, 38 S. E. 26, 83 Am. St. 661; *State v. Baum*, 6 Ohio (6 Ham.) 383; *Butler v. Kemmerer*, 218 Pa. 242, 67 Atl. 332.

²⁸ *Pulliam v. Schimpf*, 109 Ala. 179, 19 So. 428. To same effect. *Price v. Stipek*, 39 Mont. 426, 104 Pac. 195.

²⁹ *Knight v. Cooley*, 34 Iowa 218. *Harper v. Calhoun*, 7 How. (Miss.) 203.

storekeeper, upon inquiry being made as to the financial standing of the proposed customer, "to let have on" is not a promise to become liable for the goods furnished to such customer.³⁰ And a statement to the effect that, "if he is not good I am," is not sufficiently definite to bind the speaker to pay the debt.³¹ A contract or offer may be insufficient because indefinite as to time.³² The meaning of certain terms may be so ambiguous as to invalidate the offer.³³ But if the contract and its conditions are determinable and the damages resulting from a breach ascertainable, the agreement is sufficiently definite.³⁴

§ 31. Offer that may be made certain.—It is obvious that it is not permissible to vary the terms of the agreement in order to accomplish this purpose. The testimony cannot add to or take from its terms, yet the surrounding facts may be looked into to show the circumstances and thus determine whether the offer is sufficiently definite.³⁵ Thus abbreviations and symbols may be explained,³⁶ and cipher telegrams interpreted.³⁷ For it is a well-established principle that that is certain which can be rendered certain.³⁸

³⁰ *Lombard v. Martin*, 39 Miss. 147.

³¹ *Tucker v. Bitting*, 32 Pa. St. 428.

³² *Davie v. Lumberman's Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; *Ahlstrom v. Fitzpatrick*, 17 Mont. 295, 42 Pac. 757; *Manufacturing Co. v. Hobbs*, 128 N. Car. 46, 38 S. E. 26, 83 Am. St. 661. But if the time designated for the performance is certain to come at some future time the proposal is sufficiently definite even though the time is not definitely ascertainable in advance. *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914.

³³ *Peerless Glass Co. v. Pacific Crockery & Co.*, 121 Cal. 641, 54 Pac. 101; *Hall v. Chambersburg Woolen Co.*, 187 Pa. St. 18, 40 Atl. 986, 52 L. R. A. 689, 67 Am. St. 563. For additional examples of the indefinite proposals see, *Marble v. Standard Oil Co.*, 169 Mass. 553, 48 N. E. 783; *Blakistone v. German Bank*, 87 Md. 302, 39 Atl. 855; *Hauser v. Harding*, 126

N. Car. 295, 35 S. E. 586; *Teague v. Schaub*, 133 N. Car. 458, 45 S. E. 762.

³⁴ *Schlotz v. Insurance Co.*, 100 Fed. 573, 40 C. C. A. 556; *Witty v. Michigan & Co.*, 123 Ind. 411, 24 N. E. 141, 8 L. R. A. 365, 18 Am. St. 327.

³⁵ *Lulay v. Barnes*, 172 Pa. St. 331, 34 Atl. 52.

³⁶ *Brewer v. Horst & Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. 699.

³⁷ *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 74 Am. St. 349; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819. It is necessary, however, to show that the one receiving the cipher message understood its terms. *Armsby Co. v. Eckerly*, 42 Mo. App. 299.

³⁸ *Hamden v. Merwin*, 54 Conn. 418, 8 Atl. 670; *Norton v. Gale*, 95 Ill. 533; *Grier v. Puterbaugh*, 108 Ill. 602;

§ 32. **Offer need not be made to a particular ascertained person.**—At its first promulgation an offer need not be made to any specific person. It may be made generally and left open so that any one accepting it is the one contracted with. While there is nothing which may be the subject-matter of a contract that cannot be negotiated by means of a general offer, its most usual applications arise out of cases where rewards are offered for the return of lost and stolen property, and for information touching certain matters. It has often been decided that if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, makes an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him, and in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have been done.³⁹

An open letter of credit in the common form, undertaking to honor bills of exchange to be drawn by the person to whom it is given, operates as a general offer of a contract, addressed or intended to be shown to all persons who may be willing to act upon it; which may be accepted by any such person making advances upon bills drawn in conformity with its terms.⁴⁰ A contract may originate in an advertisement addressed to the public generally in case it shows an intent to assume legal liability, and if

Kirwan v. Roberts, 99 Md. 341, 58 Atl. 32; Woods v. Hart, 50 Nebr. 497, 70 N. W. 53; Parker v. Pettit, 43 N. J. L. 512; Thompson v. Stevens, 71 Pa. 161; Northern & C. R. Co. v. Walworth, 193 Pa. 207, 44 Atl. 253. If the blanks are left in a contract and the agreement affords the means for supplying the blank with certainty, the omission may be supplied. Wilson v. Samuels, 100 Cal. 514, 35 Pac. 148, 559. See post, certainty.

³⁹ Hart v. Green, 16 Colo. App. 70, 65 Pac. 344; Wentworth v. Day, 3 Metc. (Mass.) 352; Zeltner v. Irwin, 21 Misc. (N. Y.) 13, 46 N. Y. S. 852.

⁴⁰ In re Agra and Masterman's Bank, L. R. 2 Ch. App. Cas. 391, 36 L. J. Ch. 222; Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612. Newspaper advertisements, Carlill v. Carbolic Smoke-Ball Co., 1 Q. B. (1893) 256, 67 L. T. (N. S.) 837.

the proposal be accepted by one in good faith without qualifications or conditions the contract is complete.⁴¹

§ 33. **Revocation of offer.**—An offer unsupported by any consideration may be withdrawn at any time before acceptance.⁴²

⁴¹ *Vigo &c. Soc. v. Brumfiel*, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 567; *Tarbell v. Stevens & Co.*, 7 Iowa 163; *Anderson v. Public School*, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707. A circular offering a reward if acted on may amount to an agreement. *Bank v. Griffin*, 66 Ill. App. 577. The catalog of an institution of learning may contain an offer sufficiently definite to be accepted. *Niebermeyer v. University*, 61 Mo. App. 654; *Horner School v. Westcott*, 124 N. Car. 518, 32 S. E. 885. Or a design for a building submitted by an architect in answer to an advertisement calling for designs and offering a certain sum to the one whose plans were accepted is binding when acted upon by the parties. *Walsh v. St. Louis &c. Assn.*, 90 Mo. 459, 2 S. W. 842.

⁴² *Waterman v. Banks*, 144 U. S. 394, 402, 36 L. ed. 479; *Stitt v. Huideroper*, 17 Wall. (U. S.) 384, 21 L. ed. 644; *Bennett v. Potter*, — Cal. App. —, 113 Pac. 885; *Larmon v. Jordan*, 56 Ill. 204; *School Directors v. Trefethren*, 10 Ill. App. 127; *Arnold v. Cason*, 95 Mo. App. 426, 69 S. W. 34; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Isham v. Therasson*, 53 N. J. Eq. 10, 30 Atl. 969. Option for a contract for sale of oil, *Bosshardt & Wilson Co. v. Crescent Oil Co.*, 171 Pa. St. 109, 32 Atl. 1120. The plaintiffs bid on a bridge contract which was to be let by defendant's board of highway commissioners. In acting on this bid a resolution was passed that plaintiffs be notified that their bid be accepted, "conditioned upon leave being granted by the board of supervisors to issue bonds of the town in the sum of \$70,000." Before anything further was done plaintiffs telegraphed that they withdrew their bid and sent a letter of explanation. It was held that at the time the telegram was sent and received there was no valid and binding contract and so long as there was no valid contract

the plaintiff could withdraw its proposition. *Northwestern Const. Co. v. Town of North Hempstead*, 121 App. Div. (N. Y.) 187, 105 N. Y. S. 581; *Moffett &c. Co. v. Rochester*, 178 U. S. 373, 44 L. ed. 1108; *Borst v. Simpson*, 90 Ala. 373, 7 So. 814; *Abbott v. Land &c. Co.*, — Cal. —, 53 Pac. 445; *Smith v. Bateman*, 25 Colo. 241, 53 Pac. 457, affd. 8 Colo. App. 336, 46 Pac. 213; *Sherwin v. National &c. Co.*, 5 Colo. App. 162, 38 Pac. 392; *Krause v. Kraus*, 162 Ill. 328, 44 N. E. 736; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Augustine v. M. E. Society*, 79 Ill. App. 452; *Murray v. Doud*, 63 Ill. App. 247; *Young v. Trainor*, 57 Ill. App. 632; *Cincinnati &c. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *McCormick &c. Co. v. Richardson*, 89 Iowa 525, 56 N. W. 682; *Peet v. Meyer*, 42 La. Ann. 1034, 8 So. 534; *Miller v. Douville*, 45 La. Ann. 214, 12 So. 132; *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; *Brown v. Snider*, 126 Mich. 198, 85 N. W. 570; *McCormick &c. Co. v. Cusack*, 116 Mich. 647, 74 N. W. 1005; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892, 4 Am. St. 867; *Hill v. Webb*, 43 Minn. 545, 45 N. W. 1133; *Scanlon v. Oliver*, 42 Minn. 538, 44 N. W. 1031; *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Johnston v. Fessler*, 7 Watts (Pa.) 48, 32 Am. Dec. 738; *Corser v. Hale*, 149 Pa. St. 274, 24 Atl. 285; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49; *Jones v. New York Ins. Co.*, 15 Utah 522, 50 Pac. 620; *McCaffrey v. Wagner*, 81 Wis. 633, 51 N. W. 958. The offer of a reward may be withdrawn at any time before performance. *Harson v. Pike*, 16 Ind. 140. A contract made for the benefit of a third person may be rescinded by the parties thereto at any time before its acceptance by such third person. *Richard v. Reeves*, — Ind. App. —, 45 N. E. 624; *Davis v. Calloway*, 30

This applies to a general offer. It is revocable at any time before assent thereto is given and before anything is done in reliance on it. There is no contract until its terms are complied with. Like any other offer to contract, it may, therefore, be withdrawn through the same channel in which it was made. Care should be taken that the same publicity is given to the revocation that was accorded the offer.⁴³ Any general offer not made to any specific person directly may be revoked in the manner in which it was made, and if a person, being ignorant of the withdrawal, performs the service the offer called for, still he cannot recover.⁴⁴ There need be no express revocation of an offer. It may be withdrawn by implication. It may be withdrawn by acts inconsistent with the continuance of the proposal, in case such acts are brought to the knowledge of the other party.⁴⁵ Thus, if the offerer sells the property to another before an acceptance of the previous offer, this works a revocation of such prior offer in case the offeree learns of such sale before acceptance.⁴⁶ But it is not possible for the proponent to withdraw, at will, every offer

Ind. 112, 95 Am. Dec. 671. An offered freight rate may be withdrawn before acceptance. *Bouker v. Long Island R. Co.*, 89 Hun (N. Y.) 132, 35 N. Y. S. 30. A promise to buy certain real estate if the vendor perfects his title is revocable if done before the seller changes his condition, i. e., takes steps to perfect his title. *Groomer v. McCully*, 93 Mo. App. 544. An option to make a lease given without consideration may be withdrawn at any time before acceptance. *O'Connor v. Harrison*, 132 Ill. App. 264. But if it is accepted before being withdrawn a contract is created. *O'Connor v. Harrison*, 132 Ill. App. 264.

⁴³ *Shuey v. United States*, 92 U. S. 73, 23 L. ed. 697. In this case, "the Secretary of War issued, and caused to be published in the public newspapers, and otherwise, a proclamation, whereby he announced that there would be paid, by the war department, 'for the apprehension of John H. Surratt, one of Booth's accomplices,' \$25,000 reward, and also that 'liberal rewards will be paid for any information that shall conduce to the

arrest of either of the above named criminals or their accomplices,' and such proclamation was not limited in terms to any specific period, and it was signed 'Edwin M. Stanton, Secretary of War.'" About six months thereafter, the President caused to be published his order revoking the reward. Held, that the withdrawal was sufficient to work a revocation of the offer.

⁴⁴ *Shuey v. United States*, 92 U. S. 73, 23 L. ed. 697.

⁴⁵ *Dickinson v. Dodds*, 2 Ch. Div. 463; *Larmon v. Jordan*, 56 Ill. 206; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. 814; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 Am. St. 205; *Longworth v. Mitchell*, 26 Ohio St. 334. See also, consideration under the head of Mutualty Options.

⁴⁶ *Dickinson v. Dodds*, 2 Ch. Div. 463; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 Am. St. 205; *Longworth v. Mitchell*, 26 Ohio St. 334; *Thurber v. Smith*, 25 R. I. 60, 54 Atl. 790.

he may have made. For if the offer is given for a certain definite time and is supported by a valuable consideration, it cannot be revoked or withdrawn during the time specified.⁴⁷ It is also held in a number of cases that where an offer is made under seal for a specified time, it cannot be revoked prior to the expiration of such time, since the seal renders unnecessary the existence of proof of a consideration.⁴⁸

§ 34. **Time in which to accept.**—After an offer has been withdrawn there can be no acceptance such as will make a binding contract.⁴⁹ But before a revocation will be effective as such

⁴⁷ *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 Am. St. 47; *Hanna v. Ingram*, 93 Ala. 482, 9 So. 621; *Linn v. McClean*, 80 Ala. 360; *Robson v. Mississippi River Logging Co.*, 43 Fed. 364; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Souffrain v. McDonald*, 27 Ind. 269; *Herrman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Manary v. Runyon*, 43 Ore. 495, 73 Pac. 1028; *Stinson v. Hardy*, 27 Ore. 584, 41 Pac. 116; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687. If the offer is in writing for a valuable consideration, and time is given within which it shall stand open for acceptance, such option during the time specified is irrevocable. *Black v. Maddox*, 104 Ga. 157, 162, 30 S. E. 723. For a general discussion of offer and acceptance and the statutory rules governing the withdrawal of an offer in Louisiana, see *Riley v. Union Sawmill Co.*, 122 La. 863, 48 So. 304.

⁴⁸ *Xenos v. Wickham*, L. R. 2 H. L. 96; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612. See also, consideration under the head of Mutuality Options. But in some jurisdictions it is held that since a suit for specific performance is an equitable proceeding, want of consideration may be shown even though the agreement is under seal, and if it is in fact not supported by a consideration, it may be withdrawn before the expiration of the time specified. *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874. See post, § 232, Consideration, Mutuality—Options.

⁴⁹ *Borst v. Simpson*, 90 Ala. 373, 7 So. 814; *Abbott v. Land & Co.*, — Colo. —, 53 Pac. 457; affg. 8 Colo. App. 336, 46 Pac. 213; *Sherwin v. National & Co.*, 5 Colo. App. 162, 38 Pac. 392; *Krause v. Kraus*, 162 Ill. 328, 44 N. E. 736; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Augustine v. M. E. Society*, 79 Ill. App. 452; *Murray v. Doud*, 63 Ill. App. 247; *Young v. Trainor*, 57 Ill. App. 632; *Cincinnati & C. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *McCormick & Co. v. Richardson*, 89 Iowa 525, 56 N. W. 682; *Peet v. Meyer*, 42 La. Ann. 1034, 8 So. 534; *Miller v. Douville*, 45 La. Ann. 214, 12 So. 132; *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95, 49 Am. St. 480; *Brown v. Snider*, 126 Mich. 198, 85 N. W. 570; *McCormick & Co. v. Cusack*, 116 Mich. 647, 74 N. W. 1005; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892; 4 Am. St. 867; *Hill v. Webb*, 43 Minn. 545, 45 N. W. 1133; *Scanlon v. Oliver*, 42 Minn. 538, 44 N. W. 1031; *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Corser v. Hale*, 149 Pa. St. 274, 24 Atl. 285; *Johnston v. Fessler*, 7 Watts (Pa.) 48, 32 Am. Dec. 738; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49; *Jones v. New York & C. Ins. Co.*, 15 Utah 522, 50 Pac. 620; *McCaffrey v. Wagner*, 81 Wis. 633, 51 N. W. 958; *Moffett & Co. v. Rochester*, 178 U. S. 373, 44 L. ed. 1108. An offer cannot be accepted after it has been revoked so as to bind the offeror. *Benton v. Springfield Y. M. C. A.*, 170 Mass. 534, 49 N. E. 928, 64 Am. St.

it must be brought to the attention of the one to whom the offer was made.⁵⁰ Moreover, the revocation operates only from the time it is received by the one to whom it is to be delivered and has no legal existence prior to that time.⁵¹ Consequently a revocation sent by mail does not accomplish its purpose immediately upon being posted but usually becomes effective only when it reaches its destination, i. e., the person to whom it is addressed.⁵² Or if the revocation is sent by telegram, it does not become operative until received by one for whom it is intended.⁵³ But while notice of revocation must be given, it is not necessary that the offerer give express notice to that effect. It may be evidenced by the conduct of the offerer, provided such conduct is brought to the attention of the one to whom the offer is made.⁵⁴

The revocation of a general offer is accomplished and governed by different rules for it is manifest that actual notice cannot be

320. The plaintiff offered to sell his property to the city at a named price but before the offer was accepted, withdrew it. After the withdrawal the city council authorized the purchase of the land. The seller then tendered a deed and demanded payment. It was held that there was no contract to buy. *McCotter v. City of New York*, 35 Barb. (N. Y.) 609.

⁵⁰ *Byrne v. Van Tienhoven*, L. R. 5 C. P. Div. 344; *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346; *Henthorn v. Fraser*, L. R. (1892) 2 Ch. 27; *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Household Fire & Ins. Co. v. Grant*, L. R. 4 Exch. Div. 216; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390, 13 L. ed. 187; *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790; *Waterman v. Banks*, 144 U. S. 394, 36 L. ed. 479; *Stitt v. Huidekoper*, 17 Wall. (U. S.) 384, 21 L. ed. 644; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Smith v. Weaver*, 90 Ill. 392; *Shobe v. Luff*, 66 Ill. App. 414; *Burton v. Shotwell*, 13 Bush. (Ky.) 271; *Traveler's Ins. Co. v. Parker*, 92 Md. 22, 47 Atl. 1042; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. 387; *Craig v. Harper*, 3 Cush.

(Mass.) 158; *Boston & C. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Arnold v. Cason*, 95 Mo. App. 426, 69 S. W. 34; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Quick v. Wheeler*, 78 N. Y. 300; *Johnson v. Filkington*, 39 Wis. 62.

⁵¹ *The Palo Alto*, Fed. Cas. No. 10700.

⁵² *Henthorn v. Fraser*, L. R. (1892) 2 Ch. 27; *Byrne v. Van Tienhoven*, L. R. 5 C. P. Div. 344; *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390, 13 L. ed. 187; *Moore v. Pierson*, 6 Iowa 279, 71 Am. Dec. 409; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Price v. Atkinson*, 117 Mo. App. 52, 94 S. W. 816; *Malloy v. Drumheller*, 68 Wash. 106, 122 Pac. 1005; *contra*, *Watters v. Lincoln*, — S. Dak. —, 135 N. W. 712.

⁵³ *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. 387; *Price v. Atkinson*, 117 Mo. App. 52, 94 S. W. 816.

⁵⁴ *Dickinson v. Dodds*, 2 Ch. Div. 463; *Union Sawmill Co. v. Mitchell*, 122 La. 900, 48 So. 317; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417. See also, *post*, § 232, *Mutuality—Options*.

given to every one that might have seen the advertisement. Such an offer may be revoked by publishing notice to that effect in the same manner the original offer was made.⁵⁵ This might be termed constructive notice of the revocation.

The offer may or may not specify the time within which the offer must be accepted. In case the time is fixed by the offerer it may be accepted at any time before the expiration of that period, provided there is no revocation by the offerer before acceptance. This is true even though the delay might be considered unreasonable if it were not for the terms of the offer.⁵⁶ In case the offer is couched in language, or conveyed in a manner, or relates to a matter which shows that prompt action is demanded, unnecessary delay is not permissible. Thus, if an offer stipulates that an answer is desired by return mail,⁵⁷ this stipulation must be complied with or notice given by some other means of communication equally as rapid. And where the correspondence in regard to a transaction is carried on by telegraph it seems that this very fact would imply that there should be no unnecessary delay in accepting. This does not mean that acceptance must be instantaneous, but is to be made as soon as it is reasonably possible to consider and act upon the offer.⁵⁸ Thus where the offer contained a stipulation which read,

⁵⁵ *Shuey v. United States*, 92 U. S. 73, 23 L. ed. 697.

⁵⁶ *Rickard v. Taylor*, 122 Fed. 931, 59 C. C. A. 455; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. 17; *Houghwout v. Boisauhin*, 18 N. J. Eq. 315; *Paddock v. Davenport*, 107 N. Car. 710, 12 S. E. 464; *Arnold v. Blabon*, 147 Pa. St. 372, 23 Atl. 575; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255. The acceptance must be made within the time specified. *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161; *Cannon River Mfg. Assn. v. Rogers*, 42 Minn. 123, 43 N. W. 792; *Potts v. Whithead*, 20 N. J. Eq. 55. And when the offerer states that he shall consider the offer "no" in case he does not hear from the other party by a certain date, the acceptance must actually reach him by that date. *Lewis v. Browning*, 130 Mass. 173. Where a proposal by telegram provided "must have reply early to-mor-

row," and the acceptance is not received until late in the evening of the day specified, in the absence of any proof showing that the offer was complied with, the contract is not complete. *Union Nat. Bank v. Miller*, 106 N. Car. 347, 11 S. E. 321, 19 Am. St. 538.

⁵⁷ *Dunlop v. Higgins*, 1 H. L. Cas. 387; *Bernard v. Torrance*, 5 Gill. & J. (Md.) 383; *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Taylor v. Rennie*, 35 Barb. (N. Y.) 272, 22 How. Pr. (N. Y.) 101. A proposal by letter which calls for an answer "now" must be accepted by return mail. *Batterman v. Morford*, 76 N. Y. 622. If there are several mails a day or some other circumstance enters in, a strict compliance with the provision may not be necessary. *Palmer v. Phoenix Mut. Life Ins. Co.*, 84 N. Y. 63.

⁵⁸ *Lucas v. Western Union Tel. Co.*, 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016.

"This is for a wired acceptance on receiving this letter, or no trade," an acceptance wired the day following the receipt of the letter was insufficient.⁵⁹ Or when it read "kindly wire us at our own expense on receipt of this," an answer by letter two days after the offer was received was too late.⁶⁰ Likewise, where the offer stated "wire instantly or this is withdrawn," a delay of from 10 p. m. Saturday night until Monday morning was unreasonable and an acceptance at that time unavailing.⁶¹ If the offer relates to articles that fluctuate in price or matters that from the very nature of things demand immediate attention, that acceptance must be as soon as circumstances will permit.⁶²

Should there be nothing to indicate the time within which acceptance must be made, the proposition must be accepted within a reasonable time.⁶³ What is a reasonable time within which an act such as an acceptance is to be performed, when a contract is silent upon the subject, has been held a question of law, depending upon the situation of the parties and the subject-matter of the contract.⁶⁴ But each case necessarily depends upon its particular facts,

⁵⁹ *Eagle Mill Co. v. Caven*, 76 Mo. App. 458.

⁶⁰ *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393.

⁶¹ *James v. Marion Fruit &c. Co.*, 69 Mo. App. 207.

⁶² *Dunlop v. Higgins*, 1 H. L. Cas. 387; *The M. N. Hamilton*, Fed. Cas. No. 9685, 1 Hask. (U. S.) 489; *Minnesota Linseed Oil Co. v. Collier White-Lead Co.*, 4 Dill. (U. S.) 431, Fed. Cas. No. 9635; *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393. See also, *Talbot v. Pettigrew*, 3 Dak. 141, 13 N. W. 576. An acceptance by a creditor after the date set by the debtor for payment is not an acceptance within a reasonable time. *Taylor Spencer & Co. v. Brimbery*, 2 Ga. App. 84, 58 S. E. 371.

⁶³ *Martin v. Black's Ex'r.*, 21 Ala. 721; *Averill v. Hedge*, 12 Conn. 424; *Ortman v. Weaver*, 11 Fed. 358; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. 441; *Moxley's Admrs. v. Moxley*, 2 Metc. (Ky.) 309; *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155; *Stone v. Harmon*, 31 Minn. 512, 19 N.

W. 88; *Bruner v. Wheaton*, 46 Mo. 363; *McCracken v. Harned*, 66 N. J. L. 37, 48 Atl. 513; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Chicago &c. R. Co. v. Dane*, 43 N. Y. 240; *Mizell v. Burnett*, 49 N. Car. 249, 69 Am. Dec. 744; *Keck v. McKinley*, 98 Pa. St. 616; *Fort Worth &c. R. Co. v. Lindsey*, 11 Tex. Civ. App. 244, 32 S. W. 714. See also, *Ferrier v. Storer*, 63 Iowa 484, 19 N. W. 288, 50 Am. St. 752; *Graff v. Buchanan*, 46 Minn. 254, 48 N. W. 915; *Cunyus v. Hooks Lumber Co.*, 20 Tex. Civ. App. 290, 48 S. W. 1106.

⁶⁴ *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372. It is usually a question of law when there is no dispute about the facts. *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; *Aymar v. Beers*, 7 Cowen (N. Y.) 705. But see *Strauss v. Nat. &c. Furniture Co.*, 76 Miss. 343, 24 So. 703. "Where contracts are optional in respect to one party, delay on his part is viewed with especial strictness." *Jones v. Moncrief-Cook Co.*, 25 Okla. 856, 108 Pac. 403.

and for this reason authorities are of slight aid in determining the question.⁶⁵ Thus, where an advertisement offering a reward for the apprehension of criminals was made and four years thereafter the reward was claimed, the Supreme Court of Massachusetts held the offer had lapsed before the expiration of four years.⁶⁶ It has also been held that an interval of four months between the application for shares in a corporation and their allotment was not a reasonable time and the proposed application had lapsed,⁶⁷ and the Supreme Court of Iowa has declared that⁶⁸ where an acceptance was delayed four weeks, "We could not say that four weeks was not an unreasonable time," and in another case⁶⁹ where there was a delay to accept for twenty-four hours it was held that an acceptance was not made within a reasonable time.⁷⁰ Delays of six months,⁷¹ a month and over,⁷² twenty days,⁷³ two days,⁷⁴ have been declared unreasonable. On the other hand, an acceptance made after a delay of seventeen days was held not unreasonable under the circumstances in another case.⁷⁵ The better opinion is, that what is, or is not, a reasonable time must depend upon the circumstances attending the negotiations, and the character of the subject-matter of the contract. If the negotiation is in respect to an article staple in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiations related to an article subject to sudden and great fluctuations in the market.⁷⁶

⁶⁵ *Lucas v. Western Union Tel. Co.*, 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016. Nor is the question of reasonable time for performance generally a pure question of law. Even in regard to a reasonable time for acceptance we think the question is usually to be more properly regarded as a mixed question of law and fact, at least where there is conflict in the evidence and more than one reasonable inference may be drawn.

⁶⁶ *Loring v. Boston*, 7 Metc. (Mass.) 409. See also, *In re Kelly*, 39 Conn. 159.

⁶⁷ *Baily's Case*, L. R. 5 Eq. 428. See also, *Chicago &c. R. Co. v. Dane*, 43 N. Y. 240.

⁶⁸ *Ferrier v. Storer*, 63 Iowa 484, 489, 19 N. W. 288.

⁶⁹ *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. (U. S.) 431, Fed. Cas. No. 9635.

⁷⁰ *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. (U. S.) 431, Fed. Cas. No. 9635.

⁷¹ *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

⁷² *Carmichael v. Newell*, 2 Phila. (Pa.) 289.

⁷³ *Mizell v. Burnett*, 49 N. Car. 249, 69 Am. Dec. 744.

⁷⁴ *Averill v. Hedge*, 12 Conn. 424.

⁷⁵ *Phillips v. Deck*, 76 Cal. 384, 18 Pac. 336. If the offer is under seal it does not lapse on the expiration of a reasonable time. *Xenos v. Wickham*, L. R. 2 H. L. 296; *Butter v. Baker*, 3 Coke 25.

⁷⁶ *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869; *Minnesota Linseed Oil*

§ 35. **Lapse of offer and acceptance.**—An offer, as has just been seen, lapses on the expiration of the time for which it is left open.⁷⁷ And if the date on which it will lapse is not definitely stated, the proposal usually becomes a nullity if not accepted within a reasonable time.⁷⁸ Likewise, the death of either party before any acceptance of the proposal, causes it to lapse. An offer which has not been accepted in the lifetime of the maker is necessarily terminated by his death; nor can the representatives of the deceased be made liable upon the unaccepted offer.⁷⁹

Co. v. Collier Write Lead Co., 4 Dill. (U. S.) 431, Fed. Cas. No. 9635; Larmon v. Jordan, 56 Ill. 204; Moxley's Admrs. v. Moxley, 2 Metc. (Ky.) 309; James v. Marion Fruit Jar Co., 69 Mo. App. 207. See ante, note 62.

⁷⁷ See ante, § 34. Time within which acceptance must be made. Patterson v. Farmington St. R. Co., 76 Conn. 628, 645, 57 Atl. 853; Longfellow v. Moore, 102 Ill. 289; Harding v. Gibbs, 125 Ill. 85, 17 N. E. 60; Stembbridge v. Stembbridge, 87 Ky. 91, 7 S. W. 611; Cleaves v. Walsh, 125 Mich. 638, 84 N. W. 1108; Cannon River Assn. v. Rogers, 42 Minn. 123, 43 N. W. 792; Mason v. Payne, 47 Mo. 517; Schields v. Horback, 30 Nebr. 536, 46 N. W. 629; Page v. Shainwald, 169 N. Y. 246, 62 N. E. 356; Union Nat. Bank v. Miller, 106 N. Car. 347, 11 S. E. 321; Potts v. Whitehead, 20 N. J. Eq. 55, 59; Longworth v. Mitchell, 26 Ohio St. 334, 342; Swank v. Fretts, 209 Pa. 625, 59 Atl. 264; Cabot v. Kent, 20 R. I. 197, 37 Atl. 945; Cummings v. Town & Co. Realty Co., 86 Wis. 382, 57 N. W. 43; Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. 213; Waterman v. Banks, 144 U. S. 394, 36 L. ed. 479, 12 Sup. Ct. 646.

⁷⁸ See ante, Time within which acceptance must be made. Ramsgate Victoria Hotel Co. v. Montefiore, L. R. 1 Ex. 109; Averill v. Hedge, 12 Conn. 424, 433; Larmon v. Jordan, 56 Ill. 204; Ferrier v. Storer, 63 Iowa 484, 19 N. W. 288; Trounstone v. Sellers, 35 Kans. 447, 11 Pac. 441; Park v. Whitney, 148 Mass. 278, 19 N. E. 161; Bowen v. McCarthy, 85 Mich. 26,

48 N. W. 155; Stone v. Harmon, 31 Minn. 512, 19 N. W. 88; McCracken v. Harned, 66 N. J. L. 37, 48 Atl. 513; Chicago & C. R. Co. v. Dane, 43 N. Y. 240; Keck v. McKinley, 98 Pa. 616; Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. 913.

⁷⁹ Dickinson v. Dodds, L. R. 2 Ch. Div. 463, 475; Campanari v. Woodburn, 15 C. B. 400; Lee v. Griffin, 1 Best & S. 272; The Palo Alto, Fed. Cas. No. 10700; Grand Lodge & Co. v. Farnham, 70 Cal. 159, 11 Pac. 592; Riner v. Husted, 13 Colo. App. 523, 58 Pac. 793; Pratt v. Baptist Soc. of Elgin, 93 Ill. 475, 34 Am. Rep. 187; Union Sawmill Co. v. Mitchell, 122 La. 900, 48 So. 317; Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41; 23rd St. Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829; Helfenstein's Estate, 77 Pa. St. 328, 18 Am. Rep. 449; Phipps v. Jones, 20 Pa. 260, 59 Am. Dec. 708; Foust v. Board of Publication, 8 Lea (Tenn.) 552; Michigan State Bank v. Leavenworth's Estate, 28 Vt. 209. See also, Sheffield v. Whitfield, 6 Ga. App. 762, 65 S. E. 807. A request to do work and furnish material is revoked by the death of the person making the offer. Herrlich v. Hyman, 61 Misc. (N. Y.) 606, 113 N. Y. S. 971. The reason for this rule is that the continuance of an offer is in the nature of a constant repetition. Cooke v. Oxley, 3 T. R. 653. This necessarily requires one capable of

Thus, a continuing guarantee, so far as it is a mere offer which may be acted upon, is revoked as to a future action upon it, by the death of the guarantor.⁸⁰ So an agency or authority to contract on behalf of a person is terminated by his death, and a contract purporting to be made under it, although without notice of the death, is not chargeable against his representatives.⁸¹ However, if the offer is one supported by a sufficient consideration and could not have been withdrawn by the offerer in his lifetime, his death does not cause it to lapse prior to the date mentioned therein.⁸² In case it is he to whom the offer is made that dies, the same rule applies. The proposal lapses with his death.⁸³ The privilege of acceptance does not descend to his personal representatives.⁸⁴ Nor have they the right either to accept, continue or renew an offer made to the deceased person.⁸⁵ Likewise, an offer relating to the property of a person is terminated by his bankruptcy, which transfers all his property to his trustees,⁸⁶ or

making a repetition. *Pratt v. Trustees &c.*, 93 Ill. 475, 34 Am. Rep. 187.

⁸⁰ *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42, 49 L. J. Q. B. 204; *In re Sherry*, L. R. 25 Ch. Div. 692, 53 L. J. Ch. Div. 404; *Valentine v. Donohoe-Kelly B. Co.*, 133 Cal. 191, 65 Pac. 381; *Aitken v. Lang*, 106 Ky. 652, 51 S. W. 154, 90 Am. St. 263. But a continuing guaranty under seal, where the consideration is given once for all, is not terminated by the death of the guarantor, nor by the fact that his death has come to the knowledge of the person to whom the guaranty is given, nor can such guaranty be determined by the guarantor or his executors upon notice, unless there is an express stipulation to that effect. *In re Crace*, 71 L. J. Ch. 358, 86 Law Times 144.

⁸¹ *Blades v. Free*, 9 B. & C. 167; *Campanari v. Woodburn*, 15 C. B. 400; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. ed. 379; *Galt v. Galloway*, 4 Pet. (U. S.) 332, 7 L. ed. 876; *Johnson v. Wilcox*, 25 Ind. 182; *Lewis v. Kerr*, 17 Iowa 73; *Lincoln v. Emerson*, 108 Mass. 87; *Clayton v. Merrett*, 52 Miss. 353; *Weber*

v. Bridgman, 113 N. Y. 600, 21 N. E. 985; *Farmers' Loan &c. Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 19 N. Y. S. 142; *Peries v. Aycineva*, 3 W. & S. (Pa.) 64; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

⁸² *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 Am. St. 997. The death of the offerer after the acceptance does not cause the offer to lapse or affect the validity of the contract. *Northwestern Mutual Life Ins. Co. v. Joseph*, 31 Ky. L. 714, 103 S. W. 317, 21 L. R. A. (N. S.) 439; *Mactier's Admrs. v. Firth*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

⁸³ *Werner v. Humphreys*, 2 M. & G. 853.

⁸⁴ *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476.

⁸⁵ *In re Cheshire Banking Co.*, L. R. 32 Ch. Div. 301; *Werner v. Humphreys*, 2 M. & G. 853; *Sutherland v. Parkins*, 75 Ill. 338. It is also held that if the offerer becomes insane before his proposal is accepted it is cause to lapse.

⁸⁶ *Meynell v. Surtees*, 25 L. J. Ch. 257.

the dissolution of partnership,⁸⁷ or corporation,⁸⁸ when one of the parties causes the offer to lapse.

§ 36. When the contract is complete.—The contract is complete when both parties have agreed to one and the same set of propositions.⁸⁹ This is accomplished when, without fraud, duress or mistake on the part of either party, one submits a proposition to which the other accedes, provided such acceptance neither takes from nor adds to the offer, but accepts it in every respect just as it stands.⁹⁰ When the offer is accepted on the terms in which it is made before a valid revocation⁹¹ the contract becomes instantly binding on the parties and neither party can subsequently recede from the contract without the consent of the other.⁹²

§ 37. Acceptance must be unconditional.—Before this can be accomplished there must be an unconditional acceptance of the offer. The assent must be absolute and final.⁹³ The one who makes an offer cannot be bound by a conditional acceptance.⁹⁴ But an acceptance is not conditional because the acceptor

⁸⁷ *Goodspeed v. Wiard Plow Co.*, 45 Mich. 322, 7 N. W. 902.

⁸⁸ *Saltmarsh v. Planters' &c. Bank*, 14 Ala. 668.

⁸⁹ *Phenix Ins. Co. v. Schultz*, 80 Fed. 337, 25 C. C. A. 453; *Andrews v. Schreiber*, 93 Fed. 367.

⁹⁰ *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087. The parties must agree on the same thing in the same sense. *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720.

⁹¹ *Mott v. Jackson*, 172 Ala. 448, 55 So. 528.

⁹² *Adams v. Lindsell*, 1 B. & Ald. 681; *Linn v. McLean*, 80 Ala. 360; *Gartner v. Hand*, 86 Ga. 558, 12 S. E. 878; *Boston &c. Maine R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Wheaton Building &c. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *McLean v. Pastime Gymnasium Assn.*, 64 Mo. App. 55.

⁹³ *Appleby v. Johnson*, L. R. 9 C. P. 158; *Martin v. Northwestern Fuel Co.*, 22 Fed. 596; *Bowen v. Hart*, 101 Fed. 376, 41 C. C. A. 390; *Ortman v. Weaver*, 11 Fed. 358; *McGovern v. David Kaufman's Sons Co.*, 163 Fed.

76; *Spencer v. Pike Co.*, 183 Fed. 894; *Strong &c. Co. v. H. Baars & Co.*, 60 Fla. 253, 54 So. 92; *Corcoran v. White*, 117 Ill. 118, 7 N. E. 525. One cannot, without his assent, be made the debtor of another. *Mackenzie v. Barrett*, 148 Ill. App. 414; *Cal Hirsch &c. Co. v. Peru Casting Co.*, — Ind. App. —, 96 N. E. 807; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Hutcheson v. Blakeman*, 3 Metc. (Ky.) 80; *Wheaton Building &c. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Cangas v. Rumsey Mfg. Co.*, 37 Mo. App. 297; *Melick v. Kelley*, 53 Nebr. 509, 73 N. W. 945; *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770; *Hough v. Brown*, 19 N. Y. 111; *McCotter v. New York*, 37 N. Y. 325; *Cameron v. Wright*, 21 App. Div. (N. Y.) 395, 47 N. Y. S. 571, affd. 163 N. Y. 586, 57 N. E. 1105; *Corning v. Colt*, 5 Wend (N. Y.) 253. There must be a mutual assent to a definite proposition. *Strong &c. Co. v. H. Baars & Co.*, 60 Fla. 253, 54 So. 92.

⁹⁴ *Monk v. McDaniel*, 116 Ga. 108, 42 S. E. 360; *Baxter v. Bishop*, 65 Iowa 582, 22 N. W. 685; *Plant Seed*

expresses dissatisfaction with the offer, yet nevertheless gives his unqualified assent,⁹⁵ nor because he adds immaterial words.⁹⁶

§ 38. Acceptance must be on terms of offer.—Not only must the acceptance be unconditional but it must be identical with

Co. v. Hall, 14 Kans. 553; Seymour v. Armstrong, 62 Kans. 720, 64 Pac. 612; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Falls Wire Mfg. Co. v. Broderick, 12 Mo. App. 378; Brecheisen v. Coffey, 15 Mo. App. 80. Where a bid for the construction of a building is accepted upon condition that bond or surety be given for the faithful performance of the contract, the contract is not complete until the condition is complied with. Flynn v. Dougherty (Cal.), 26 Pac. 831; Howard v. Industrial School, 78 Maine 230, 3 Atl. 657; McGrath v. Brown, 66 Barb. (N. Y.) 481. But if the defendants permit the contractor to go ahead and perform the work without executing the bond, they cannot set up this as a defense in an action for the balance due. Devlan v. Wells, 65 N. J. L. 213, 47 Atl. 467. See also, Disken v. Herter, 175 N. Y. 480, 67 N. E. 1081; Joske v. Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586. An agreement to take certain city bonds conditioned upon the opinion of the city attorney that the bonds were valid does not bind the city. Coffin v. Portland, 43 Fed. 411. The acceptance of an offer to sell real estate "provided the title is perfect" is conditional and does not constitute a binding contract. Corcoran v. White, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858; Sawyer v. Brossart, 67 Iowa 678, 25 N. W. 876, 56 Am. Rep. 371. A reply to an offer for the sale of tin which read "We accept your offer, if full weight plates," was conditional and did not constitute a contract. Kirwan v. Byrne, 9 Misc. (N. Y.) 76, 29 N. Y. S. 287. The acceptance of an offer for the unexpired term of a lease, provided the lessor assented, was conditional and did not form a contract. Putnam v. Grace, 161 Mass. 237, 37 N. E. 166. By the terms of an agreement fish were to be shipped to Boston. Subsequently one of the parties

requested that they be shipped to Plymouth, to which the other assented on condition that he be paid a certain commission. It was held in an action for breach of contract that the contract was never completed between the parties. Harlow v. Curtis, 121 Mass. 320. In Egger v. Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. 596, Burgess, J., said: "Defendant's letter to plaintiff of March 4, 1890, was not an acceptance of the proposition contained in defendant's letter to him of date February 26, 1890, for the reason that the acceptance was not unconditional, but with the understanding that plaintiff would deliver to him all the papers in reference to the land—United States patents and other deeds—about which there was nothing said in defendant's letter or proposition, thereby making a new proposition of his own, and imposing new burdens upon defendant, though light they may have been. As the conditions upon which the proposition was accepted materially differed from the original proposition, it amounted to the rejection of the offer. Cangas v. Mfg. Co., 37 Mo. App. 297; Strange v. Crowley, 91 Mo. 287, 2 S. W. 421." An agreement to buy if the horse suits him is conditional. Stagg v. Compton, 81 Ind. 171. The acceptance of an order for bottles "if you will give us any reasonable opportunity to make ready for you" is conditional. Sidney Glass Works v. A. S. Barnes & Co., 86 Hun (N. Y.) 374, 33 N. Y. S. 508.

⁹⁵ Joyce v. Swann, 17 C. B. (N. S.) 84; Brown v. Cairns, 63 Kans. 693, 66 Pac. 1033.

⁹⁶ Simpson v. Hughes, 66 L. J. Ch. 334; Bruner v. Wheaton, 46 Mo. 363; Hubbell v. Palmer, 76 Mich. 441, 43 N. W. 442; Warren Bros. Co. v. King, 96 Minn. 190, 104 N. W. 816; Wood v. Dales, 20 Barb. (N. Y.) 42; Fitzhugh v. Jones, 6 Munf. (Va.) 83; Matteson v. Scofield, 27 Wis. 671.

the terms of the offer.⁹⁷ It must not vary from the proposal either by way of omission, addition or alteration. If it does, neither party is bound.⁹⁸

§ 39. **Variance between offer and acceptance.**—An acceptance varies from the terms of the offer when it omits certain features of the proposal and assent is given to only part of its terms.⁹⁹ Thus, where one party offers to sell all the timber on his land at a certain price and the other responded by offering to buy only that standing on a part of land, there is no contract.¹ So, also, where defendant offered to sell plaintiff a certain number of kegs of nails and the plaintiff in reply wrote that he would not take the number of kegs proposed, but that the defendant might ship him a certain less number, there was no sale or agreement to sell.² Likewise, if the acceptance adds to or goes beyond the terms proposed, no contract is formed.³ Thus, one advertised his estate for sale. The plaintiff proposed to purchase it, and authorized his solicitor to make an offer of a certain sum

⁹⁷ *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225, 4 L. ed. 556; *Salomon v. Webster*, 4 Colo. 353; *Strong & Co. v. H. Baars & Co.*, 60 Fla. 253, 54 So. 92; *Fox v. Turner*, 1 Ill. App. 153; *Rugg v. Davis*, 15 Ill. App. 647; *Esmann v. Gorton*, 18 Ill. 483; *Hutchesson v. Blakeman*, 3 Metc. (Ky.) 80; *McDonough v. Winchester*, 1 La. 188; *Barrow v. Ker*, 10 La. Ann. 120; *Jenness v. Mt. Hope Iron Co.*, 53 Maine 20; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Thomas v. Greenwood*, 69 Mich. 215, 37 N. W. 195; *Eads v. Carondelet*, 42 Mo. 113; *Brunner v. Wheaton*, 46 Mo. 363; *Strange v. Crowley*, 91 Mo. 287, 2 S. W. 421; *Green v. Colo.*, 103 Mo. 70, 15 S. W. 317; *Sutter v. Raeder*, 149 Mo. 297, 50 S. W. 813; *State v. Board & Co.*, 37 Mont. 378, 96 Pac. 736; *Krum v. Chamberlain*, 57 Nebr. 220, 77 N. W. 665; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Swing v. Walker*, 27 Pa. Super. Ct. 366; *Mead & Speer Co. v. Krimm*, 43 Pa. Super. Ct. 376; *Olds v. East Tennessee Stone & Co. (Tenn. Ch. App.)*, 48 S. W. 333; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888; *Snow v. Miles*, Fed. Cas. No. 13146; *Carr*

v. Duval, 14 Pet. (U. S.) 77, 10 L. ed. 361.

⁹⁸ *Scott v. Davis*, 141 Mo. 213, 42 S. W. 714. A modified acceptance does not create a contract. *Kimbarck v. Illinois Car & Co.*, 103 Ill. App. 632; *Kansas City & Co. v. McGuire Mfg. Co.*, 108 Ill. App. 258; *Baker v. Johnson Co.*, 37 Iowa 186; *Bethel v. Hawkins*, 21 La. Ann. 620; *Metropolitan Coal Co. v. Boutell & Co.*, 185 Mass. 391, 70 N. E. 421.

⁹⁹ *Crabtree v. St. Paul Opera House Co.*, 39 Fed. 746. Any qualification of or departure from the terms of the offer invalidates it, unless agreed to by the proponent. *Goodridge v. Wood*, 133 Ill. App. 483; *Fox v. Turner*, 1 Ill. App. 153; *Steel v. Miller*, 40 Iowa 402; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Bruce v. Pearson*, 3 Johns. (N. Y.) 534; *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087.

¹ *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087.

² *Jenness v. Mount Hope Iron Co.*, 53 Maine 20.

³ *Baker v. Johnson Co.*, 37 Iowa 186; *Bridge v. Calhoun & Co.*, 57 Wash. 272, 106 Pac. 762.

for it. This offer was accepted by letter, but with the added condition that a certain deposit should be made and the sale completed within a given time. The House of Lords agreed that there was no contract here.⁴ Also where the defendant agreed to feed and water 400 cattle for a certain sum per head and the plaintiff accepted the terms but changed the number of cattle to be fed from 400 to 650 or 700 head, they thereby undertook to add to the offer, and, as a result, no contract was formed.⁵

The doctrine that the acceptance must be unequivocal has been carried in some cases to the extreme. Thus, a resident of California wrote to a resident of Iowa, offering to sell certain land, and added: "Let me hear from you at once." The receiver of the letter telegraphed his acceptance of the offer and added "money at your order at First National Bank here." It was held that as the proposal said nothing about the place where the money was to be paid, it was payable in California, and the depositing it in the bank in Iowa was not an unconditional acceptance of the offer.⁶ And where a person in Connecticut wrote to a man in Wisconsin, offering to sell land for a certain sum, nothing being said about the place of payment or delivery of the deed, a letter was written accepting this proposal, and this was added: "You may make out the deed, leaving the name of the grantee in blank, and forward the same to X or to your agent, if you have one here to be delivered to me on payment." It was held there was no unconditional acceptance.⁷ In another case, the plaintiff by letter offered defendant three hundred dollars for two horses. "The defendant wrote in reply 'that he might have the horses for three hundred dollars if he would come for them,'" and the court declared there was no consummated contract.⁸ In these latter cases the courts fail to appreciate the fact that the reply may go beyond the terms of the proposal without qualifying the

⁴ *Honeyman v. Marryatt*, 6 H. L. C. 112. Lord Wensleydale said: "There certainly was no complete contract in this case."

⁵ *Ingham & Sons v. Cisco Oil Mill*, 38 Tex. Civ. App. 608, 86 S. W. 630.

⁶ *Sawyer v. Brossart*, 67 Iowa 678, 25 N. W. 876.

⁷ *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8.

⁸ *Fenno v. Weston*, 31 Ver. 345. For other rather extreme cases, see *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447; *Sidney Glass Works v. A. S. Barnes & Co.*, 86 Hun (N. Y.) 374, 33 N. Y. S. 508; *Myers v. Smith*, 48 Barb. (N. Y.) 614.

acceptance. The addition may be such as fairly to impart a request instead of a condition,⁹ or, as has been seen, the words inserted may be immaterial.¹⁰ So long as no new term is added to the proposal and the offer is not varied in any respect, the acceptance is unconditional and valid.¹¹ The rule that an acceptance must be absolute should be applied with caution and the language construed so as not to defeat the intent of the parties.¹²

§ 40. Mistake.—The doctrine of the preceding section must be qualified by the words “provided the agreement is not entered into through mistake.” If the mistake relates to the subject-matter and is such that but for it the contract would not have been made, there is no valid agreement. This is based upon the idea that no contract has been consummated, the minds of the parties never having met.¹³ For this reason if an offer is made through mistake as to the facts, its acceptance does not form a binding contract.¹⁴ It is in general, however, only when the phraseology of the contract has no obvious meaning or is reasonably capable of diverse interpretation and was in fact differently understood by the parties, that there is no agreement. Consequently, if there is

⁹ *Purrington v. Grimm*, 83 Vt. 466, 76 Atl. 158.

¹⁰ See ante, § 37.

¹¹ *Wheaton Bldg. & Co. v. Boston*, 204 Mass. 218, 90 N. E. 598.

¹² See *McKell v. Chesapeake & C. R. Co.*, 175 Fed. 321; *Empire Rubber Mfg. Co. v. Morris*, 73 N. J. L. 602, 65 Atl. 450.

¹³ *Iowa Loan & Trust Co. v. Schnose*, 19 S. Dak. 248, 103 N. W. 22; *Bedell v. Wilder*, 65 Vt. 406, 26 Atl. 589, 36 Am. St. 871. If the mistake is made by one party because of its own negligence, this fact will not be permitted to prejudice the other party. *Bowers & Co. v. United States*, 41 Ct. Cl. 214.

¹⁴ *Merriam v. Lapsley*, 12 Fed. 457, 2 McCrary (U. S.) 606; *Board & Co. v. Bender*, 36 Ind. App. 164, 72 N. E. 154; *Gulf & C. R. Co. v. Dawson*, — Tex. Civ. App. —, 24 S. W. 566. As to the liability of a telegraph company for the incorrect transmission of, or failure to transmit an offer or its acceptance, see *Haubalt Bro. v. Rea*

& C. Milling Co., 77 Mo. App. 672; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760. The above cases go on the assumption that the telegraph company is the agent of the sender and that he is bound by any mistake the company may make in the transmission of the message, but that it in turn is answerable to him in damages. Other cases base their decision on the theory that the company has violated its duty and is answerable in damages therefor. *Rose v. United States Tel. Co.*, 3 Abb. Pr. (N. S.) (N. Y.) 408; *Shingleur v. West Union Tel. Co.*, 72 Miss. 1030, 18 So. 425, 30 L. R. A. 444, 48 Am. St. 604; *Pepper v. West Union Tel. Co.*, 87 Tenn. 544, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. 699. Failure to deliver within time limit. *Purdon Naval Stores Co. v. Western Union Tel. Co.*, 153 Fed. 327. A mistake in the transmission of a message may be ratified by accepting a part payment of the prices quoted with knowledge of the mistake. *Culver v. Warren*, 36 Kan. 491, 13 Pac. 577.

no mistake of fact, but simply a misconception of the consequences of the language used in making the proposal, the agreement is binding, and against such mistakes of law the court affords no remedy. The misunderstanding of the legal effect of language used in an instrument freely signed is not such a mistake as will afford grounds for relief.¹⁵

§ 41. Condition amounts to a rejection of offer.—It is well recognized that any change of any material stipulations or the injection of new stipulations amounts to a rejection of the offer.¹⁶ Consequently a subsequent acceptance in accordance with the terms of the proposal is unavailing. The rejection of an offer terminates it and it is beyond the power of the acceptor to revive the proposal by a subsequent acceptance.¹⁷ However, a mere inquiry as to the term of the proposal, or a request to modify or change the offer, does not have the effect of rejecting the offer, and if the offer has not been revoked a party may accept it, although he previously asked the proposer to modify it.¹⁸

§ 42. Counter offer.—Both the modified acceptance and an unconditional assent after such modified acceptance are in effect nothing more than counter propositions that must be assented to by the original offerer before any binding obligation is fastened on the parties.¹⁹ In case the original proponent accedes to the

¹⁵ *Wheaton Building &c. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 Am. St. 530. At common law a party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect. *Zdancewicz v. Burlington Co. Traction Co.*, 77 N. J. L. 10, 71 Atl. 123.

¹⁶ *National Bank v. Hall*, 101 U. S. 43, 25 L. ed. 822; *Sloan v. Wolf Co.*, 124 Fed. 196, 59 C. C. A. 612; *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 75 Pac. 329; *Goodridge v. Wood*, 133 Ill. App. 483; *Kansas City &c. R. Co. v. McGuire Mfg. Co.*, 108 Ill. App. 258; *Kimberk v. Illinois Car &c. Co.*, 103 Ill. App. 632; *Baker v.*

Johnson Co., 37 Iowa 186; *Wheaton Bldg. &c. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Metropolitan Coal Co. v. Boutell &c. Co.*, 185 Mass. 391, 70 N. E. 421; *Egger v. Nesbit*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. 596; *Bridge v. Calhoun &c.*, 57 Wash. 272, 106 Pac. 762.

¹⁷ *Goulding v. Hammond*, 54 Fed. 639, 4 C. C. A. 533, 13 U. S. App. 30; *Ortman v. Weaver*, 11 Fed. 358; *Crabtree v. St. Paul Opera House Co.*, 39 Fed. 746; *Egger v. Nesbit*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. 596; *Prith v. Lawrence*, 1 Paige (N. Y.) 434. See also, *Zearing v. Crawford &c. Co.*, — Ark. —, 145 S. W. 226. But see *Foster v. Boston*, 39 Mass. 33.

¹⁸ *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346.

¹⁹ *Jones v. Daniel* (1894), L. R. 2 Ch.

modification imposed and gives notice to that effect, the contract is concluded.²⁰ It is not necessary in every instance that an express assent to the modified acceptance be shown. If the parties proceed with their contract as if the condition of the acceptance were a part of it, this is as effectual as an acceptance as if the changes had been formally assented to.²¹

§ 43. Manner of communicating or indicating acceptance.

—In the absence of any restriction placed by the offerer on the manner of communicating or indicating acceptance it may be given by any means competent to bring knowledge of such acceptance to the offerer. But it is essential that the acceptance be evinced by some intelligent conduct, act or sign actually communicated to the offerer.²² The mere intention to accept is not sufficient if no notice of such intention is sent to or received by the proposer within a reasonable time or in accordance with the

Div. 332; *Crossley v. Maycock*, L. R. 18 Eq. 180, followed; *Sheffield Canal Co. v. Sheffield &c. R. Co.*, 3 Eng. Ry. & C. Cas. 357; *Burchard-Hulburt Inv. Co. v. Hanson*, 143 Ill. App. 97; *Hartford Life Ins. Co. v. Milet*, 31 Ky. L. 1297, 105 S. W. 144; *Wheaton Building &c. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Putnam v. Grace*, 161 Mass. 237, 37 N. E. 166; *Egger v. Nesbit*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. 596; *Greenwich Bank &c. v. Oppenheim*, 133 App. Div. 586, 118 N. Y. S. 297; *Mead & Speer Co. v. Krimm*, 43 Pa. Super. Ct. 376; *Bridge v. Calhoun &c.*, 57 Wash. 272, 106 Pac. 762.

²⁰ *Sloan v. Wolf Co.*, 124 Fed. 196, 59 C. C. A. 612; *Baldwin v. Commonwealth*, 11 Bush. (Ky.) 417; *Earle v. Angell*, 157 Mass. 294, 32 N. E. 164; *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384; *Underhill v. North American &c. Co.*, 36 Barb. (N. Y.) 354.

²¹ *McKell v. Chesapeake &c. R. Co.*, 175 Fed. 321; *Tilt v. La Salle Silk Mfg. Co.*, 5 Daly (N. Y.) 19; *Gray v. Foster*, 10 Watts (Pa.) 280; *General Lithographing &c. Co. v. Washington Rubber Co.*, 55 Wash. 461, 104 Pac. 650. A request that the contract be modified after it has been concluded does not affect the validity of

the contract. *Society &c. v. Old Jordan Mining Co.*, 9 Utah 483, 35 Pac. 492.

²² *Peet v. Meyer*, 42 La. Ann. 1034, 8 So. 534; *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396; *White v. Corlies*, 46 N. Y. 467. Assent in the eyes of the law is a matter of overt acts, not of inward unanimity of motive. Mental acts are not the stuff from which promises are made. *Cleveland &c. R. Co. v. Shea*, — Ind. —, 91 N. E. 1081; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747. The acceptance must be actually or constructively communicated. *McCully's Admr. v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Flethouse v. Bindley*, 11 C. B. (N. S.) 869; *Brogden v. Metropolitan R. Co.*, 2 L. R. App. Cas. 666, 688, 691, 697; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. 441; *Jenness v. Mount Hope Iron Co.*, 53 Maine 20; *Caton v. Shaw*, 2 Har. & G. (Md.) 13; *McCullough v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *McDonald v. Boeing*, 43 Mich. 394, 5 N. W. 349, 38 Am. Rep. 199; *Beckwith v. Cheever*, 21 N. H. 41; *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. 668; *White v. Corlies*, 446 N. Y. 467; *Mactier's Admr. v. Frith*, 6 Wend. (N. Y.) 103. If the proponent has knowledge of the acceptance it is

terms of the offer.²³ The assent of the acceptor may be evidenced by his signature attached to an offer,²⁴ it may be orally given,²⁵ or by conduct which shows assent.²⁶

§ 44. Communications by mail.—Negotiations which finally culminate in a contract may be carried on entirely by letter.²⁷ There is no dispute as to whether or not contracts can be so formed. The only question to be determined in such instance is whether the correspondence shows an agreement upon which the minds of the parties met or whether the negotiations are

equivalent to a communication thereof. *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130. A contract arises in that place where a valid acceptance of the offer is made and is put in the way of communication. *Bennett v. Cosgriff*, 38 L. T. (N. S.) 177; *Taylor v. Jones*, 1 C. B. D. 87; *Newcomb v. De Roos*, 2 El. & El. 271; *Cowan v. O'Connor*, L. R. 20 Q. B. Div. 640; *Boit v. Maybin*, 52 Ala. 252. Where a party puts his acceptance in a way to reach the proponent in the natural course of things, a contract is thereby consummated between the parties. *Morrison v. Tuska*, 113 N. Y. S. 611.

²³ *Cleveland & C. R. Co. v. Shea*, — Ind. —, 91 N. E. 1081; *Trounstone v. Sellers*, 35 Kans. 447, 11 Pac. 441; *Cangas v. Rumsey Mfg. Co.*, 37 Mo. App. 297; *Busher v. New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41. Accidental omission of the acceptance from a letter. *Frith v. Lawrence*, 1 Paige (N. Y.) 434.

²⁴ *Groetzinger v. Wyman*, 105 Iowa 574, 75 N. W. 512; *Elastic Tip Co. v. Graham*, 174 Mass. 507, 55 N. E. 315; *Taylor Co. v. Bannerman*, 120 Wis. 189, 97 N. W. 918; *Happel v. Rosenthal*, 103 N. Y. S. 715. In the above case it is said that if the written agreement omits portions of the verbal understanding, the acceptance should not be signed without insisting on a correction of the writing if the acceptor does not wish to be bound by the written agreement in its then form.

²⁵ *Tinn v. Hoffmann*, 29 Law. Times (N. S.) 271; *Block v. J. Stern & Sons*, 152 Ill. App. 434; *Metropolitan Coal Co. v. Boutell & C. Co.*, 196 Mass. 72, 81 N. E. 645. If an acceptance is

made both orally and in writing the acceptor may rely on each to show a binding agreement. *Beach & C. Co. v. American & C. Co.*, 202 Mass. 177, 88 N. E. 924.

²⁶ *Harvey v. Johnston*, 6 C. B. 295, 304, *Cresswell, J.*: "If a man writes, send me such and such goods and I will pay for them, is not the sending of the goods, without more, an acceptance of the offer?" *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; *Springer v. Cooper*, 11 Ill. App. 267; *Graves v. Smedes' Admr.*, 7 Dana (Ky.) 344. The bringing of a suit may show acceptance. *Shreveport Tract. Co. v. Mulhaupt*, 122 La. 667, 48 So. 144. An offer may be accepted by a performance of its conditions, in case the proposal does not stipulate the form of acceptance. *Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023. See post, § 57, Sales.

²⁷ *Household Fire & C. Ins. Co. v. Grant*, 4 Exch. Div. 216; *Kimbell v. Moreland*, 55 Ga. 164; *Kennedy v. Supreme Lodge K. of P.*, 124 Ill. App. 55; *Dana v. Short*, 81 Ill. 468; *Thames Loan & Trust Co. v. Beville*, 100 Ind. 309; *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582; *Lynn v. Richardson*, 151 Iowa 284, 130 N. W. 1097; *Bourne v. Shapleigh*, 9 Mo. App. 64; *Busher v. New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41; *Mactier's Admrs. v. Frith*, 6 Wend. (N. Y.) 103; *Baker v. Packard*, 112 App. Div. (N. Y.) 543, 98 N. Y. S. 804, affd., 189 N. Y. 524, 82 N. E. 1124; *Spier v. Hyde*, 78 App. Div. (N. Y.) 151, 79 N. Y. S. 699; *Hawkinson v. Harmon*, 69 Wis. 551, 35 N. W. 28; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692.

inchoate and unperfected. If the latter is true there is, of course, no contract.²⁸ A contract entered into by means of such agency becomes complete when the latest proposition on the part of one is assented to by the other of the parties.²⁹ This happens at the time an unqualified assent to the offer is dropped in the post-office properly directed and stamped,³⁰ unless the offer is so qualified as to require the actual receipt of the letter of acceptance before

²⁸ *Bissenger v. Prince*, 117 Ala. 480, 23 So. 67; *Havens v. American Ins. Co.*, 11 Ind. App. 315, 39 N. E. 40; *Wills v. Carpenter*, 75 Md. 80, 25 Atl. 415; *Ellis v. Block*, 187 Mass. 408, 73 N. E. 475; *Brown v. New York & C. R. Co.*, 44 N. Y. 79; *Brauer v. Oceanic Steam Nav. Co.*, 77 App. Div. (N. Y.) 407, 79 N. Y. S. 299; *Myers v. Smith*, 48 Barb. (N. Y.) 614; *Miller v. Leo*, 35 App. Div. (N. Y.) 529, 55 N. Y. S. 165, *affd.* 165 N. Y. 619, 59 N. E. 1126. As in all other cases the offer must be unconditionally accepted, (*Franck v. McGilvray*, 144 Mich. 318, 107 N. W. 886; *Sennett v. Melville* (Nebr.), 107 N. W. 991; *Dougherty v. Briggs*, 231 Pa. 68, 79 Atl. 924), in exact harmony with the proposal. *Eagle Mill Co. v. Caven*, 76 Mo. App. 458. See also, *Hollister Bros. v. Bluthenthal*, 9 Ga. App. 176, 70 S. E. 970; *Stroock Plush Co. v. Talcott*, 134 N. Y. S. 1052. See ante, § 27.

²⁹ *Darlington Iron Co. v. Foote*, 16 Fed. 646. See also, *Union Service Co. v. Moffet-West Drug Co.*, 148 Mo. App. 327, 128 S. W. 7. All the terms of the agreement need not be embodied in a single instrument. *Fruit Dispatch Co. v. Gilinsky*, 84 Neb. 821, 122 N. W. 45.

³⁰ *Household Fire & C. Co. v. Grant*, L. R. 4 Exch. D. 216, 234. See, especially, the remarks of Lord Bramwell. *Adams v. Lindsell*, 1 B. & Ald. 681; *McGiverin v. James*, 33 U. C. Q. B. 203; *In re Dodge*, 9 Ben. (U. S.) 482; *Winterport & C. Co. v. The Jasper*, 1 Holmes 99; *Yonge v. Equitable Life Assur. Soc.*, 30 Fed. 902; *Darlington Iron Co. v. Foote*, 16 Fed. 646; *Sea Ins. Co. v. Johnston*, 105 Fed. 286, 291, 44 C. C. A. 477; *Levi-sohn v. Waganer*, 76 Ala. 412; *Linn v. McLean*, 80 Ala. 360; *Triple Link & C. Assn. v. Williams*, 121 Ala. 138,

26 So. 19, 77 Am. St. 34; *Levy v. Cohen*, 4 Ga. 1; *Bryant v. Booze*, 55 Ga. 438; *Haas v. Myers*, 111 Ill. 421; *Chytraus v. Smith*, 141 Ill. 231, 257, 30 N. E. 450; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Swing v. Marion Pulp Co.*, 47 Ind. App. 199, 93 N. E. 1004; *Moore v. Pierson*, 6 Iowa 279, 71 Am. Dec. 409; *Ferrier v. Storer*, 63 Iowa 484, 19 N. W. 288, 50 Am. Rep. 752; *Siebold v. Davis*, 67 Iowa 560, 25 N. W. 778; *Hunt v. Higman*, 70 Iowa 406, 30 N. W. 769; *Gipps Brewing Co. v. De France*, 91 Iowa 108, 112, 58 N. W. 1087, 51 Am. St. 329; *Chiles v. Nelson*, 7 Dana (Ky.) 281; *Northwestern Mut. L. Ins. Co. v. Joseph*, 31 Ky. L. 714, 103 S. W. 317, 12 L. R. A. (N. S.) 439; *Carter v. Hibbard*, 26 Ky. L. 1033, 83 S. W. 112; *Bailey v. Hope Ins. Co.*, 56 Maine 474; *Wheat v. Cross*, 31 Md. 99; *Daily v. Preferred Masonic & C. Assn.*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; *Price v. Atkinson*, 117 Mo. App. 52, 94 S. W. 816; *Lungstrass v. German Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 100; *Lancaster v. Elliott*, 42 Mo. App. 503; *Egger v. Nesbitt*, 122 Mo. 667, 674, 27 S. W. 385, 43 Am. St. 596; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356; *Abbott v. Shepard*, 48 N. H. 14; *Davis v. Ætna Mut. F. I. Co.*, 67 N. H. 218, 34 Atl. 464; *Busher v. New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379; *Northampton & C. Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Vassar v. Camp*, 11 N. Y. 441. "The contract as made by letters must not be incomplete or indefinite in some substantial provision or requirement." *Stein Gray Drug Co. v. H. Michel-*

the agreement is complete.³¹ Whether the correspondence constitutes a contract is a question of law for the court.³²

Posting an acceptance or an offer may be sufficient where it can be fairly inferred from the circumstances of the case that the acceptance might be sent by post; that is, where the circumstances

sen Co., 116 N. Y. S. 789; Trevor v. Wood, 36 N. Y. 307; Watson v. Russell, 149 N. Y. 388, 391, 44 N. E. 161; Hacheny &c. v. Leary, 12 Ore. 40, 7 Pac. 329; Hamilton v. Lycoming M. I. Co., 5 Pa. St. 339; McClintock v. South Penn. Oil Co., 146 Pa. 144, 161, 23 Atl. 211; Otis v. Payne, 86 Tenn. 663, 8 S. W. 848; Blake v. Hamburg-Bremen F. I. Co., 67 Tex. 160, 2 S. W. 368; Haarstick v. Fox, 9 Utah 110, 33 Pac. 251; Durkee v. Vermont Central R. R. Co., 29 Vt. 127; Washburn v. Fletcher, 42 Wis. 152. Where one party proposes by mail a contract with another residing at a distance, and the latter accepts it and deposits his acceptance by letter in the post-office, addressed and to be transmitted to the former, that contract is complete. The contract must be carried out, and becomes mutually obligatory upon both parties, and a revocation of the proposal or a notice of its withdrawal takes effect only if received by the offeror before the mailing of the acceptance. Taylor v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187; Patrick v. Bowman, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811; Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; Moore v. Pierson, 6 Iowa 279, 71 Am. Dec. 409; Hand v. Marble Co., 88 Md. 226, 40 Atl. 899; Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. 387; Vassar v. Camp, 11 N. Y. 441; Brisbane v. Boyd, 4 Paige (N. Y.) 17; Clark v. Dales, 20 Barb. (N. Y.) 42; Stearn Gray Drug Co. v. H. V. Michelson Co., 116 N. Y. S. (Mun. Ct.) 789; Hartford &c. Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629, 44 Am. St. 859. It is not when the letter is written that controls, but when it is actually mailed. Averill v. Hedge, 12 Conn. 424; Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35. Depositing it in a street mail box is sufficient. Wood v. Callaghan, 61

Mich. 402, 28 N. W. 162; Greenwich Bank v. DeGroot, 7 Hun (N. Y.) 210. Delivery to a letter carrier while in the performance of his duties is sufficient. Pearce v. Langfit, 101 Pa. 507. Contra in England. In re London & Northern Bank, 69 L. J. Ch. 24, 81 Law T. (N. S.) 512. The rule that an acceptance becomes binding when it is mailed, irrespective of the time it is received, and the rule that the withdrawal of an offer operates not from the time it is mailed, but only from the time it is actually received, seems rather anomalous. But the anomaly, if any, arises from the different nature of the two communications. If it was contemplated by the parties that acceptance might be sent by post, the acceptor has done all he is bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. This was not a contemplated proceeding. The person withdrawing is bound to bring his change of purpose to the knowledge of the other party. Benton v. Springfield Y. M. C. A., 170 Mass. 534, 49 N. E. 928, 64 Am. St. 320.

³¹ Cobb v. Dunlevie, 63 W. Va. 398, 60 S. E. 384.

³² Henthorn v. Fraser (1892), L. R. 2 Ch. 27; Scanlan v. Hodges, 52 Fed. 354, 3 C. C. A. 113; Ennis Brown Co. v. Hurst, 1 Cal. App. 752, 82 Pac. 1056; Luckhart v. Ogden, 30 Cal. 547; Ellis v. Crawford, 39 Cal. 523; Telluride Power &c. Co. v. Crane Co., 103 Ill. App. 647, aff'd. 208 Ill. 218, 70 N. E. 319; Robinson Machine Works v. Chandler, 56 Ind. 575. In the above case the answer was by telegram. Penn Investment Co. v. Wilson, 3 Kans. App. 651, 44 Pac. 291; Van Valkenburg v. Rogers, 18 Mich. 180; Union Service Co. v. Moffett-West Drug Co., 148 Mo. App. 327, 128 S. W. 7; Falls Wire Mfg. Co. v. Broderick, 12 Mo. App. 378.

are such that it must have been within the contemplation of the parties that the post was to be or might be used as a means of communicating an acceptance of the offer, then the acceptance by post is justified; but it is generally stated that when a proposition is sent by mail the sender impliedly authorizes its acceptance through the same agency and that such implication arises when the post is used to make the offer and no other mode is suggested.³³ This doctrine, however, is loosely stated. It certainly is somewhat artificial to speak of the person to whom the offer is made as having implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel, he may select any means he pleases provided they are within the contemplation of the parties and according to the ordinary usages of mankind, the post-office no less than any other. To give effect to the rule as it is usually stated would be to limit the manner of acceptance to the method used in making known the proposal. If any other means of communication were adopted the acceptor would do so at his own risk.³⁴ The post-office is merely an agent to convey communications, not to receive them, and cannot be considered as the only means by which an acceptance may be communicated.³⁵

§ 45. Communications by telegraph.—There is but little, if any, difference between the rules governing contracts formed by correspondence through the post-office and those governing contracts made through communication by means of the telegraph.³⁶ It is universally conceded that people may contract by means of telegraphic messages.³⁷ Contracts thus formed are governed, the

³³ *Lucas v. Western Union Tel. Co.*, 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016; *Scottish-American Mortg. Co. v. Davis*, 96 Tex. 504, 74 S. W. 17, 97 Am. St. 932.

³⁴ *Lucas v. Western Union Tel. Co.*, — Iowa —, 109 N. W. 191, 6 L. R. A. (N. S.) 1016. See also, *Scottish-American Mortg. Co. v. Davis*, 96 Tex. 504, 74 S. W. 17, 97 Am. St. 932.

³⁵ *Henthorn v. Fraser* (1892), 2 Ch. 27; *Phenix Ins. Co. v. Schultz*, 80 Fed. 337, 22 C. C. A. 453; *Perry v. Mount Hope Iron Co.*, 15 R. I. 380,

5 Atl. 362, 2 Am. St. 902. See also, *Tuttle v. Iowa State Traveling Men's Assn.*, 132 Iowa 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223.

³⁶ *Minnesota &c. Oil Co. v. Collier &c. Co.*, 4 Dill. (U. S.) 431, Fed. Cas. No. 9635.

³⁷ *Utley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54; *Calhoun v. Atchison*, 4 Bush. (Ky.) 261, 96 Am. Dec. 299; *Whaley v. Hinchman*, 22 Mo. App. 483; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Duble v. Batts &c.*, 38 Tex. 312.

same as all other contracts, by the general rules relative to offer and acceptance. A telegram, in order to constitute an offer, must be made with the intention to form a legal obligation or relation. It must not be intended only as a preliminary negotiation.³⁸ The telegrams sent and received must be final,³⁹ free from fatal ambiguity or indefiniteness,⁴⁰ and sufficiently designate the parties.⁴¹ And the answers must usually be given promptly in order to form a binding contract.⁴² In short, they must show all the essential elements of the contract.⁴³ As in the case of offer and acceptance by letter, the contract becomes complete at the time the acceptance is delivered to the telegraph company without reference to the time

³⁸ Strobridge Lithographing Co. v. Randall, 73 Fed. 619, 19 C. C. A. 611; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88.

³⁹ In the case of Martin v. Northwestern Fuel Co., 22 Fed. 596, a proposition was made by the plaintiff, by telegraph, to sell coal at a certain figure, to which the following reply was made: "Telegram received. You can consider the coal sold. Will be in Cleveland next week, and arrange particulars." The question before the court was whether these two despatches made a definite contract between the parties, whether there was a direct, unqualified acceptance of the terms offered. The court held that there was not (after citing approvingly the case of Myers v. Smith, 48 Barb. (N. Y.) 614), in the following language: "So it seems to me that the telegram carrying to the proposed vendor a statement from the proposed vendee that he will come to Cleveland, to his place of business, and arrange particulars, carries with it a fair implication that the particulars are to be arranged before the contract is finally consummated."

⁴⁰ Breckenridge v. Crocker, 78 Cal. 529, 21 Pac. 179; North v. Mendel, 73 Ga. 400, 54 Am. Rep. 879; Watt v. Wisconsin Cranberry Co., 63 Iowa 730, 18 N. W. 898; Lincoln v. Erie Preserving Co., 132 Mass. 129; Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790; Hastings v. Weber, 142 Mass. 232, 7 N. E. 846, 56 Am. Rep. 671; Palmer v. Marquette & Co., 32 Mich. 274; Williams v. Brick-

ell, 37 Miss. 682, 75 Am. Dec. 88; Alexander v. Western Union Tel. Co., 67 Miss. 386, 7 So. 280; Rector Provision Co. v. Sauer, 69 Miss. 235, 13 So. 623; Whaley v. Hinchman, 22 Mo. App. 483; Marschall v. Eisen Vineyard Co., 7 Misc. (N. Y.) 674, 28 N. Y. S. 62; Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516. See also, Miller v. Nugent, 12 Ind. App. 348, 40 N. E. 282. In this case defendant contracted orally to sell plaintiff his farm for \$13,000, but, having an offer of \$13,800, telegraphed plaintiff: "Will you take four hundred and let them have it, or will you take it at \$13,400?" to which he replied by telegram, "I will take \$400 and let them have the farm." There was no answer to this. It was held that plaintiff would not be entitled to \$400 unless defendant sold the farm.

⁴¹ Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; Brewer v. Horst & Lachmond, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; Watt v. Wisconsin Cranberry Co., 63 Iowa 730, 18 N. W. 898; Lincoln v. Erie Preserving Co., 132 Mass. 129; Crossett v. Carleton, 23 App. Div. (N. Y.) 366, 48 N. Y. S. 309.

⁴² See ante, § 34, Time in which to accept.

⁴³ Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179. The telegrams may be signed by the parties or their agents. Cobb v. Glenn Boom & Co., 57 W. Va. 49, 49 S. E. 1005; Purdom Naval Stores Co. v. Western Union Tel. Co., 153 Fed. 327.

the telegram is actually received.⁴⁴ It has been held, however, that an acceptance by a telegram of an offer sent by mail and which does not specify any mode of acceptance does not complete the contract until the telegram is delivered to the sendee.⁴⁵ This decision is based on the theory that the offerer by depositing his letter in the post-office selects a common agency through which to conduct the negotiations and there is consequently no implied authority granted by the offerer that acceptance may be communicated by telegram, and for this reason there is no acceptance until the actual receipt of the message by the proponent. It seems, however, that such holding rests on no solid foundation. Unless particularly limited as to the means by which acceptance shall be communicated, the acceptor may transmit his assent through any particular channel he may select or by any means he may choose, provided the means employed are sufficient, according to the ordinary usage of mankind, to carry notice of the acceptance to the offeree within a reasonable time.⁴⁶

But where the offer is made by telegram, there is more reason for requiring an answer by telegram or actual reception of the acceptance and while there is dictum to the effect that where an offer is made by telegram and the acceptance is sent by mail the contract is closed when the letter accepting the offer is deposited in the post-office,⁴⁷ its correctness may be ques-

⁴⁴ *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1087, 26 Sup. Ct. 688; *Andrews v. Schreiber*, 93 Fed. 367, *affd.* 101 Fed. 763; *Minnesota Linseed Oil Co. v. Collier & Co.*, 4 Dill. (U. S.) 431, Fed. Cas. No. 9635; *Garrettson v. North Atchison Bank*, 47 Fed. 867, *affd.* 51 Fed. 168, 2 C. C. A. 145; *Price v. Atkinson*, 117 Mo. App. 52, 94 S. W. 816; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Lungstrass v. Insurance Co.*, 48 Mo. 201, 8 Am. Rep. 100; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. R. 902; *Western Union Tel. Co. v. E. F. Connell Land Co.*, — Tex. Civ. App. —, 128 S. W. 1162; *Malloy v. Drummheller*, 68 Wash. 106, 122 Pac. 1005. See also, *Chesebrough v. Western Union Tel. Co.*, 135 N. Y. S. 583. However, if it is apparent that the parties intend

that the contract shall be complete only upon the actual delivery of the accepting message to the proponent, such delivery is essential. *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634; *Lewis v. Browning*, 130 Mass. 173.

⁴⁵ *Lucas v. Western Union Tel. Co.*, 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016. See also, *Western Union Tel. Co. v. E. F. Connell & Co.*, — Tex. Civ. App. —, 128 S. W. 1162.

⁴⁶ *Henthorn v. Fraser* (1892), L. R. 2 Ch. 27. See also, *Tuttle v. Iowa State Traveling Men's Assn.*, 132 Iowa 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223. On this question of agency see also, *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. 699.

⁴⁷ *Phenix & Co. Ins. Co. v. Schultz*, 80 Fed. 337, 25 C. C. A. 453.

tioned, since the means employed to communicate the offer would indicate that there must be a prompt and immediate acceptance. An offer by telegram might be regarded as implying that the proponent desired to be informed by the same prompt means of acceptance. Therefore, acceptance by letter might be evidence of an unreasonable delay.⁴⁸ But this does not mean that the acceptance must be sent by telegram and that the telegraph company is the agency through which the offerer intends that the negotiations are to be conducted. Such a narrow and technical holding would limit the acceptor to the particular company employed by the offerer. If he sent his message by any other company, there would be no acceptance until the telegram was received by the offerer. Such a holding would not be in accordance with reason. It is manifest that parties intend only that the negotiations shall be carried on by means that might be reasonably contemplated or that are equally as expeditious as the means employed in transmitting the offer. Whether or not communications carried on entirely by telegraph and letters combined constitute a contract is a question of law for the court.⁴⁹ Since the rule is firmly established that a contract is complete the moment the letter of acceptance is posted or a telegram giving assent is delivered to the telegraph company,⁵⁰ it would logically follow that the acceptor cannot revoke his acceptance after it has been mailed or delivered to the telegraph company. The minds of the parties have met and there is a concurrence upon a distinct proposition. And if the offerer is bound it must also be true that the acceptor is bound. Both must be bound or neither.⁵¹ To hold that the acceptor might revoke his acceptance would be to hold, in effect, that the acceptance did not take effect until received by the offerer. It has been decided, however, by the Supreme Court of Texas that, in the absence of agreement expressed or implied, the mails or telegraph may be used as a means of acceptance of the terms of an offer, and that the one employing either of such means of communication constitutes it his

⁴⁸ *Quenerduaine v. Cole*, 32 Weekly Rep. 185.

⁴⁹ *American Jobbing Assn. v. James*, 24 Okla. 460, 103 Pac. 670. See ante, Communication by letter.

⁵⁰ See ante, §§ 44, 45, Acceptance by mail and telegraph.

⁵¹ See ante, § 26, *Aggregatio mentium—Mutuality*.

agent, and the offer or acceptance, as the case may be, can be recalled at any time prior to the actual delivery of the assent.⁵²

§ 46. Communications by telephone or phonograph.—Contracts may be consummated by means of telephonic conversations. When a person places himself in connection with another by means of the telephone system he thereby invites communication relative to his business through that channel.⁵³ In a recent case, referring to an argument against the validity of such a contract, it is said: "If by this is meant that a contract cannot be made by telephone conversation it is too late to so argue. A large part of our business transactions are, in this century, carried on by telephone. Our courts have long ago held that contracts made by telephone are as effective and binding in law as if made verbally between the parties standing face to face and carrying on the conversation which culminates in the contract."⁵⁴ From the reasoning in a recent case, and on principle, it would

⁵² *Scottish-American Mortgage Co. v. Davis*, 96 Tex. 504, 76 S. W. 17, 97 Am. St. 932; *Flowers v. Sovereign Camp Modern Woodmen*, 40 Tex. Civ. App. 593, 90 S. W. 526. These cases are decided on the theory that the mails or telegraph companies, as the case may be, are the agents of the one using them. The above cases simply hold that where the offeror has not, by conduct expressed or implied, constituted the mails his agent to receive acceptance, the offeree may revoke his mailed or telegraphed assent prior to its receipt by the offeree. See also, *Sherrerd v. Western Union Tel. Co.*, 146 Wis. 197, 131 N. W. 341. Lord Bramwell in his dissenting opinion in the case of *Household Fire Ins. Co. v. Grant*, L. R. 4 Ex. Div. 203, 216, says "it" (meaning the letter of acceptance) "is revokable when sent by post," not that the letter can be got back, but that its arrival might be anticipated by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say it would; and that a letter honestly but mistakably written and posted must bind the writer, if hours

before its arrival he informed the person addressed that it was coming, but was wrong and recalled."

⁵³ *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90; *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539. The operator may act as intermediary. *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Oskamp v. Gadsden*, 35 Nebr. 7, 52 N. W. 718, 17 L. R. A. 440. In the following cases the conversation over the telephone was supplemented by a subsequent writing. *Monarch Electric & Wire Co. v. Nat. Conduit & Cable Co.*, 138 Fed. 18; *Williams v. Bedford Bank*, 63 App. Div. (N. Y.) 278, 71 N. Y. S. 539.

⁵⁴ *St. Louis Maple & Co. v. Knost*, — Mo. —, 128 S. W. 532. As to what amounts to a sufficient identification of the person with whom the conversation is had, see *Planters' Cotton Oil Co. v. Western Union Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180 and note; *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746; *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. 531.

seem that a phonograph may be the means through which the offer may be made and its acceptance recorded. Communications conducted through the medium of the telephone are held to be admissible in evidence at least in case where there is testimony that the voice was recognized. The ground for receiving the testimony on the phonograph would seem even stronger since in this case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves.⁵⁵

§ 47. Conduct as offer or acceptance.—It is not necessary that either the offer or acceptance be communicated by express words written or oral. The offer may be implied from the conduct of the proponent and the acceptance express, or vice versa. For it is elementary that if one knowingly accepts and avails himself of a service performed by another, there may be implied a request and promise to pay therefor, although in fact it may not have been requested nor authorized.⁵⁶ On the other hand, the offer may be express and the acceptance implied from the conduct of the one to whom the offer was made. If he does the work or bears the expense entailed by a compliance with the offer this usually constitutes an acceptance by conduct and the contract is complete and binding on the proponent.⁵⁷ This principle is well illustrated by a recent ruling of the Supreme Court

⁵⁵ *Boyne City &c. Co. v. Anderson*, 146 Mich. 328, 109 N. W. 429, 8 L. R. A. (N. S.) 306. It must be understood that in the foregoing cases in order to form a binding obligation there must be present all the essential elements of the contract.

⁵⁶ *Ford v. Ward*, 26 Ark. 360; *Abbott v. Third School Dist.*, 7 Maine 118; *Indiana Mfg. Co. v. Hayes*, 155 Pa. 160, 26 Atl. 6; *Bartholomae v. Paull*, 18 W. Va. 771; *Wheeler v. Hall*, 41 Wis. 447; *Wellauer v. Fellows*, 48 Wis. 105, 4 N. W. 114; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515. Services by a stenographer. *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975. Services by a nurse. *Baxter v. Knox* (Ky.), 44 S. W. 972. Serving as farm hand.

Snyder v. Neal, 129 Mich. 692, 89 N. W. 588. A town which accepts water furnished it is liable for a reasonable compensation therefor. *Port Jervis Water Works Co. v. Port Jervis*, 151 N. Y. 111, 45 N. E. 388. See, however, *Klug v. Sheriffs*, 129 Wis. 468, 109 N. W. 656, 7 L. R. A. (N. S.) 362. See also, *Post*, *Implied Contracts*.

⁵⁷ *United States v. Carlisle*, Fed. Cas. No. 14724; *Mott v. Jackson*, 172 Ala. 448, 55 So. 528; *Springer v. Cooper*, 11 Ill. App. 267. The performance must be induced by the offer. *Schmitt v. Weil*, 46 Ind. App. 264, 92 N. E. 178; *Orme v. Cooper*, 1 Ind. App. 449, 27 N. E. 655; *Bradford v. Brown*, 11 Mart. (La.) (O. S.) 217; *Seal v. Erwin*, 2 Mart. (La.) (N. S.) 245; *Springfield v. Har-*

of Vermont. It was shown that the deceased agreed to make certain provisions for her niece in consideration of her surrendering her employment and rendering such services as the deceased might, during her lifetime, require of her. The niece immediately gave up her employment and made full performance of the things required of her in the proposal of her aunt. This conduct was held to amount to a complete acceptance.⁵⁸ So where a debtor offered to allow his creditor to take certain machinery from his mill in satisfaction of the debt, the action of the creditor in taking such machinery four days thereafter constituted an acceptance of the proposition.⁵⁹ And where a landowner, desirous of having a railroad constructed over his land, executed a written agreement "releasing to the company which undertakes to construct such road the right of way of lawful width through my land; * * * the damages to be assessed when the road is located, and the amount of such damages to be paid in stock in said railroad," it was held that the acceptance of such agreement by the railroad company by a resolution of its board of directors, followed by a construction of the road on the right of way so granted, rendered the agreement binding on the landowner without formal written notice of acceptance, inasmuch as the construction of the road was equivalent thereto, and that a delay of three years in the construction of the road after the agreement was executed was not unreasonable, in view of the nature of the work to be done, including the organization of a company, and the raising of the money necessary for the enter-

ris, 107 Mass. 532; *Mauger v. Crosby*, 117 Mass. 330; *Allen v. Chonteau*, 102 Mo. 309, 14 S. W. 869; *Nicholson v. Acme &c. Co.*, — Mo. App. —, 122 S. W. 773. *Kennedy v. Siemers*, 120 Mo. 73, 25 S. W. 512, per *Macfarlane, J.*: "We think there is no significance in the fact that the Siemer agreement was not signed by Brault and Bunch, the other parties interested in and to be benefited by it. Its acceptance by them was sufficient to bind them to its covenants and conditions. *Wiggins Ferry Co. v. Chicago &c. R. Co.*, 73 Mo. 389; *Heim v. Vogel*, 69 Mo. 529. The written assignment of the contract by Mrs. Brault, attested by

Bunch, and the co-operation of the latter in its execution, are sufficient proof of its acceptance by them." *Atchison &c. R. Co. v. Miller*, 16 Nebr. 661, 21 N. W. 451; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *New York &c. R. Co. v. Pixley*, 19 Barb. (N. Y.) 428; *Patton v. Hassinger*, 69 Pa. St. 311; *Lamb v. Prettyman*, 33 Pa. Super. Ct. 190; *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52.

⁵⁸ *Porter v. Evert's Estate*, 81 Vt. 517, 71 Atl. 722.

⁵⁹ *Watters v. Glendenning*, 87 Wis. 250, 58 N. W. 404.

prise; and hence that such delay did not invalidate the acceptance, time not being declared to be the essence of the contract.⁶⁰

It is obvious, however, that before there can be an acceptance by conduct the offer must be one capable of being so accepted, in which case the doing of the act will constitute the acceptance. The acts intended as an acceptance of the proposal must be done openly. They must amount to an absolute and unconditional acceptance,⁶¹ and be such that knowledge of them as an acceptance may be communicated to the proponent.⁶²

⁶⁰ *Hoffman v. Bloomsburg &c. R. Co.*, 157 Pa. St. 174, 27 Atl. 564, per curiam: "Such acceptance was not late by reason of the delay of over three years. No time was specified in the agreement, and from the nature of the work to be done, the time required to organize the company and raise the money necessary for the enterprise, it was not intended that it should in any manner be of the essence of the contract. The purpose of the appellant as shown was to secure the building of the railroad, and as soon as the company was in condition to build, it was contemplated that it should then enter upon the right of way thus granted. No time was designated for acceptance, and a reasonable time was intended. Time does not become of the essence of a contract, unless so declared or indicated by the circumstances. *Shaw v. Turnpike Co.*, 2 Pen. & W. 454; *Hewson v. Paxson*, 38 Leg. Int. 308; *Barnard v. Lee*, 97 Mass. 92. The delay under the circumstances of this case was not unreasonable, and it does not appear by the evidence that appellant himself so treated or considered it." Where a franchise fails to provide any manner for acceptance, use of the franchise constitutes an acceptance, (*City of Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023; *Heath v. Silverthorn &c. Co.*, 39 Wis. 146; *Madison &c. Co. v. Reynolds*, 3 Wis. 287), and where goods are taken by the purchaser without objection to the terms of the sale it is an acceptance in accordance to such terms. *Dent v. Steamship Co.*, 49 N. Y. 390. See also, *Bauman v. McManus*, 75 Kans.

106, 89 Pac. 15, 10 L. R. A. (N. S.) 1138; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Watters v. Glenning*, 87 Wis. 250, 58 N. W. 404. Both the offer and acceptance may be implied. *Indiana Mfg. Co. v. Hayes*, 155 Pa. 160, 26 Atl. 6.

⁶¹ *Warner v. Willington*, 3 Drew. 523; *Trounstein v. Sellers*, 35 Kans. 447, 11 Pac. 441; *Beckwith v. Cheever*, 21 N. H. 41; *White v. Corlies*, 46 N. Y. 407.

⁶² *Morton v. Burn*, 7 Ad. & El. 19; *Sumner v. Thompson*, 31 N. S. 481; *Old Jordan &c. Co. v. Societe &c.*, 164 U. S. 261, 41 L. ed. 427, 17 Sup. Ct. 113; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Sanford v. Howard*, 29 Ala. 684, 68 Am. Dec. 101; *Marshall v. Old*, 14 Colo. App. 32, 59 Pac. 217; *Stanton v. New York &c. R. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110; *Lauder v. Peoria &c. Trotting Society*, 71 Ill. App. 475; *More v. Habbard*, 15 Ind. App. 84, 42 N. E. 962; *Moore v. McKenney*, 83 Maine 80, 21 Atl. 749, 23 Am. St. 953; *Howe v. Taggart*, 133 Mass. 284; *Wellington v. Aphthorp*, 145 Mass. 69, 13 N. E. 10; *Batelle v. Northwestern &c. Co.*, 37 Minn. 89, 33 N. W. 327; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869; *W. W. Kendall &c. Co. v. Bain*, 46 Mo. App. 581; *Pettis v. Asphalt Co.*, 71 Nebr. 513, 99 N. W. 235; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Crook v. Cowan*, 64 N. Car. 743; *Thomas v. Croft*, 2 Rich. L. (S. Car.) 113, 44 Am. Dec. 279; *Yancey v. Brown*, 3 Sneed (Tenn.) 89; *Erbacher v. Seefeld*, 92 Wis. 350, 66 N. W. 252. Even when

§ 48. **Silence does not always give consent.**—Perhaps it would be more accurate if this section were headed, “Silence but rarely gives consent.” It is even doubtful whether silence will of itself ever constitute an acceptance in ordinary cases, but silence coupled with other circumstances may do so. Where hides were shipped to the defendant in a manner similar to the way in which they had been sent several times before and the defendant remained silent for an unreasonable length of time and he had reason to suppose that the plaintiff would presume from his silence that the hides were accepted, it was held that his failure to give notice entitled the plaintiff to recover.⁶³ Likewise, the retention of a contract without any express acceptance or rejection may raise a question as to whether an acceptance may not be inferred from such silence.⁶⁴ But in each of these cases there was something more than silent assent. In one the goods were retained for an unreasonable length of time, in the other, the contract was kept by the acceptor in his possession. In a recent case the head-notes state that “assent to the stipulations of a parol contract may be implied by silent acquiescence.”⁶⁵ In this case the facts show that the defendant advertised pasture for horses. The parties to the suit had a conversation over the telephone relative to the pasturing of plaintiff’s horse, nothing being said about its condition. The horse was taken to the pasture by the plaintiff’s agent. The defendant then saw that it was blind and informed the agent that there were at least a dozen places in the pasture where a blind horse might kill itself. It was, however, turned in the pasture by the agent and was later killed by falling in a well. This silence on the part of the plaintiff’s agent was construed as an agreement to the defendant’s

an act is done showing an intention to accept, it may be insufficient to constitute an acceptance. *New v. Germania Fire Ins. Co.*, 171 Ind. 33, 85 N. E. 703. In case there has been a modified acceptance and the modification is not expressly acquiesced in, but the parties nevertheless proceed with the agreement as though the condition had been accepted, the agreement is valid. *McKell v. Chesapeake & C. R. Co.*, 175 Fed. 321, 99 C. C. A. 109. The manner in which

this information is obtained by the proponent is immaterial. *German Sav. Bank v. Roofing Co.*, 112 Iowa 184, 83 N. W. 960, 88 Am. St. 335, 51 L. R. A. 758.

⁶³ *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N. E. 495; to the same effect, *Wheeler v. Klaholt*, 178 Mass. 141, 59 N. E. 756.

⁶⁴ *Robertson v. Tapley*, 48 Mo. App. 239.

⁶⁵ *Wilensky v. Martin*, 4 Ga. App. 187, 60 S. E. 1074.

offer to keep the horse only at the risk of the plaintiff. Here again the leaving of the horse would indicate an acceptance. In any event, the silence must be under such circumstances as amount to an acquiescence before it is equivalent to an acceptance.⁶⁶

§ 49. Performance or acceptance of consideration as an acceptance of the offer.—The performance or acceptance of the consideration is sometimes mentioned as a valid and binding assent to a proposal. This is no doubt true, but it is hardly proper that such matters be included under the heading "offer and acceptance." They amount to an executed consideration and will be discussed under that head in the chapter on Consideration.⁶⁷

§ 50. Acceptance must be by an ascertained person.—As has been seen, the offer may or may not be made to a particular individual.⁶⁸ If the offer is made by public advertisement for the recovery of property and the like, the proposal is open to the public generally and any one who performs its condition is entitled to the reward. It is an offer to become liable to any one who meets its terms. It was originally held that the performance of such a proposal imposed no liability on the offerer because "it was not averred nor declared to whom the offer was made."⁶⁹ This rule no longer obtains and by the modern doctrine an offer need not be made to an ascertained person but no contract is formed until it has been accepted by an ascertained person. The offer is made to those who do accept, not those who may. The truth of this will become apparent in the consideration of the following specific instances.

⁶⁶ *Huck v. Flentye*, 80 Ill. 258; *Whitman Agricultural Co. v. Hornbrook*, 24 Ind. App. 255; *Royal Ins. Co. v. Beatty*, 119 Pa. 6, 12 Atl. 607. Compare *Ind. Mfg. Co. v. Hayes*, 155 Pa. St. 160, 26 Atl. 6. Where A offered to buy B's horse for a certain price, adding "If I hear no more about him, I consider the horse is mine at that price," and no answer was returned, it was held that there was no contract. *Felthouse v. Bindley*, 11 C. B. (N. S.) 869. Mere failure of one who has made a verbal offer to purchase chattels to reply to a letter accepting the offer has been held not to

effect a contract binding upon him under the statute of frauds. *Godkin v. Weber*, 154 Mich. 207, 117 N. W. 628, 20 L. R. A. (N. S.) 498.

⁶⁷ See, however, *Meridian Life & Co. v. Eaton*, 41 Ind. App. 118, 82 N. E. 480, in which the court holds that a party cannot accept the benefits of a contract and at the same time refuse to be bound by its terms. See also, *Miller v. McManis*, 56 Ill. 126; *Pickrel v. Rose*, 87 Ill. 263.

⁶⁸ See ante, § 32.

⁶⁹ *Weeks v. Tybald*, Noy 11, 1 Rolle Ab., 6 M. Pl. 1.

§ 51. **Rewards.**—The publication of an advertisement offering a reward is a general offer to make a contract with any person who is able to perform the required services and meet the conditions of the proposal. The performance of the service, or the performance of the condition on which the promise is made, with knowledge, is an acceptance of the offer, and, when done, concludes the contract. The matter rests exclusively in the domain of contracts involving an offer and its acceptance.⁷⁰ This being true, it logically follows that a reward cannot be earned by one who did not know it had been offered, for there can be no acceptance of an uncommunicated offer. This view is supported by the weight of authority.⁷¹ There are a few cases which hold that one may earn a reward by services rendered without knowledge of the offer. Some of the cases so holding, in effect, base their decisions on the moral obligation to pay.⁷² Others hold

⁷⁰ *Williams v. Carwardine*, 4 B. & Ad. 621; *McClaghry v. King*, 147 Fed. 463, 79 C. C. A. 91, 7 L. R. A. (N. S.) 216; *Campbell v. Mercer*, 108 Ga. 103, 33 S. E. 871; *Bank of Minneapolis v. Griffin*, 66 Ill. App. 577; *Cummings v. Clinton Co.*, 181 Mo. 162, 79 S. W. 1127; *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057. See also, *Hayden v. Songer*, 56 Ind. 42; *Wentworth v. Day*, 3 Metc. (Mass.) 352; *Crowell v. Hopkinson*, 45 N. H. 9; *Reif v. Paige*, 55 Wis. 496, 13 N. W. 473.

⁷¹ *Chicago & C. A. R. Co. v. Sebring*, 16 Ill. App. 181; *Ensminger v. Horn*, 70 Ill. App. 605; *Williams v. West Chicago St. R. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. 278; *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791; *Howland v. Lounds*, 51 N. Y. 604, 10 Am. Rep. 654; *Couch v. State*, 14 N. Dak. 361, 103 N. W. 942; *Stamper v. Temple*, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; *Bent v. Wakefield Bank*, L. R. 4 C. P. D. 1; *Thatcher v. England*, 3 C. B. 254. See also, *Turner v. Walker*, L. R. 2 Q. B. 301, 36 L. J. Q. 112; *Williams v. Carwardine*, 4 Barn. & Adol. 621; *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65; *Marvin v. Treat*, 37 Conn. 96, 9 Am. Rep. 307; *Lee v. Trustees of Flemingsburg*, 7 Dana (Ky.)

29; overruled, *Auditor v. Ballard*, 9 Bush. (Ky.) 572, 15 Am. Rep. 728. So where the plaintiff's information leading to the conviction of persons charged with a murder was given before he knew of the offer of a reward for the conviction of the murderers, he is not entitled to the reward. *Judgment*, 94 Ill. App. 385, affd. *Williams v. West Chicago St. R. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. 278; *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057 and note. Some cases hold that the act must be done, not only with knowledge of, but also with the intention to claim, the reward. *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65. If it appears that information was given which led to the detection of a crime by reason of fear of punishment for complicity and not for the reward, a judgment for defendant in an action for the reward will not be disturbed. *Vitty v. Eley*, 51 App. Div. (N. Y.) 44, 64 N. Y. S. 397. The motives which prompted compliance with the terms of the reward are immaterial. *Williams v. Carwardine*, 4 Barn. & Ad. 621. But see *Vitty v. Eley*, 51 App. Div. (N. Y.) 44, 64 N. Y. S. 397.

⁷² *Dawkins v. Sappington*, 26 Ind. 199; *Auditor v. Ballard*, 9 Bush. (Ky.) 572, 15 Am. Rep. 728. See also,

that a performance of the conditions is an acceptance of the offer.⁷³ Not only must the services be rendered with knowledge of the offer but their performance must be a substantial compliance with the conditions of the proposal.⁷⁴ Thus, a reward offered for the arrest of an offender is not earned by giving information which leads to his arrest.⁷⁵ Likewise, if the reward is offered for the arrest of a fugitive, it seems the one arrested must actually be a fugitive to entitle the one making the arrest to the reward offered.⁷⁶ Nor will part performance of its conditions entitle one to the reward.⁷⁷ It is held, however, that the

Gibbons v. Proctor, 64 L. T. (N. S.) 594; *Drummond v. U. S.*, 35 Ct. Cl. (U. S.) 356; *Burke v. Wells & Fargo*, 50 Cal. 218; *Eagle v. Smith*, 4 Houst. (Del.) 293. It has been held that the claimant of the reward may recover even though he apprehends the criminal before the reward is offered, but does not deliver him over until after the reward is offered. *Coffey v. Commonwealth*, — Ky. —, 37 S. W. 575. In the jurisdiction so holding it is unnecessary to plead knowledge. *Everman v. Hyman*, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. 284; *Clinton Co. v. Davis*, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780.

⁷³ *Russell v. Stewart*, 44 Vt. 170. In the above case payment was not contested because of want of knowledge. In the following cases it does not definitely appear whether the one claiming the reward had knowledge that it had been offered at the time of performance. *Campbell v. Mercer*, 108 Ga. 103, 33 S. E. 871; *Cummings v. Clinton Co.*, 181 Mo. 162, 79 S. W. 1127. The decisions holding contrary to the general rule are criticized by text writers, and, in the main, justly so. For as is said in a note on p. 14 of *Wald's Pollock of Contracts* (3rd), "They are utterly inconsistent with the idea that the obligation to pay the reward arises out of contract." It would seem that these cases have, however, been decided on a mistaken theory. Had they been determined on the ground that the publication of the offer was a constructive offer to any one who did comply with its conditions it is difficult to see where the inconsistency would arise.

In other words, give the publication of the offer the same effect as is given a legal publication.

⁷⁴ *Haskell v. Davidson*, 91 Maine 488, 40 Atl. 330, 64 Am. St. 254.

⁷⁵ *McClaghry v. King*, 147 Fed. 463, 79 C. C. 91, 7 L. R. A. (N. S.) 216; *Burke v. Wells & Co.*, 50 Cal. 218; *Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140; *Lovejoy v. Atchison & Co. R. Co.*, 53 Mo. App. 386; *In re Walker*, 9 Pa. Dist. Cts. 121; *Sias v. Hallock*, 14 Nev. 332; *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. 1012. It has been held that the arrest must be legal in order to entitle the one making the arrest to the reward. *Marking v. Neevy*, 8 Bush. (Ky.) 22; *Moore v. Peace*, — Ky. —, 97 S. W. 762; *Morris v. Kasling*, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398n.

⁷⁶ *Goldsborough v. Cradie*, 28 Md. 477; *State v. Clark*, 61 Mo. 263; *Monroe v. Bell* (Miss.), 18 So. 121. See also, *Currie v. Swindall*, 11 Ired. (N. Car.) 361. Contra, *Montgomery Co. v. Robinson*, 85 Ill. 174; *Hogg v. Commonwealth*, 3 Ky. L. 470. In case a reward is offered for the person who steals a horse, one who arrests a man guilty of stealing a mule does not earn the reward. *Commonwealth v. Edwards*, 10 Phil. (Pa.) 215; *Commonwealth v. Davidson*, 4 Pa. Dist. 172.

⁷⁷ *Van Horn v. Rick Water Co.*, 115 Cal. 448, 47 Pac. 361; *Hogan v. Stopphet*, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; *Partin v. Snider*, 8 Ky. L. 616; *Pool v. Boston*, 5 Cush. (Mass.) 219; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Adair v. Cooper*, 25 Tex. 548. In

arrest need not be made personally and alone in order to earn the reward. He may have the assistance of an officer.⁷⁸ Or he may hire another to make the arrest as his agent or servant.⁷⁹

§ 52. **Reward—Who may not accept.**—By the decided weight of authority a public officer cannot claim a reward for the apprehension of a criminal whom he was in duty bound to arrest.⁸⁰ This ruling is based on public policy and sound morals

case the reward is offered for the arrest of two persons, the apprehension of one does not entitle one making the arrest to the reward. *Blain v. Pacific Exp. Co.*, 69 Tex. 74, 6 S. W. 679. But where one in order to save himself kills a fugitive he is entitled to the reward offered for his arrest. *Mosley v. Stone*, 108 Ky. 492, 56 S. W. 965. If the delivery is to be made at a particular jail, the delivery to an officer of the law does not entitle the one first making the arrest to the reward. *Clanton v. Young*, 11 Rich. L. (S. Car.) 546. It is otherwise, however, if the officer delivers the felon to the designated jail. *Williams v. Thweatt*, 12 Rich. (S. Car.) 478.

⁷⁸ *Swanton v. Ost*, 74 Ill. App. 281; *Stone v. Wickliffe*, 106 Ky. 252, 50 S. W. 44; *Crawshaw v. Roxbury*, 7 Gray (Mass.) 374; *Besse v. Dyer*, 9 Allen, (Mass.) 151; *Ralls Co. v. Stevens*, 104 Mo. App. 115, 78 S. W. 291.

⁷⁹ *Montgomery Co. v. Robinson*, 85 Ill. 174; *Pruitt v. Miller*, 3 Ind. 16; *Heather v. Thompson*, 25 Ky. L. 1554, 78 S. W. 194. But see, *Juniata Co. v. McDonald*, 122 Pa. 115, 15 Atl. 696. By statute in Mississippi, "Any person who shall arrest any one who has killed another and is fleeing or attempting to flee before arrest and shall deliver him up for trial shall be entitled to the sum of \$100." For decision under this statute see, *Iatawamba Co. v. Candler*, 62 Miss. 193; *Newton Co. v. Dolittle*, 72 Miss. 929, 18 So. 451; *Wilson v. Wallace*, 64 Miss. 13, 8 So. 128; *Martin v. Copiah Co.*, 71 Miss. 407, 15 So. 73; *Gould v. Chickasaw Co.*, 85 Miss. 123, 37 So. 710.

⁸⁰ *Witty v. Southern Pac. Co.*, 76 Fed. 217; *Spinney v. United States*, 32 Ct. Cl. 397; *St. Louis & C. R. Co. v.*

Grafton, 51 Ark. 504, 11 S. W. 702, 14 Am. St. 66; *Lees v. Colgan*, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355; *Hogan v. Stophlet*, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; *Marking v. Needy & Co.*, 8 Bush. (Ky.) 22; *Smitha v. Gentry*, 20 Ky. L. 171, 45 S. W. 515, 42 L. R. A. 302; *Pool v. Boston*, 5 Cush. (Mass.) 219; *Warner v. Grace*, 14 Gil. (Minn.) 364; *Day v. Putnam Ins. Co.*, 16 Gil. (Minn.) 365; *Ex parte Gore*, 57 Miss. 251; *Monroe County v. Bell*, — Miss. —, 18 So. 121; *Gould v. Chickasaw County*, 85 Miss. 123, 37 So. 710; *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658; *Thorn-ton v. Missouri P. R. Co.*, 42 Mo. App. 58; *Atwood v. Armstrong*, 102 App. Div. (N. Y.) 601, 92 N. Y. S. 596; *Malpass v. Caldwell*, 70 N. Car. 130; *Somerset Bank v. Edmund*, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170; *Rea v. Smith*, 2 Handy (Ohio) 193; *Gilmore v. Lewis*, 12 Ohio 281; *Brown v. Sandusky County*, 24 Ohio C. C. 481; *Smith v. Whildin*, 10 Pa. 39, 49 Am. Dec. 572; *Commonwealth v. Harshman*, 20 Pa. St. Co. Ct. 666; *Commonwealth v. Lane*, 28 Pa. Super. Ct. 149; *Commonwealth v. Edwards*, 6 Lack. (Pa.) Legal News 44; *Commonwealth v. Riker*, 6 Lack. (Pa.) Legal News 46; *Commonwealth v. Hobbs*, 3 Del. Co. (Pa.) 97; *Stamper v. Temple*, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296. But it has been held by the United States Supreme Court that if a statute authorizing a reward is broad enough to include an officer, he is entitled to the reward on complying with the conditions under which it is offered. *United States v. Matthews*, 173 U. S. 381, 43 L. ed. 738, 19 Sup. Ct. 413. See, however, dicta in *Means v. Hendershott*, 24 La. 78.

and has been held to apply although the arrest was made by the officer when off duty,⁸¹ or when he makes the arrest without warrant if it was his duty to make the arrest, notwithstanding the lack of any warrant.⁸² However, if the officer is not in duty bound to make the arrest without a warrant, he may earn a reward for an arrest when made without process.⁸³ This brings us to the exception to the general rule, which is, that an officer can earn a reward for the arrest of a person if he was under no obligation, because of his official character, to make the arrest.⁸⁴

§ 53. Tickets, receipts and the like.—A great many contracts are now made by delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party tendering it. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents; and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not.⁸⁵ This rule applies where

⁸¹ *In re Russell*, 51 Conn. 577, 50 Am. Rep. 55.

⁸² *Witty v. Southern P. Co.*, 76 Fed. 217; *Warner v. Grace*, 14 Minn. 487.

⁸³ *Creamer v. Hall*, 2 Del. Co. (Pa.) 378; *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315; *Russell v. Stewart*, 44 Vt. 170; *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. 1012.

⁸⁴ *Smith v. Vernon County*, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. 324; *Pyle v. Sweigart*, 18 Lanc. L. Rev. (Pa.) 81; *Kasling v. Morris*, 71 Tex. 584, 9 S. W. 739, 10 Am. St. 797. If he makes an arrest outside the limits of the territory in which he is called upon to act he is entitled to the reward. *Bronnenberg v. Coburn*, 110 Ind. 169, 11 N. E. 29; *Gregg v. Pierce*, 53 Barb. (N. Y.) 387, or if he arrests a fugitive for another state. *Morrell v. Quarles*, 35 Ala. 544; *Smith v. Vernon County*, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. 324. *Contra*, *Rea v. Smith*, 2 Handy (Ohio) 193; *Brown*

v. Sandusky Co., 24 Ohio C. C. 481. It has also been held that an officer has a right to a reward offered for the arrest of one who has jumped his bond, since the reward is offered not because of the commission of the crime but by the surety for his own individual benefit and to save himself from loss as surety on the bail bond. *Curran v. Collier* (Ind. Ter.), 104 S. W. 572.

⁸⁵ *Watkins v. Rymill*, L. R. 10 Q. B. D. 178; *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 539; *Harris v. Great Western R. Co.*, L. R. 1 Q. B. D. 515; *Parker v. South Eastern R. Co.*, L. R. 2 C. P. D. 416; *Burke v. South Eastern R. Co.*, L. R. 5 C. P. D. 1; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174, 23 L. ed. 874; *Southern R. Co. v. White*, 108 Ga. 201, 33 S. E. 952; *Freeman v. Atchison & c. R. Co.*, 71 Kans. 327, 80 Pac. 592; *Coburn v. Morgan's & c. R. Co.*, 105 La. 398, 29 So. 882, 83 Am. St. 242; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; *McMillan v.*

the person buying the ticket⁸⁶ or bill of lading⁸⁷ knows the terms and conditions on which it is issued. In case he does not know of the special terms incorporated in the ticket or other paper given him it then often becomes a question of fact whether the notice given was reasonably sufficient to inform the party of its conditions.⁸⁸ It has been held that if one signs a ticket⁸⁹ even

Michigan &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; *Heffron v. Detroit City R. Co.*, 92 Mich. 406, 52 N. W. 802, 16 L. R. A. 345, 31 Am. St. 601; *Collender v. Dismore*, 55 N. Y. 200, 14 Am. Rep. 224; *Magnin v. Dinsmore*, 56 N. Y. 168; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Long v. New York &c. R. Co.*, 50 N. Y. 76; *Madan v. Sherard*, 73 N. Y. 329, 334, 29 Am. Rep. 153; *Gulf &c. R. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54; *Schaller v. Chicago &c. R. Co.*, 97 Wis. 31, 71 N. W. 1042. See also, *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860; *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433. One accepting a street car transfer which states on its face that the transfer is to be made at a certain point has no right to attempt to make the transfer before such point is reached, although the cars from and to which the transfer is made run over the same track to the transfer point. *Shortsleeves v. Capital Tract. Co.*, 28 App. D. C. 365, 8 L. R. A. (N. S.) 287; *Perry v. Metropolitan St. R. Co.*, 58 Mo. App. 75. The time within which the transfer is to be used may also be limited. *Hornesby v. Georgia R. &c. Co.*, 120 Ga. 913, 48 S. E. 339; *Garrison v. United R. &c. Co.*, 97 Md. 347, 99 Am. St. 452, 55 Atl. 371. But as to the cars of the company being late and preventing the making of the transfer within the time prescribed see, *Little Rock Tract. &c. Co. v. Winn*, 75 Ark. 529, 87 S. W. 1025; *Heffron v. Detroit City R. Co.*, 92 Mich. 406, 52 N. W. 802, 31 Am. St. 601, 16 L. R. A. 345; *Hanna v. Nassau Electric R. Co.*, 45 N. Y. S. 437, 18 App. Div. 137; *Jenkins v. Brooklyn Heights R. Co.*, 29 App. Div. 8, 51 N. Y. S. 216; *Golden v. Pittsburgh R. Co.*, 28 Pa. Super. Ct. 313.

⁸⁹ *Hanlon v. Illinois Cent. R. Co.*,

109 Iowa 136, 80 N. W. 223; *Coburn v. Morgan's Louisiana &c. R. Co.*, 105 La. Ann. 398, 29 So. 882, 83 Am. St. 242; *Trezona v. Chicago Great Western R. Co.*, 107 La. 22, 77 N. W. 486, 43 L. R. A. 136; *Bowers v. Pittsburgh &c. R. Co.*, 158 Pa. St. 302, 27 Atl. 893; *Houston &c. R. Co. v. Arey*, 18 Tex. Civ. App. 457, 44 S. W. 894; *Muldoon v. Ry. Co.*, 10 Wash. 311, 38 Pac. 995, 45 Am. St. 787.

⁸⁷ *Merchants' &c. Transp. Co. v. Joesting*, 89 Ill. 152; *Smith v. Express Co.*, 108 Mich. 572, 66 N. W. 479; *Texas &c. R. Co. v. Gallagher* (Tex. Civ. App.), 70 S. W. 97. See also, 4 *Elliott on Railroads* (2d ed.), § 1423.

⁸⁸ *Acton v. Packets Co.* (Q. B.), 73 Law T. 158; *McGhee v. Drisdale*, 111 Ala. 597, 20 So. 391; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. 50. A warehouse receipt which has stamped on its face, "at owner's risk" exempts the warehouseman from examining the goods to detect leakage. *Taussig v. Bode*, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774; *Garden Grove Bank v. Huneston &c. R. Co.*, 67 Iowa 526, 25 N. W. 761; *Hewett v. Chicago &c. R. Co.*, 63 Iowa 611, 19 N. W. 790; *Robinson v. Transportation Co.*, 45 Iowa 470; *Mulligan v. Illinois &c. R.*, 36 Iowa 181, 14 Am. Rep. 514; *Walker v. Price*, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; *Rahilly v. St. Paul &c. R. Co.*, 66 Minn. 153, 68 N. W. 853; *Aiken v. Wabash R. Co.*, 80 Mo. App. 8; *Zimmer v. New York Cent. &c. R. Co.*, 137 N. Y. 460, 33 N. E. 642; *Bal-lou v. Earle*, 17 R. I. 441, 22 Atl. 1113, 14 L. R. A. 433, 33 Am. St. 881.

⁸⁹ *Watson v. New York &c. R. Co.*, 24 Misc. (N. Y.) 628, 54 N. Y. S. 201; *Daniels v. Florida &c. R. Co.*, 62 S. Car. 1, 39 S. E. 762; *Boylan v. Hot*

though hastily,⁹⁰ or even where he fails to sign⁹¹ the purchaser is bound by its conditions, the fact that he was required to sign and the very appearance of the ticket giving him notice that it contained special provisions. Such tickets are sometimes termed "contract tickets." The sale of a ticket at a reduced rate is notice that it contains conditions.⁹² Likewise a pass is notice that there are special provisions in the contract of carriage.⁹³ The above rules also apply to bills of lading. Where the terms of shipment appear on the face of the bill the shipper is bound regardless of whether or not he read its terms,⁹⁴ and even though he may not be able to read.⁹⁵

Springs R. Co., 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. 50.

⁹⁰ *Bethea v. Northeastern R. Co.*, 26 S. Car. 91, 1 S. E. 372.

⁹¹ *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 25 Am. St. 660, 12 L. R. A. 340.

⁹² *St. Louis &c. R. Co. v. Weakley*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; *Boling v. St. Louis &c. R. Co.*, 189 Mo. 219, 88 S. W. 35; *Bissell v. New York Central R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Watson v. Louisville &c. R. Co.*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454; *Ranchau v. Rutland R. Co.*, 71 Vt. 142, 43 Atl. 11, 76 Am. St. 761. In case such a ticket provides that it must be stamped before returning this provision is binding even though the holder can not read. *Watson v. Louisville &c. R. Co.*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454. This rule does not apply when full fare is charged. *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. 146; *Norman v. Southern R. Co.*, 65 S. Car. 517, 44 S. E. 83, 95 Am. St. 809; *Dagnall v. Southern R. Co.*, 69 S. Car. 110, 48 S. E. 97.

⁹³ *Griswold v. New York &c. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Illinois &c. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Quimby v. Boston &c. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Squire v. New York Central Ry. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Perkins v. New York Central R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282n; *Gulf &c. R. Co. v. McGown*, 65 Tex. 640; *Boering v. Chesapeake Beach R. Co.*, 193 U. S.

442, 48 L. ed. 742, 24 Sup. Ct. 515. He is deemed to have accepted the condition. *Quimby v. Boston &c. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846.

⁹⁴ *Mouton v. Louisville &c. R. Co.*, 128 Ala. 537, 29 So. 602; *St. Louis &c. R. Co. v. Weakley*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; *Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 683, 50 Pac. 847; *Overland Mail &c. Co. v. Carroll*, 7 Colo. 43, 1 Pac. 682; *Calderon v. Steamship Co.*, 64 Fed. 874; *Pacific Express Co. v. Foley*, 46 Kans. 457, 26 Pac. 565, 26 Am. St. 107; *Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; *Graves v. Express Co.*, 176 Mass. 280, 57 N. E. 462; *Smith v. Express Co.*, 108 Mich. 572, 66 N. W. 479; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; *St. Louis &c. R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Wyrick v. Missouri &c. R. Co.*, 74 Mo. App. 406; *McFadden v. Missouri Pacific R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721; *Durgin v. Express Co.*, 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; *Merrill v. American Express Co.*, 62 N. H. 514; *Hill v. Syracuse, Binghamton &c. R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163; *Phifer &c. v. Carolina Cent. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687; *Johnstone v. Richmond &c. R. Co.*, 39 S. Car. 55, 17 S. E. 512; *Davis v. Central Vermont R. Co.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. 852. See also, 4 *Elliott on Railroads* (2nd ed.), § 1607; *Cau v. Texas &c. R. Co.*, 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. 663.

⁹⁵ *Jones v. Cincinnati &c. R. Co.*, 89

To this general rule, however, there are a number of exceptions or qualifications. In the first place the nature of transactions may be such that the person accepting the ticket, bill of lading or the like may believe and justly so, that it contains no terms other than those already agreed upon and that it is merely an acknowledgment thereof not intended to introduce any special terms.⁹⁶ Thus where a passenger enters into an oral agreement with a railroad company, he has a right to assume in the absence of any notice to the contrary that the ticket given him embodies the terms of the agreement.⁹⁷ So, ordinarily, when a shipper is given a bill of lading which embodies terms different from those orally agreed upon, he is not bound thereby.⁹⁸ Nor will, it seems,

Ala. 376, 8 So. 61. See also, *Rogers v. Kennebec Steamship Co.*, 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby v. Boston &c. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; 4 *Elliott on Railroads* (2d ed.), § 1607.

⁹⁶ See *Parker v. South Eastern R. Co.*, L. R. 2 C. P. D. 416; *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023.

⁹⁷ *Indianapolis &c. R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640; *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. 198, 59 Am. St. 238; *Malone v. Boston &c. R. Corp.*, 12 Gray (Mass.) 388, 74 Am. Dec. 598; *Aplington v. Pullman Co.*, 110 App. Div. (N. Y.) 250, 97 N. Y. S. 329, 17 N. Y. Ann. Cas. 455; *Gulf &c. R. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239. See also, *Cincinnati &c. R. Co. v. Harris*, 115 Tenn. 501, 91 S. W. 211.

⁹⁸ *Northwest &c. Co. v. McKenzie*, 25 Can. Sup. Ct. 38; *Merchants &c. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265, affd. 47 Ill. App. 561; *Stoner v. Chicago &c. R. Co.*, 109 Iowa 551, 80 N. W. 569; *Missouri Pac. R. Co. v. Beeson*, 30 Kans. 298, 2 Pac. 496; *Caldwell v. Felton*, 21 Ky. L. 397, 51 S. W. 575; *Louisville &c. R. Co. v. Cooper*, 21 Ky. L. 1644, 56 S. W. 144; *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415; *Southard v. Minneapolis &c. Ry.*, 60 Minn. 382, 62 N. W. 442, 619; *Germania Fire Ins. Co. v. Memphis &c. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Lowenstein v.*

Lombard Ayres & Co., 164 N. Y. 324, 58 N. E. 44; *Pittsburgh &c. R. Co. v. Blakemore*, 1 Ohio Cir. Ct. 42, 1 Ohio C. D. 26; *Galveston &c. R. Co. v. Botts*, 22 Tex. Civ. App. 609, 55 S. W. 514; *Gulf &c. R. Co. v. Combes &c.*, — Tex. Civ. App. —, 80 S. W. 1045; *Gulf &c. R. Co. v. Funk*, 42 Tex. Civ. App. 490, 92 S. W. 1032. See also, 4 *Elliott on Railroads* (2d ed.), § 1423. Under such circumstances the bills of lading are only evidence of the date and amount of shipment. *St. Louis &c. R. Co. v. Elgin &c. Milk Co.*, 74 Ill. App. 619, affd. 175 Ill. 557, 51 N. E. 911, 67 Am. St. 238. Where the carrier and shipper enter into an oral agreement by the terms of which the liability of the carrier is unlimited and subsequently a bill of lading is given him containing restrictive features the shipper must give his express assent thereto in order to relieve the carrier of its common-law liability. *Michigan Central Ry. Co. v. Boyd*, 91 Ill. 268; *Gott v. Dinsmore*, 111 Mass. 45; *Gann v. Chicago &c. R. Co.*, 72 Mo. App. 34; *Bostwick v. Baltimore &c. R. Co.*, 45 N. Y. 712; *Gains v. Union Transportation &c. Co.*, 28 Ohio St. 418; *Mobile &c. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. 566, and it may be necessary that this release be supported by a valid consideration. *Kansas Pacific Ry. Co. v. Reynolds*, 17 Kans. 251; *Hendrick v. Boston &c. R. Co.*, 170 Mass. 44, 48 N. E. 835; *Texas &c. R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897; *Missouri*

a receipt which the shipper puts in his pocket and does not read vary the terms of a verbal agreement entered into before the giving of the receipt. Assent to the alleged change cannot be inferred from his acceptance of the folded writing.⁹⁹ Nor does it apply in those cases where there is no actual notice given of the terms and conditions on which the ticket is sold and the ticket itself does not give the purchaser reasonable notice thereof.¹ Nor is a shipper bound who is given no opportunity to examine his bill of lading.²

&c. Ry. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; San Antonio R. Co. v. Wright, 20 Tex. Civ. App. 136, 49 S. W. 147; Gulf &c. R. Co. v. House &c., 40 Tex. Civ. App. 105, 88 S. W. 1110; Strohn v. Detroit & Milwaukee R. Co., 21 Wis. 562, 94 Am. Dec. 564. See also, 5 Cent. L. J. 134. The written contract may, however, be signed under such circumstances as to supersede the oral agreement. Helm v. Missouri Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148. And see, McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721. The verbal agreement may be waived. Wabash Ry. Co. v. Wright, 75 Ill. App. 243.

⁹⁹This same rule applies when the prior agreement was in writing. Farmers Loan & Trust Co. v. Northern &c. R. Co., 120 Fed. 873, 57 C. C. A. 533, affd. 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. 84. This is certainly true where he has a right to believe that the receipt does not change the terms. Stoner v. Chicago &c. R. Co., 109 Iowa 551, 80 N. W. 569.

¹Richardson v. Browntree, L. R. (1894) App. Cas. 217; Potter v. Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746; The Majestic, 56 Fed. 244; Wiegand v. Cent. R. Co., 75 Fed. 370; Phillips v. Georgia &c. Banking Co., 93 Ga. 356, 20 S. E. 247; Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. 146; Kansas &c. R. Co. v. Rodabaugh, 38 Kans. 45, 15 Pac. 899, 5 Am. St. 715; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Runyan v. Cent. R. Co., 61 N. J. L. 537, 41 Atl. 367, 43 L. R. A. 284, 68 Am. St. 711; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Rawson v. Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Kent v. Balti-

more &c. R. Co., 45 Ohio St. 284, 12 N. E. 798, 4 Am. St. 539; Lake Shore &c. R. Co. v. Mortal, 8 Ohio C. D. 134; Mack &c. Co. v. Great Western Dispatch, 2 Ohio C. D. 22; Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142; Arnold v. Pennsylvania R. Co., 115 Pa. St. 135, 8 Atl. 213, 2 Am. St. 542; Louisville &c. R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; San Antonio &c. R. Co. v. Newman, 17 Tex. Civ. App. 606, 43 S. W. 915; The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. 597. "If the ticket constituted the contract in part, it could only become binding on the plaintiff in the event of his knowing or discovering its provisions or his attention being drawn thereto, and whether he was negligent in not discovering the same would, at most, be a question for the jury." Aplington v. Pullman Co., 110 App. Div. (N. Y.) 250, 97 N. Y. S. 329, 17 N. Y. Ann. Cas. 455. For instance in which the notice has been unreasonable see, "See back" on face of ticket. The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. 597. Handing passenger folded ticket. Richardson v. Browntree, L. R. (1894) App. Cas. 217. Insufficient light by which to read terms and was assured by agent that it was all right. Callaway v. Mellett, 15 Ind. App. 366, 44 N. E. 198, 59 Am. St. 238. See also, Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701. Expressed in marks which are unintelligible. Madam v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153. Or cannot be readily understood by a person of ordinary intelligence. O'Rourke v. Citizens' Street R. Co., 103 Tenn. 124, 52 S. W. 872, 76 Am. St. 639, 46 L. R. A. 614.

²Chicago &c. R. Co. v. Simon, 160

It is obvious that if the conditions were printed in such manner as to be fraudulent,³ misleading and the instrument does actually mislead the person to whom it is made⁴ or if through mistake on the part of the agent, the ticket is so limited that it would be impossible to use it⁵ the acceptor is not bound. It has also been held that if the conditions are unreasonable or irrelevant to the main purposes of the contract they are of no binding force.⁶ This would be true of a ticket having on it a condition that the goods deposited in a cloak room should become the absolute property of the railway if not removed in two days.⁷

As appears from the cases cited in this section the general rule set out at its beginning is sought most frequently to be applied in contracts entered into with common carriers. In such cases a confusing element is apt to enter in. There is usually an attempt on the part of the carrier to limit or avoid its common-law liability. As to whether or not this may be done is something that does not concern offer and acceptance.⁸ However, there is one question involved in such cases that does concern itself with offer and acceptance and that is whether, as in the case of rewards, the terms of the offer must be actually brought to the attention of the adverse party. It has been held by many cases that where a common carrier seeks to avoid its common-law liability it must call special attention to the terms which do this to the party to be bound there-

Ill. 648, 43 N. E. 596. As to bills of lading see, *M. C. R. Co. v. Mfg. Co.*, 16 Wall. (U. S.) 318, 21 L. ed. 297; *Merchants &c. Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265; *Newell v. Smith*, 49 Vt. 255; *New York &c. Co. v. Sayles*, 87 Fed. 444; *Ryan v. M. K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Perry v. Thompson*, 98 Mass. 249.

³ *Watkins v. Rymill*, L. R. 10 Q. B. D. 178.

⁴ The case of *Henderson v. Stevenson* (L. R. 2 H. L. 470), is an illustration of this. A particular clause of a bill of lading will not be given a hidden or obscure meaning. *Texas &c. R. Co. v. Reiss*, 183 U. S. 621, 46 L. ed. 358, 22 Sup. Ct. 253.

⁵ *Krueger v. Chicago &c. R. Co.*, 68 Minn. 445, 64 Am. St. 487. In the above case a 2,000-mile ticket was

sold the plaintiff which through mistake was made to expire on the day it was issued. It was held that the plaintiff would not be compelled to stand on the contract as written nor have the mistake reformed in equity.

⁶ Company may make reasonable rules. *Shortsleeves v. Capital Trac. Co.*, 28 App. D. C. 365, 8 L. R. A. (N. S.) 287; *Cherry v. Chicago &c. R. Co.*, 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695; *O'Rourke v. Street R. Co.*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. 639; *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

⁷ *Parker v. South Eastern Ry. Co.*, L. R. 2 C. P. D. 416.

⁸ See post, § 765 et seq, *Agreements exempting from liability for negligence*.

by.⁹ The reason for the ruling given in such jurisdictions is that tickets are usually bought in haste and that the ticket is not a contract but merely the evidence of one, i. e., the oral contract entered into before the delivery of the ticket.¹⁰ Consequently if the ticket is bought under such circumstances as to furnish the purchaser with full opportunity for examination,¹¹ it may be said,

⁹ *Wiegand v. Cent. R. Co.*, 75 Fed. 370; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. 146; *Illinois Central R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. 253, 43 L. R. A. 210, affd. 69 Ill. App. 363; *Illinois Central R. Co. v. Carter*, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; reversing 62 Ill. App. 618; *Chicago & C. R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Chicago & C. R. Co. v. Davis*, 159 Ill. 53, 42 N. E. 382, 50 Am. St. 143; *Kansas City & C. R. Co. v. Rodebaugh*, 38 Kans. 45, 15 Pac. 899, 5 Am. St. 715; *Newberger Cotton Co. v. Illinois Cent. R. Co.*, 75 Miss. 303, 23 So. 186; *Gardner v. Southern R. Co.*, 127 N. Car. 293, 37 S. E. 328; *Norman v. Southern R. Co.*, 65 S. Car. 517, 44 S. E. 83, 95 Am. St. 809; *Louisville & C. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; *The Majestic*, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. 597; *M. C. R. Co. v. Mfg. Co.*, 16 Wall. (U. S.) 318, 21 L. ed. 297.

¹⁰ *Henderson v. Stevenson*, L. R. 2 H. L. 470; *Mauritz v. New York & C. R. Co.*, 23 Fed. 765; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. 148; *Aiken v. Southern R. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. 107; *Kansas City & C. R. Co. v. Rodebaugh*, 38 Kans. 45, 15 Pac. 898, 5 Am. St. 715; *Burnham v. Grand Trunk R. Co.*, 63 Maine 298, 18 Am. Rep. 220; *Sears v. Eastern R. Co.*, 96 Mass. 433, 92 Am. Dec. 780; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97. Even though the passenger may not be able to read. *O'Reagan v. Steamship Co.*, 160 Mass. 356, 35 N. E. 1070, 39 Am. St. 484; *Fonseca v. Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660; *Logan v. Hannibal & C. R. Co.*, 77 Mo. 663, 12 Am. & Eng. R. Cas. 140; *Steers v. Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *Quimby v.*

Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199; *Gordon v. Manchester & C. R. Co.*, 52 N. H. 596, 13 Am. Rep. 97; *Cleveland & C. R. Co. v. Bartram*, 11 Ohio St. 457; *Baltimore & C. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. R. 617; *Kent v. Baltimore & C. R. Co.*, 45 Ohio St. 284, 12 N. E. 798, 4 Am. St. 539; *O'Rourke v. Citizens St. R. Co.*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. 639; *Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107, 22 Am. St. 88; *McCollum v. Southern Pac. R. Co.*, 31 Utah 494, 88 Pac. 663. The ticket is but the evidence of the contract. It is the act of the carrier over which the passenger has no control. The carrier is alone responsible for mistakes therein and their consequences. The passenger has a right to presume and rely upon the ticket as correctly expressing the contract. *Cincinnati & C. R. Co. v. Harris*, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A. (N. S.) 779. *Norman v. Southern R. Co.*, 65 S. Car. 517, 44 S. E. 83, 95 Am. St. 809. (In *Louisville & N. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140, it was held the printing of restriction on the back of a local ticket and its acceptance by the passenger is in the absence of actual notice of such restrictions and assent thereto does not render them binding on the passenger.) This case also gives prominence to the haste with which tickets are usually bought. On this later point see also, *Norman v. Southern R. Co.*, 65 S. Car. 517, 44 S. E. 83, 95 Am. St. 809.

¹¹ Mere acceptance of a bill of lading does not as a matter of law show an acceptance of its terms. *Chicago & C. R. Co. v. Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68;

at least with plausibility, that the reason for the rule fails and is no longer applicable.

§ 54. **Deeds.**—Under this heading all contracts under seal will be considered although a majority of the cases will have to do with transfers of realty. At this point it would be well to note the variance between the law of United States and England. Thus will be made apparent, what, at first, seems as anomalous holding by the courts of the latter country and the American rule emphasized by such comparison. It is well settled in England that a deed may be binding on the obligor before it comes into the custody of the obligee, and even before he knows of it.¹² This consequence arises from the inherent nature of a deed. History reveals that the very object of a sealed writing was to dispense with any other form of proof, as the hazards of oath, ordeal, trial by combat, and the like. The maker acknowledged himself actually bound and, except in special and exceptional cases, was estopped from disputing its validity. Whether a deed should in modern law, retain its ancient qualities does not concern us. However, until a deed is accepted by the obligee it is merely an offer which he may refuse,¹³ because it is well settled that no matter how formal a document may be and how it may purport to bind a party, until acceptance by the person to be benefited thereby it is a mere offer,¹⁴ but, according to the English rule it is one that cannot be withdrawn. As a consequence of these rules of law a proposal made by deed, though the deed itself until acceptance is a mere offer, is binding on the obligor before the obligee either accepts or knows of the offer, and is irrevocable; thus where a policy of insurance, purporting to be signed, sealed and delivered in the presence of a witness by the directors of an insurance company, was left in the company's office to be sent for by the insured,

Chicago &c. R. Co. v. Simon, 160 Ill. 648, 43 N. E. 596; Erie &c. Transportation Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Gamies v. Union Trans. &c. Co., 28 Ohio St. 418.

¹² Doe v. Knight, 5 B. & C. 671; Hall v. Palmer, 3 Hare 532; Fletcher v. Fletcher, 4 Hare 67; In re Dodds, 60 L. J. Q. B. 599; Cracknall v. Janson, L. R. 11 Ch. D. 1;

Xenos v. Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313. Compare Dillon v. Coppin, 4 M. & Cr. 647; Roberts v. Security Co. (1897), 1 Q. B. D. 111; Exton v. Scott, 6 Sim. 31.

¹³ Xenos v. Wickham, L. R. 2 H. L. 296, 312.

¹⁴ Dickison v. Dodds, L. R. 2 Ch. Div. 463, 473.

according to the usual practice, it was held to be a valid policy and binding upon the company, though they canceled it while it remained in their possession.¹⁵ A father, being displeased with his son, executed a deed giving his wife \$100 per annum in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, canceled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though canceled.¹⁶

§ 55. **Deeds—Subject continued.**—A woman executed a deed, by which she covenanted to stand seized to the use of herself, remainder to a child, her nephew, in fee. She kept this deed in her possession and afterward burnt it and made a new settlement; it was held that the first settlement was valid and a perpetual injunction was granted against the party claiming under the second.¹⁷ Where a bond was executed for the benefit of a woman with whom the grantor had cohabited, though retained in the hands of the testator's solicitor, and quite unknown to her till his death, it was declared to be valid for her benefit.¹⁸ So in another case where a man had executed a deed in favor of his illegitimate son, though unknown to the son, and the deed was kept in the grantor's possession, and not discovered until after his death, it was held to entitle the son to sue his estate for the amount.¹⁹ And in delivering a learned and elaborate opinion in a leading case on this subject,²⁰ it has been said: "Upon these authorities, it seems to me, where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential." According to this English doctrine contracts under seal do not have their in-

¹⁵ *Xenos v. Wickham*, L. R. 2 H. L. 296.

¹⁶ See dictum of Bailey, J., in *Doe v. Knight*, 5 B. & C. 671, 690.

¹⁷ *Naldred v. Gilham*, 1 Pr. Wms. 577.

¹⁸ *Hall v. Palmer*, 13 L. J. (N. S.) Ch. 352, 3 Hare 532.

¹⁹ *Doe v. Lewis*, 11 C. B. 1035; *Fletcher v. Fletcher*, 4 Hare 67.

²⁰ *Doe v. Knight*, 5 B. & C. 671, 692.

ception in proposal and acceptance, and the rules touching proposal and acceptance, their communication and revocation have no place in contracts by deed and are entirely inapplicable.

§ 56. **The American doctrine as to deeds and sealed instruments.**—The old common-law rule has been altered by the courts of this country. Here the law is well settled that a sealed instrument in order to take effect must be delivered by the grantor, and actually or by implication be accepted as his own by the grantee. A deed takes effect only from its delivery; either express or implied. They are necessarily simultaneous and correlative acts.²¹ The mere subscribing and sealing, accompanied with the ordinary attestation of those acts by the witnesses, followed by the grantor keeping the deed in his own custody, are not sufficient to constitute a legal delivery of a sealed instrument.²² The English cases which have established the doctrine that a deed can be effective without the grantee's knowledge or

²¹ *Tibbals v. Jacobs*, 31 Conn. 428; *Merrills v. Swift*, 18 Conn. 257; *Stallings v. Newton*, 110 Ga. 875, 36 S. E. 227; *Desmond v. Lanphier*, 86 Ill. App. 101; *Hawes v. Hawes*, 177 Ill. 409, 53 N. E. 78; *Pratt v. Griffin*, 184 Ill. 514, 56 N. E. 819; *Berry v. Anderson*, 22 Ind. 36; *Hawkes v. Pike*, 105 Mass. 560; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Hefron v. Flanigan*, 37 Mich. 274; *Pennington v. Pennington*, 75 Mich. 600, 42 N. W. 985; *Bisard v. Sparks*, 133 Mich. 587, 95 N. W. 728; *Ligon v. Barton*, 88 Miss. 135, 40 So. 555; *Young v. Elgin* (Miss.), 27 So. 595; *Parmelee v. Simpson*, 5 Wall. (U. S.) 81, 18 L. ed. 542; *Younge v. Gilbeau*, 3 Wall. (U. S.) 636, 18 L. ed. 262. From the execution and record of a deed delivery is presumed. *McReynolds v. Grubb*, 150 Mo. 352, 51 S. W. 822. An instrument transferring property even though recorded, cannot be given effect to the prejudice of third parties, who acquired rights in the property before the actual delivery of the conveyance. *Barnes v. Cox*, 58 Nebr. 675, 79 N. W. 550. *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Stilwell v. Hubbard*, 20 Wend. (N. Y.) 44; *Clay v. Cline*, 18 Ohio Cir. Ct. 89, 9 Ohio C. D. 871;

Payne v. Hallgarth, 33 Ore. 430, 54 Pac. 162; *Cameron v. Gray*, 202 Pac. 566, 52 Atl. 132; *Blackmore v. Crutcher*, — Tenn. Ch. App. —, 46 S. W. 310. But the recording of a deed by one not authorized so to do by the grantor will not be given the effect of a delivery of the deed. *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 51 S. W. 886; *Gaines v. Kenner*, 48 W. Va. 56, 35 S. E. 856.

²² *Fisher v. Hall*, 41 N. Y. 416. The grantee need not, however, be put in actual possession of the deed. *McCartney v. McCartney*, 93 Tex. 359, 55 S. W. 310. *Cowen & Hill's Notes*, (3d ed.) 826; and their general result is stated to be that, "to constitute a complete delivery of a deed, the grantor must do some act putting it beyond his power to revoke." The Supreme Court of the United States has said: "The delivery of a deed is essential to the transfer of the title. It is the final act without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed, or the right to retain it." *Younge v. Gilbeau*, 3 Wall. (U. S.) 636, 641, 18 L. ed. 262. What amounts to a delivery will be discussed elsewhere.

consent, and binding on the grantor beyond revocation, are directly opposite to the entire current of modern authority, both in the state and federal courts, and they have been repudiated. Under modern conditions a rule of law by which a voluntary deed, executed by the grantor, and retained by him during his life in his own exclusive possession and control, never during that time being made known to the grantee, and never delivered to any one for him, or declared by the grantee to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title or as a binding proposal, is so inconsistent with every substantial right of property, that it would be unsafe for any court, either of law or equity, to adopt it.²³ After the delivery of a deed it is not revocable by the grantor,²⁴ even with the grantee's consent.²⁵

The result of the American cases on the subject of sealed instruments is that a deed has no effect until delivered; that a delivery can only be made by such an act on the part of the grantor as shows an absolute intention to surrender all control over it and such an act on the part of the grantee as communicates to the grantor or shows his acceptance; that the delivery of a deed is synonymous with its acceptance, the two things being correlative terms; that until the deed is delivered and accepted it is revocable; that after delivery of a deed it is irrevocable. A contract by deed has its inception in proposal and acceptance, and the rules governing inception and acceptance, their communication and revocation

²³ *Fisher v. Hall*, 41 N. Y. 416. The court says that such a rule should deserve "no toleration whatever from intelligent court, either of law or equity."

²⁴ *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337, 4 L. R. A. (N. S.) 816, and note, 112 Am. St. 152; *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865 and note; *Tompkins v. Thompson*, 93 N. Y. S. 1070, 16 N. Y. Ann. Cas. 275; *Arnegard v. Arnegard*, 7 N. Dak. 475, 75 N. W. 797, 41 L. R. A. 258.

²⁵ *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212; *Herculis &c. Mining Co. v. Central Inv. Co.*, 98 Ill. App. 427; *Durand v. Higgins*, 67 Kans.

110, 72 Pac. 567; *Jeffers v. Philo*, 35 Ohio St. 173; *Rogers v. Rogers*, 53 Wis. 36, 10 N. W. 2; *Parker v. Kane*, 4 Wis. 1; *Bogie v. Bogie*, 35 Wis. 659; *Hinchliff v. Hinman*, 18 Wis. 130; *Lowber v. Connit*, 36 Wis. 176; See also, *Clark v. Harper*, 215 Ill. 24, 74 N. E. 61; *Hazle v. Bondy*, 70 Ill. App. 185, affd. in part 173 Ill. 302, 50 N. E. 671; *Old National Bank v. Findley*, 131 Ind. 225, 31 N. E. 62; *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4; *Brown v. Hartman*, 57 Neb. 341, 77 N. W. 776; *Peterson v. Carson*, (Tenn.) 48 S. W. 383; *McClen-don v. Brockett*, 32 Tex. Civ. App. 150, 73 S. W. 854.

are in general as applicable to a sealed instrument in America as they are to a simple contract.

§ 57. **Sales.**—The general rules governing offer and acceptance find many illustrations in the case of sales. Indeed an offer to sell goods or chattels and an acceptance of such offer is the most apt illustration that can be given showing that a contract has its inception in offer and acceptance. There must be an offer to buy,²⁶ or sell²⁷ to which must be given an unconditional assent²⁸ prior to the withdrawal or lapse of the offer.²⁹ A sufficient assent may be shown by acting on the offer. Thus the shipment or delivery of the goods specified by the order and in accordance with its terms is an acceptance of such order.³⁰ If an acceptance

²⁶ *Shady Hill Nursery Co. v. Waterer & Sons*, 179 Mass. 318, 60 N. E. 789; *West Shore Lumber Co. v. Northrop*, 94 Wis. 558, 69 N. W. 338; *Abrahams v. Revillion Freres*, 129 Wis. 235, 107 N. W. 656. See ante, § 27, Nature of offer.

²⁷ *State v. Peters*, 91 Maine 31, 39 Atl. 342; *Ward v. Beecher*, 56 Mich. 616, 23 N. W. 438; *Buckberg v. Washburn-Crosby Co.*, 115 Mo. App. 701, 92 S. W. 733. See ante, § 27, Nature of offer.

²⁸ *Hyde v. Wrench*, 3 Beav. 334; *Jones v. Daniel* (1894), 2 Ch. 332; *Appleby v. Johnson*, L. R. 9 C. P. 159; *Hutchinson v. Bowles*, 5 M. & W. 535; *Jordan v. Norton*, 4 M. & W. 155; *D. S. Cage & Co. v. Black*, 97 Ark. 613, 134 S. W. 942; *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 79 Pac. 366, 68 L. R. A. 226; *Kelley & Co. v. Sibley*, 137 Fed. 586, 69 C. C. A. 674; *China & C. Trading Co. v. Davis*, 119 Fed. 688, 56 C. C. A. 108; *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447; *Decker v. Gwinn*, 95 Ga. 518, 20 S. E. 240; *Chicago & C. Co. v. Paepcke & C. Co.*, 108 Ill. App. 249; *Maclay v. Harvey*, 90 Ill. 525; *Rogers v. French*, 122 Iowa 18, 96 N. W. 767; *Hudson v. Arnold*, 29 Ky. L. 375, 93 S. W. 42; *Hutcheson v. Blakeman*, 3 Metc. (Ky.) 80; *Stock v. Towle*, 97 Maine 408, 54 Atl. 918; *Maynard v. Tabor*, 53 Maine 511; *Thomas v. Greenwood*, 69 Mich. 215, 37 N. W. 195; *Eggles-*

ton v. Wagner, 46 Mich. 610, 10 N. W. 37; *Brophy v. Idaho & C. Provision Co.*, 31 Mont. 279, 78 Pac. 493; *Arnold v. Cason*, 95 Mo. App. 426, 69 S. W. 34; *Robinson & Co. v. Ralph*, 74 Nebr. 55, 103 N. W. 1044; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Myers v. Smith*, 48 Barb. (N. Y.) 614; *Uhlman v. Day*, 38 Hun. (N. Y.) 298; *Myers v. Trescott*, 59 Hun. (N. Y.) 395, 13 N. Y. S. 54; *Hartford & C. Insurance Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629; *Snow v. Miles*, 3 Clif. (U. S.) 608; *Carr v. Duval*, 14 Pet. (U. S.) 77, 10 L. ed. 361; *Bringham v. American Bridge Co.*, 39 Wash. 3, 80 Pac. 788; *Northwestern Iron Co. v. Meade*, 21 Wis. 474.

²⁹ *Minneapolis Threshing Machine Co. v. Evans*, 139 Fed. 860; *Bradley v. Smith* (Iowa), 77 N. W. 506; *Arnold v. Cason*, 95 Mo. App. 426, 69 S. W. 34; *Hallwood Cash Register Co. v. Finnegan*, 84 N. Y. S. 154; *E. Bement & Sons v. Rockwell*, 92 App. Div. (N. Y.) 44, 86 N. Y. S. 876. Lapse by death of offerer, *Riner v. Husted's Estate*, 13 Colo. App. 523, 58 Pac. 793.

³⁰ *McCormick Harvesting Mach. Co. v. Markert*, 107 Iowa 340, 78 N. W. 33; *Aultman Miller & C. Co. v. Nilson*, 112 Iowa 634, 84 N. W. 692; *Minneapolis & C. Co. v. Zemanek*, 130 Iowa 120, 106 N. W. 512; *National Cash Register Co. v. Dehn*, 139 Mich. 406, 102 N. W. 965.

is duly signified by mail,³¹ or telegraph,³² it is usually binding from the time the assent is mailed or delivered to the telegraph company. In the absence of an express agreement providing otherwise it is the sending and not the receipt of the acceptance that controls.³³ A mere proposal to sell³⁴ or purchase,³⁵ notwithstanding it purports to give a definite time for acceptance,³⁶ may be withdrawn at any time before the acceptance. This is true of orders given agents. Since they may be rejected by the principal, the signature of the agents attached to such orders not being an acceptance on the part of the employer, the purchaser may countermand the order before acceptance by the agent's principal.³⁷ But if the agent has authority to bind his principal and accept the offer, his acceptance is binding on the principal who cannot sub-

³¹ *Wheat v. Cross*, 31 Md. 99; *Peck v. Freese*, 101 Mich. 321, 59 N. W. 600; *Reeves & Co. v. Bruening*, 13 N. Dak. 157, 100 N. W. 241; *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811, 866; *Taylor v. Merchants Fire Ins. Co.*, 9 How. (U. S.) 390, 13 L. ed. 187; *The Palo Alto*, 2 Ware (N. S.) 344; *Whitman Agricultural Co. v. Strand*, 8 Wash. 647, 36 Pac. 682.

³² *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. 387; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. (U. S.) 431, Fed. Cas. No. 9635.

³³ See also, *Acceptance by mail and telegraph*.

³⁴ *Miller v. Douville*, 45 La. Ann. 214, 12 So. 132; *Sprague v. Train*, 34 Vt. 150.

³⁵ *Weiden v. Woodruff*, 38 Mich. 130.

³⁶ *Dickinson v. Dodds*, 2 Ch. D. 463; *Offord v. Davies*, 12 C. B. (N. S.) 748; *Great Northern R. Co. v. Witham*, L. R. 9 C. P. 16, 19; *Smith v. Bateman*, 25 Colo. 241, 53 Pac. 457; *School Directors v. Trefethren*, 10 Ill. App. 127; *Larmon v. Jordan*, 56 Ill. App. 204, 206; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417; *Boston & C. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Weiden v. Woodruff*, 38 Mich. 130; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Schenectady Stove Co. v. Hol-*

brook, 101 N. Y. 45, 4 N. E. 4; *Bosshardt & Co. v. Crescent Oil Co.*, 171 Pa. 109, 32 Atl. 1120; *Minneapolis & C. R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. 168; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. 103n.

³⁷ *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 So. 675; *Atlanta Buggy Co. v. Hess Springs & Co. Axel Co.*, 124 Ga. 338, 52 S. E. 613, 4 L. R. A. (N. S.) 431n; *L. A. Becker Co. v. Alvey*, 27 Ky. L. 832, 86 S. W. 974; *Cary v. Appo*, 84 N. Y. S. 569; *National Ref. Co. v. Miller*, 1 S. Dak. 548, 47 N. W. 962; *Whitaker v. Zehner* (Tex. Civ. App.), 61 S. W. 499; *Wolf v. Galbraith*, 35 Tex. Civ. App. 505, 80 S. W. 648. The above is especially true where it is expressly provided in the order that the sale was made subject to the seller's approval. *Martin v. Wilms*, 61 Ill. App. 108; *J. Thompson & Sons Mfg. Co. v. Perkins*, 97 Ia. 607, 66 N. W. 874; notwithstanding, there is also in the provision in the order against its being countermanded. *Challenge & Co. Mill Co. v. Kerr*, 93 Mich. 328, 53 N. W. 555. After the order has been accepted by the principal it then becomes mutually binding. *Bauman v. McManus*, 75 Kans. 106, 89 Pac. 15, 10 L. R. A. (N. S.) 1138n. There is no sale until the order is accepted by the seller. *Bowlin Liquor Co. v. Beaudoin*, 15 N. Dak. 557, 108 N. W. 545. *Peck v. Freese*, 101 Mich. 321, 59 N. W. 600.

sequently reject it.³⁸ A fortiori, a purchaser may cancel an order given to an agent at any time before its acceptance by the principal.³⁹ The reason for this rule being that since there is no consideration for the offer, it is a mere unilateral promise and consequently a nudum pactum.⁴⁰

§ 58. **Auction sales.**—The announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intent to hold an auction at which bids will be received. A bid is an offer which is accepted when the hammer falls.⁴¹ Until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase,⁴² or, ordinarily at least the auctioneer his offer to sell.⁴³ In reviewing the decisions on this subject one

³⁸ *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 94 Am. St. 112n, 59 L. R. A. 122; *Reeves v. Bruening*, 13 N. Dak. 157, 100 N. W. 241.

³⁹ *Merchants Exchange Co. v. Sanders*, 74 Ark. 16, 84 S. W. 786; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897; *Baird v. Pratt*, 148 Fed. 825, 78 C. C. A. 515, 10 L. R. A. (N. S.) 1116; *Martin & Co. v. Wilms*, 61 Ill. App. 108; *Durkee v. Schultz*, 122 Iowa 410, 98 N. W. 149; *L. A. Becker Co. v. Alvey*, 27 Ky. L. 832, 86 S. W. 974; *Brown v. Snider*, 126 Mich. 198, 85 N. W. 570; *Hallwood Cash Register Co. v. Finnegan*, 84 N. Y. S. 154; *Mayo v. Koller*, 28 Pa. Super. Ct. 91; *L. J. Mueller Furnace Co. v. Meiklejohn*, 121 Wis. 605, 99 N. W. 332.

⁴⁰ *Cooke v. Oxley*, 3 T. R. 653; *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533; *Cady v. Straus*, 97 Va. 701, 34 S. E. 615. An order for materials may be canceled at any time before acceptance. *Johnson v. Filkington*, 39 Wis. 62.

⁴¹ *Anderson v. Wisconsin & C. R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133n.

⁴² *Payne v. Cave*, 3 T. R. 148; *Fenwick v. McDonald & C. Co.*, 6 Fed. 850; *Anderson v. Wisconsin & C. R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133n; *Fisher v. Seltzer*,

23 Pa. St. 308, 62 Am. Dec. 335. Property may be withdrawn before any bids are received and one who intended to bid is not entitled to recover for loss of time and expenses in attending such sale. *Harris v. Nickerson* (1873), L. R. 8 Q. B. 286, 21 Weekly Rep. 635. See also, *Manser v. Back*, 6 Hare 443.

⁴³ *Corryolles v. Mossy*, 2 La. 504. This decision is based in the statutory provision. *Anderson v. Wisconsin R. Co.*, 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133n; *Newman v. Vonderheide*, 9 Ohio Dec. (reprint) 164. One holding a judicial (*Keightley v. Birch*, 3 Campb. 521; *Henderson v. Sublett*, 21 Ala. 626; *State Bank v. Brown*, 128 Iowa 665, 105 N. W. 49; *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 88 Pac. 199, 9 L. R. A. (N. S.) 748); or administrator's sale (*Bean v. Kirkpatrick*, 105 Ga. 476, 30 S. E. 426; *Rogers v. Dickey*, 117 Ga. 819, 45 S. E. 71; *Tillman v. Dunman*, 114 Ga. 406, 40 S. E. 849, 88 Am. St. 28, 7 L. R. A. 784); may withdraw the property and prevent its being sacrificed. As to sheriff withdrawing from sale, see *Conway v. Nolte*, 11 Mo. 74. *Knox v. Spratt*, 19 Fla. 817; *Shaw v. Potter*, 50 Mo. 281; *State v. Moore*, 72 Mo. 285; *Cole Co. v. Madden*, 91 Mo. 585, 4 S. W. 397; *Rogers & C. Co.*

occasionally finds strong intimations to the effect that the auctioneer cannot withdraw the property from sale when it is offered without reserve.⁴⁴ But investigation discloses that the cases containing statements to this effect were decided on other grounds. Nor could such a holding be sustained on principle, for it is conceded that the bidder may withdraw his bid any time before acceptance. It follows therefore that the bid is a mere offer which is not binding until accepted. Mutuality is an essential element of a contract. One party cannot be bound and the other remain free; consequently if the bidder has a right to withdraw his bid it follows that the auctioneer or owner must be accorded the privilege of withdrawing the property from sale.⁴⁵ The property in a chattel sold by auction passes at the fall of the hammer.⁴⁶

v. Cleveland Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. 494, 31 L. R. A. 335; Davis v. McCann, 143 Mo. 172, 44 S. W. 795; Blossom v. Milwaukee &c. R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43. The following are cases holding that the sheriff has no discretion but must sell in case bids are made by a responsible person. See State v. Johnson, 2 N. Car. 293; Gilbert v. Watts-DeGolyer Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. 154; Morton v. Moore, 4 Ky. L. 717; McLeod v. McCall, 48 N. Car. 87. An auctioneer may refuse to accept a bid which is trifling when compared to the actual value of the property. Taylor v. Harnett, 26 Misc. (N. Y.) 362, 55 N. Y. S. 988. To same effect, Anderson v. Wisconsin &c. R. Co., 107 Minn. 296, 120 N. W. 39, 131 Am. St. 462n, 20 L. R. A. (N. S.) 1133n. It is provided by the uniform sales law that goods offered at auction may be withdrawn at any time before the fall of the hammer provided the sale has not been announced to be without reserve. This statute has been adopted by the states of Arizona, Connecticut, New Jersey, Massachusetts, Ohio, Rhode Island. It has been suggested by Prof. Langdell that it would have been better to hold that every bid constitutes "an actual sale, subject to the condition that no one else should bid higher." Summary Law of Contracts, § 19.

⁴⁴ Warlow v. Harrison, 1 El. & El. 309. The above case is criticized and doubted in Walds Pollock on Contracts (3d ed.), p. 18. Johnston v. Boyes (1899), 2 Ch. D. 73, 68 L. J. Ch. (N. S.) 425; Harris v. Nickerson (1873), L. R. 8 Q. B. 286, 21 Weekly Rep. 635; Spencer v. Harding, L. R. 5 C. P. 561; In re Agra &c. Bank, L. R. 2 Ch. 391; Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168; Hartwell v. Gurney, 16 R. I. 78, 13 Atl. 113.

⁴⁵ Anderson v. Wisconsin &c. R. Co., 107 Minn. 296, 120 N. W. 39, 131 Am. St. 462n, 20 L. R. A. (N. S.) 1133n.

⁴⁶ Sweeting v. Turner, L. R. 7 Q. B. 310, 41 L. J. Q. B. 58; Coker v. Dawkins, 20 Fla. 141; Lucas v. Wallace, 42 Ill. App. 172; Canal Bank v. Copeland, 6 La. 543; Municipality No. 1 v. Cordeviole, 19 La. 235; Succession of Bondonsquire, 9 Rob. (La.) 405; Noah v. Pierce, 85 Mich. 70, 48 N. W. 277; Ives v. Tregent, 29 Mich. 390; Clark v. Greeley, 62 N. H. 394. Unless under the terms and conditions of the sale a contrary intention is evinced. Williams v. Connoway, 3 Houst. (Del.) 63; Mazoue v. Caze, 18 La. Ann. 31. In the case of Pike v. Balch, 38 Maine 302, 61 Am. Dec. 248, 254, it is said, "The property did not rest in the bidder by being fairly knocked off to him," but this case was decided under a statute of that state. One who bid off a lot under

§ 59. **Building and working contracts.**—A contract which calls for the performance of work and labor in the construction, erection or repair of some building, structure or work, is governed by the rules applicable to contracts in general. Consequently, before a binding working or building contract is formed, there must be an offer and its acceptance.⁴⁷ The builder may ask

the good faith impression that he is buying a different one is not bound by the purchase provided he can show there was no want of diligence on his part to ascertain the facts. There was no meeting of minds. *Clay v. Kagelmacher*, 98 Ga. 149, 26 S. E. 493. The employment of "puffers" to bid up the price invalidates a sale to a bona fide purchaser at his option; *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168; *Baham v. Bach*, 13 La. 287, 33 Am. Dec. 561; *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.) 281, 1 Am. Dec. 407; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Springer v. Kleinsorge*, 83 Mo. 152; *Wolfe v. Luyster*, 1 Hall Super. Ct. (N. Y.) 146; *National Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431; *Fisher v. Hersey*, 17 Hun. (N. Y.) 370; *Bowman v. McClenahan*, 20 App. Div. (N. Y.) 346, 46 N. Y. S. 945, 4 N. Y. Ann. Cas. 388; *Trust v. Delaplaine*, 3 E. D. Smith (N. Y.) 219; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Smith v. Greenlee*, 2 Dev. (N. Car.) 126, 18 Am. Dec. 564; *McDowell v. Simms*, 6 Ired. Eq. (N. Car.) 278; *Woods v. Hall*, 1 Dev. Eq. (N. Car.) 411; *Morehead v. Hunt*, 1 Dev. Eq. (N. Car.) 35; *Pennock's Appeal*, 14 Pa. St. 446, 53 Am. Dec. 561; *Donaldson v. McRoy*, 1 Browne (Pa.) 346; *Yerkes v. Wilson*, 32 Smith (Pa.) 9; *Flannery v. Jones*, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. 648; *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492; *Hinde v. Pendleton*, Wythe (Va.) 145; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398; *Veazie v. Williams*, 8 How. (U. S.) 134, 12 L. ed. 1018, 3 Story (U. S.) 611. Even though the buyer gets his money's worth. *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492. As to who is a "puffer" see *McMillian v. Harris*, 110 Ga. 72, 35 S. E. 334, 78 Am. St. 93, 48 L. R. A. 345; *Locke*

v. Willingham, 99 Ga. 297, 25 S. E. 693. On the other hand an agreement among the bidders not to bid against each other vitiates a sale and the seller is not bound. *Carrington v. Caller*, 2 Stew. (Ala.) 175; *Loyd v. Malone*, 23 Ill. 41, 74 Am. Dec. 179n; *Pike v. Balch*, 38 Maine 302, 61 Am. Dec. 248; *Phippen v. Stickney*, 3 Metc. (Mass.) 384; *Whitaker v. Bond*, 63 N. Car. 290; *Smith v. Greenlee*, 13 N. Car. 126, 18 Am. Dec. 564. But the mere attempt on the part of the purchaser to stifle competition will not invalidate the sale. *Haynes v. Crutchfield*, 7 Ala. 189. An attempt by the auctioneer to discourage bidding is a fraud on the seller. *Brotherline v. Swires*, 48 Pa. St. (12 Wright) 68. But an agreement among several persons by which one is to purchase for all is valid unless it was intended to prevent competition. *Goode v. Hawkins*, 17 N. Car. 393. *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743. See also, *Kearney v. Taylor*, 15 How. (U. S.) 494, 15 L. ed. 607; *Allen v. Stephanes*, 18 Tex. 658. In case the auctioneer is selling goods for one man, and another procures him to sell his goods without disclosing to whom they belong, it is a fraud both on the auctioneer and purchaser and will entitle the latter to repudiate the sale. *Thomas v. Kerr*, 3 Bush. (Ky.) 619, 96 Am. Dec. 262n. ⁴⁷*Hodges v. Sublett*, 91 Ala. 588, 8 So. 800; *Mobile &c. R. Co. v. Worthington*, 95 Ala. 598, 10 So. 839; *Nagle v. McMurray*, 84 Cal. 539, 24 Pac. 107; *Dunning v. Thomas*, 10 Colo. 84, 14 Pac. 49; *Lewis v. Crow*, 69 Ind. 434; *Jackson v. Carson*, 160 Mass. 215, 35 N. E. 483; *White v. Corlies*, 46 N. Y. 467; *Poulson v. De Navarro*, 171 N. Y. 692, 64 N. C. 1125, 57 App. Div. (N. Y.) 623; *Dysken v. Herter*, 175 N. Y. 480, 67 N. E. 1081, 73 App.

for bids on the work to be performed but until he has accepted one of the bids there is no binding contract.⁴⁸ The agreement is consummated and becomes binding on the parties when a particular offer is accepted.⁴⁹ This acceptance must, of course, be unconditional and conform strictly to the terms of the bid.⁵⁰ A modified acceptance is nothing more than a new offer which must be accepted by the bidder before there is any binding contract.⁵¹

Div. (N. Y.) 453, 77 N. Y. S. 300; *Talmadge v. Spofford*, 41 N. Y. Super. Ct. 428; *Levenson v. Bollowa*, 85 N. Y. S. 386; *Peoples R. Co. v. Memphis R. Co.*, 10 Wall. (U. S.) 38, 19 L. ed. 844; *Johnson v. Filkington*, 39 Wis. 62. See also, *Detroit Sav. Bank v. Loveland*, — Mich. —, 130 N. W. 678. A schedule of prices when signed by the parties does not constitute a written agreement to erect a building. *Eyser v. Weissgerber*, 2 Iowa 463. An offer to dig a well is not binding until accepted by the employer. *Kernan v. Carter*, 31 Ky. L. 865, 104 S. W. 308. As with rewards, the offer need not be made to any particular person. *Bull v. Talcot*, 2 Root (Conn.) 119, 1 Am. Dec. 62.

⁴⁸*Reusch v. American Brewing Assn.*, 44 La. Ann. 1111; *Howard v. Maine Industrial School*, 78 Maine 230, 3 Atl. 657; *Doyle v. Desenberg*, 74 Mich. 79, 41 N. W. 866; *Hogan v. Shields*, 20 Mont. 438, 52 Pac. 55; *Soper v. Buffalo & C. R. Co.*, 19 Barb. (N. Y.) 310; *Topping v. Swords*, 1 E. D. Smith (N. Y.) 609; *State v. Board of Education*, 42 Ohio St. 374; *Leskie v. Haseltine*, 155 Pa. St. 98, 25 Atl. 886. See also, *Molloy v. New Rochelle*, 198 N. Y. 402, 92 N. E. 94, 30 L. R. A. (N. S.) 126n, holding that making of lowest bid does not complete the making of the contract where the advertisement for bids reserves the right to reject any or all bids.

⁴⁹*Acceptance* (Allen v. Yoxall, 1 C. & K. 315, 47 E. C. L. 314; *Lewis v. Brass*, 3 Q. B. D. 667; *McCormack v. Lynch*, 69 Mo. App. 524; *Dutch v. Harrison*, 37 N. Y. Super. Ct. 306; *Lane & Nearn v. Warren*, 53 Tex. Civ. App. 122, 115 S. W. 903; *Garfield v. United States*, 93 U. S. 242, 23 L. ed. 779) binds the builder (*Jackson v. North Wales R. Co.*, 1

Hall & T. 75, 6 R. & Can. Cas. 112; *Mobile & C. R. Co. v. Worthington*, 95 Ala. 598, 10 So. 648; *Sandford v. East Riverside Irrigation Dist.*, 101 Cal. 275, 35 Pac. 865; *Matter of Protestant Episcopal School*, 58 Barb. (N. Y.) 161, 40 How. Pr. (N. Y.) 139; *Highland Co. v. Rhoades*, 26 Ohio St. 411; *Hughes v. Clyde*, 41 Ohio St. 339; *Joske v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. 586) even though it seems that the parties may have intended to draw up a contract at a time subsequent to the acceptance of the bid provided no new or different provisions were to be embodied therein (*Lewis v. Brass*, 3 Q. B. D. 667), notwithstanding that it is understood that a formal contract is to be drawn up. *Disken v. Herter*, 73 App. Div. (N. Y.) 453, 77 N. Y. S. 300. Where the builder agreed to reduce the contract to writing the contractor may suspend work until this provision is complied with. *Smith v. O'Donnell*, 36 N. Y. S. 480, 15 Misc. (N. Y.) 98.

⁵⁰*Howard v. Industrial & C. School*, 78 Maine 230, 3 Atl. 657.

⁵¹*Hughes v. Clyde*, 41 Ohio St. 339. Should the bid vary from the specifications of the request, its acceptance will create a contract in conformity to the terms of such bid. *Sneed & C. Iron Works v. Douglas*, 49 Ark. 355, 5 S. W. 585; *Schwoerer v. Zimmermann*, 63 N. Y. S. 1020, 30 Misc. (N. Y.) 800. In case a formal written contract is drawn up and signed after acceptance, which contains provisions which differ from those of the original offer and acceptance, the original contract found by such assent is merged in the written contract. *Taylor v. Fox*, 16 Mo. App. 527; *Megrath v. Gilmore*, 10 Wash. 339, 39 Pac. 131.

In the absence of any express provision as to the method by which acceptance is to be evidenced, it is unnecessary to follow any particular form in making the acceptance,⁵² provided there is manifested an intention to accept the bid.⁵³ Should there be a provision in the specifications requiring the bidder to give bond it may be waived by the one asking for bids,⁵⁴ and when this is done failure to furnish such bond is no defense to an action on the contract.⁵⁵ By the statutes of most states it is provided that when a municipal corporation contracts for the performance of work and labor such contract is to be let to the lowest responsible bidder.⁵⁶ The competition between bidders on public works must be real; consequently an agreement whereby the prospective bidders seek to stifle competition in bids is against public policy and illegal,⁵⁷ and should one of the parties to such an agreement be awarded the contract the municipality may avoid the contract because of fraud.⁵⁸

The assent must be real. But one's conduct may be such that he will not be permitted to assert that he did not intend to accept, when the other relying on such conduct has performed his part of the contract.⁵⁹ Nor will one be relieved from the contract resulting from his unconditional acceptance of an offer when such acceptance was induced by his own mistake

⁵² *Burch v. New Lindell Hotel Co.*, 7 Mo. App. 583.

⁵³ *Leskie v. Haseltine*, 155 Pa. St. 98, 25 Atl. 886.

⁵⁴ *Mobile &c. R. Co. v. Worthington*, 95 Ala. 598, 10 So. 839.

⁵⁵ *Diskens v. Herter*, 73 App. Div. (N. Y.) 453, 77 N. Y. S. 300, affd. 175 N. Y. 480, 67 N. E. 1081; *Joske v. Pleasants*, 15 Tex. Civ. App. 433, 37 S. W. 586.

⁵⁶ *Roberts v. Taft*, 109 Fed. 825, 116 Fed. 228; *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Fox v. New Orleans*, 12 La. Ann. 154, 68 Am. Dec. 766; *Hoole v. Kinkead*, 16 Nev. 217; *People v. Dorsheimer*, 55 How. Pr. (N. Y.) 118; *Weed v. Beach*, 56 How. Pr. (N. Y.) 470; *People v. Contracting Board*, 27 N. Y. 378; *State v. Licking Co.*, 26 Ohio St. 531; *State v. Board of Education*, 42 Ohio St. 374; *Commonwealth v.*

Mitchell, 82 Pa. St. 343; *Mueller v. Eau Claire Co.*, 108 Wis. 304, 84 N. W. 430.

⁵⁷ *Hannah v. Fife*, 27 Mich. 172; *Gulick v. Ward*, 10 N. J. L. 102, 18 Am. Dec. 389; *People v. Lord*, 6 Hun (N. Y.) 390, affd. 71 N. Y. 527; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *People v. Stephens*, 71 N. Y. 527; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627.

⁵⁸ *People v. Lord*, 6 Hun (N. Y.) 390, affd. 71 N. Y. 527.

⁵⁹ *Phillip v. Gallant*, 62 N. Y. 256. One who requests that certain work be done is liable on an implied promise to pay the reasonable cost of such work. *Hennessy v. Fleming*, 40 Colo. 27, 90 Pac. 77. See also, *Jones v. Slaughter*, 28 App. D. C. 43.

negligently made.⁶⁰ Nor will he be relieved on the ground that he misunderstood the legal import of the language used.⁶¹ As with other contracts, building and working agreements must be certain in their terms.⁶² The oft repeated rule that a contract is not complete until the minds of the parties have met upon all the terms which they intend to introduce into the contract applies. But this does not mean that the parties must leave absolutely nothing to be done after the acceptance of the offer. It means merely that as between them nothing further is to be agreed upon. The agreement may be entered into with reference to certain plans and specifications which detail the work to be done,⁶³ but the reference to such plans must be definite and certain.⁶⁴ The interpretation of the drawings and specifications may be left to the architects.⁶⁵ Or they may select some one person to act as umpire, supervise the work and determine how much is due the contractor for work and materials.⁶⁶ The time within

⁶⁰ *Moffett &c. Co. v. Rochester*, 91 Fed. 28, 33 C. C. A. 319 (reversed in *Moffett v. Rochester*, 178 U. S. 373, 44 L. ed. 1108, 20 Sup. Ct. 957, on the ground that the minds of the parties never met, however, and not denying the general rule stated in the text). *Brown v. Levy*, 29 Tex. Civ. App. 389, 69 S. W. 255. See also, *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564n, 10 L. R. A. (N. S.) 114, 117 Am. St. 224 and note; 1 *Elliott on Roads & Sts.* (3d ed.), § 648. But if the mistake is mutual and renders the contract impossible of performance it discharges the agreement. *Nordyke & Marmon Co. v. Kehlor*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. 600. See also, *R. O. Bromagin & Co. v. Bloomington*, 234 Ill. 114, 84 N. E. 700.

⁶¹ *Kimberley v. Dick*, L. R. 13 Eq. 1; *Wood v. Wack*, 31 Ind. App. 252, 67 N. E. 562; *Wheaton Building &c. Co. v. City of Boston*, 204 Mass. 218, 90 N. E. 598.

⁶² *Fraley v. Bentley*, 1 Dak. 25, 46 N. W. 506; *Phelps v. Sheldon*, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384; *Doyle v. Desenberg*, 74 Mich. 79, 41 N. W. 866; *Isaacs v. Smith*, 55 N. Y. Super. Ct. 446; *Thomas v. Thomasville Shooting*

Club, 123 N. Car. 285, 31 S. E. 654; *Levering v. Mayor*, 7 Humph. (Tenn.) 553; *Cole v. Clark*, 4 Chand. (Wis.) 29, 3 Pin. (Wis.) 303.

⁶³ *O'Connor v. Adams*, 6 Ariz. 404, 59 Pac. 105; *Worden v. Hammond*, 37 Cal. 61.

⁶⁴ *Worden v. Hammond*, 37 Cal. 61; *Williamette &c. Co. v. Los Angeles &c. Co.*, 94 Cal. 229, 29 Pac. 629; *Donnelly v. Adams*, 115 Cal. 129, 46 Pac. 916; *Almini Co. v. King*, 92 Ill. App. 276. If the contract itself sufficiently describes the work to be done the mere fact that the reference to the specifications is indefinite is not such an uncertainty as will render the agreement unenforceable. *Hitchcock v. Galveston*, 3 Woods (U. S.) 287, 12 Fed. Cas. No. 6534.

⁶⁵ *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347. Or the contract may provide that the owner shall have the right to construe the contract and that his construction is final. *Swealt v. Hunt*, 42 Wash. 96, 84 Pac. 1.

⁶⁶ *Carlile v. Corrigan*, 83 Ark. 136, 103 S. W. 620; *Mundy v. Louisville &c. R. Co.*, 67 Fed. 633; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139. The one to whom this power is delegated must exercise it in good

which the work is to be done and payment made therefor need not be set out.⁶⁷ The contractor may usually recover for a substantial performance provided he has made a good faith attempt to comply with its provisions.⁶⁸

§ 60. Miscellaneous cases of offer and acceptance held sufficient.—The appellee advertised for bids for the erection of a proposed residence. The appellant submitted a proposal. When the bids that had been submitted were opened and examined by appellee, it was found that the one submitted by appellant was the lowest. The appellee then remarked to the appellant, "Well, Mr. Lane, I guess it is up to you. Yours is the lowest

faith. *Baltimore &c. R. Co. v. Scholes*, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. 307n; *Edwards v. Hartshorn*, 42 Kans. 19, 82 Pac. 520, 1 L. R. A. (N. S.) 1050; *Young v. Stein*, 152 Mich. 310, 116 N. W. 195, 17 L. R. A. (N. S.) 231, 125 Am. St. 412; *Chism v. Schipper*, 51 N. J. L. 1, 16 Atl. 316; 14 Am. St. 668, 2 L. R. A. 544; *Cornell v. Steele*, 109 Va. 589, 64 S. E. 1038, 132 Am. St. 931; *Halsey v. Waukesha Springs &c. Co.*, 125 Wis. 311, 104 N. W. 94, 110 Am. St. 838.

⁶⁷ Where the agreement is silent as to how certain work is to be done there is an implied agreement that it shall be done in a workmanlike manner. *Schindler v. Green*, 149 Cal. 752, 87 Pac. 626. It is implied that the contractor take such steps toward the completion of the work as the necessities of the occasion demand. *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598. *Phelps v. Sheldon*, 13 Pick. (Mass.) 50, 23 Am. Dec. 659.

⁶⁸ *Walstrom v. Oliver-Watts Const. Co.*, 161 Ala. 608, 50 So. 46; *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723; *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264; *Morehouse v. Bradley*, 80 Conn. 611, 69 Atl. 937; *Peterson v. Pusey*, 141 Ill. App. 578; *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 476, 81 N. E. 1067; *Fauble v. Davis*, 48 Iowa 462; *Morford v. Mastin*, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168; *Dugue*

v. Levy, 114 La. 21, 37 So. 995; *Handy v. Bliss*, 204 Mass. 513, 90 N. E. 864, 134 Am. St. 673n; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268n; *Gleason v. Smith*, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; *Cullen v. Sears*, 112 Mass. 299; *Handy v. Bliss*, 204 Mass. 513, 90 N. E. 864, 134 Am. St. 673n; *Strome v. Lyon*, 110 Mich. 680, 68 N. W. 983; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52n; *Boteler v. Roy*, 40 Mo. App. 234; *Hahn v. Bonacum*, 76 Nebr. 837, 107 N. W. 1001, 109 N. W. 368; *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *Nolan v. Whitney*, 88 N. Y. 648; *Van Orden v. MacRae*, 121 App. Div. (N. Y.) 143, 105 N. Y. S. 600; *Anderson v. Todd*, 8 N. Dak. 158, 77 N. W. 599; *Kane v. Ohio Stone Co.*, 39 Ohio St. 1; *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573; *Todd v. Huntington*, 13 Ore. 9, 4 Pac. 295; *Danville Bridge Co. v. Pomroy*, 15 Pa. 151; *Gallagher v. Sharpless*, 134 Pa. 134, 19 Atl. 491; *Aldrich v. Wilmarth*, 3 S. Dak. 523, 54 N. W. 811; *Jennings v. Willer* (Tex. Civ. App.), 32 S. W. 24; *Franks v. Harkness*, — Tex. Civ. App. —, 117 S. W. 913; *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004; *Gilman v. Hall*, 11 Vt. 510, 34 Am. Dec. 700; *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443; *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327. As to what constitutes substantial performance, see ante, § 49. Performance of Consideration as Acceptance.

bid." The submission of the bid was held to be an offer and the statement by appellee to appellant construed as an acceptance of such offer.⁶⁹ And where it appeared that an intestate, had during his life, a desire to sell his stock in a certain oil company and wrote the company to that effect to which the superintendent replied, "Now at any time after six months if you still think you want to quit, I will cash you up myself and pay you 6 per cent., if you can't do better." This was held to be a continuing offer good, if not withdrawn, for six months and for reasonable time thereafter.⁷⁰ Likewise where a defendant offered to lease his store to a trading corporation and to furnish a certain amount of money for an issue of preferred stock by such company, a meeting of the stockholders and the authorization of such increase and the election of the defendant as a director in the corporation amounted to an acceptance of his offer.⁷¹ And where it appeared that the parties had orally agreed upon the terms of a contract and that this oral agreement was reduced to writing but was not read by one of the parties who, when sued, claimed that the terms of said oral agreement were not the same as those contained in the formal writing, a judgment in favor of defendant was set aside. For it appeared that after defendants had knowledge of the contents of the writing which they had previously signed, they shipped goods, received shipping orders, sent stock lists and promised performance of the contract and failed to repudiate its terms. For this reason it was held that the plaintiff was entitled to a new trial.⁷² The defendant wrote the plaintiff to the effect, "You understand that I have guaranteed the stock to Mr. Doyon as against bills owing Mr. Stevens on the stock and there is no need of you making costs or trouble for Mr. Doyon." To which the plaintiff replied, "We will accept \$338.59 as payment in

⁶⁹ *Lane & Nearn v. Warren*, 53 Tex. Civ. App. 122, 115 S. W. 903.

⁷⁰ *Ellis' Admr. v. Durkee*, 79 Vt. 341, 65 Atl. 94. For other cases holding that the offeree has a reasonable time in which to accept upon the arrival and the time for which the offer is made. See *Dawley v. Potter*, 19 R. I. 372, 36 Atl. 92. For a case held that six months is too long to wait, see *Park v. Whitney*, 148 Mass.

278, 19 N. E. 161. What is a reasonable time is ordinarily a question of fact. *New England Fire Ins. Co. v. Hayes*, 71 Vt. 306, 45 Atl. 221, 76 Am. St. 771; *Brainard v. Vandyke*, 71 Vt. 359, 45 Atl. 758; *Reynolds v. Reynolds*, 74 Vt. 463, 52 Atl. 1036.

⁷¹ *Person-Riegel Co. v. Lipps*, 219 Pa. 99, 67 Atl. 1081.

⁷² *Hobe Lumber Co. v. McGrath*, 102 Minn. 66, 112 N. W. 1053.

full of this claim, provided we receive remittance at once." This was held to be a substantial acceptance of the defendant's terms as the words "provided we receive remittance at once" would be implied by the terms of the promise.⁷³ And where an offer was accepted by mail and the letter read, "We have your esteemed favor of the 24th inst. with order No. 6504 * * * which we have entered for our best attention, and expect to make shipment by the time you have specified." It was held that there had been a complete and binding acceptance.⁷⁴ Likewise the words "your kind order through Mr. Schultz is duly at hand and will receive our prompt and careful attention," amounted to an acceptance.⁷⁵ A certain company offered to sell its business together with all property and effects for a specified sum. This offer after describing the property in question was as follows, "We offer the above property when we have finished our year's business for \$13,909." By agreement these terms were left open for acceptance on or before a certain date. This offer was construed as one contemplating an immediate sale on acceptance though possession was not to be surrendered until the expiration of the year's business, consequently the proposal was not so conditional that its acceptance would not constitute a contract.⁷⁶ And it has been held that there is an implied promise to pay for the support furnished where the decedent, before her death, requested her son-in-law to keep her, stating that she did not expect to be kept as a pauper, and that she was able to pay and requested that he keep an account.⁷⁷

§ 61. Miscellaneous cases of offer and acceptance held insufficient.—Bids were requested for the construction of a public work. On opening the bids it was found that the defendant had submitted the lowest figures. Thereupon "A motion was made and carried that the contract, as per plans and specifications be awarded to Mr. R. H. Fisher, he being the lowest bidder

⁷³ Grimsrud Shoe Co. v. Jackson, 106, 89 Pac. 15, 10 L. R. A. (N. S.) 22 S. Dak. 114, 115 N. W. 656. 1138n.

⁷⁴ Haskell & Barker Car Co. v. Allegheny Forging Co., — Ind. App. —, 91 N. E. 975. ⁷⁵ Purdom Naval Stores Co. v. Western Union Tel. Co., 153 Fed. 327.

⁷⁶ Bauman v. McManus, 75 Kans. L. 159, 104 S. W. 982. ⁷⁷ Bryson's Admr. v. Biggs, 32 Ky. L. 159, 104 S. W. 982.

and that the secretary instruct said Fisher to that effect." The secretary sent Fisher the following telegram: "You are the lowest bidder. Come on morning train." This telegram was held not to conclude a contract with him. It served no other purpose than the words thereof import, to advise Fisher that his bid was the lowest and that further consideration or arrangement awaited his appearance in response to the invitation to come.⁷⁸ Upon opening the bids for private enterprise the defendant or his agent said to the plaintiff, "You are the lucky man." These words were held not to complete the contract but were simply an acknowledgment that the plaintiff was the lowest bidder.⁷⁹ So, the mere fact that the lowest bidder knows that he is the lowest bidder will not award the contract to him.⁸⁰ Likewise a letter which stated, "I am instructed by our executive committee to say in reply that the plan set forth in your letter is entirely satisfactory to our company and we are ready to accept the agreement upon the basis proposed whenever prepared and submitted to us" did not conclude the contract, but was merely a preliminary step.⁸¹ And where the plaintiff in order to prove an acceptance of defendant's proposal alleged that he had refrained from acquiring a lien on its property because he had relied on such proposal, the court said, "There is an entire absence of proof that appellee ever announced or advised appellant that he would file a claim on its property, * * *" "Appellee may have had it in mind to claim a lien upon the property and may have had it in mind that appellee's letter to him was an offer to pay his claim if he would not file a lien for such claim, and he may have had it in mind to accept said offer but if so he announced none of these mental processes to appellant. The acceptance must be put by the party accepting, in a proper channel to be communicated to the party making the offer."⁸² A manufacturer of condensed milk claimed there was an agreement with a dealer whereby he was to have the exclusive right to sell a certain brand of milk in

⁷⁸ Cedar Rapids Lumber Co. v. Fisher, 129 Iowa 332, 105 N. W. 595, 4 L. R. A. (N. S.) 177n.

⁷⁹ Leskie v. Haseltine, 155 Pa. 98, 25 Atl. 886.

⁸⁰ Erving v. New York, 131 N. Y. 133, 29 N. E. 1101.

⁸¹ Commercial Tel. Co. v. Smith, 47 Hun (N. Y.) 494.

⁸² Cleveland &c. R. Co. v. Shea, 174 Ind. 303, 91 N. E. 1081.

a given territory. The evidence to support this agreement was a statement in a letter written by the manufacturer to this effect, "We expect you to have a large sale of this brand, as you have the exclusive control of it in your city." Under the circumstances this was held not to prove the agreement.⁸³ Nor does a broker employed to sell or procure a purchaser earn his commission by procuring a person to sign an option purchase and not binding him to purchase. The signing of a mere option to purchase would not be authorized by an authority to sell. It would not be a "sale" or contract of sale within the meaning of the principal's authority; for "sale" must ordinarily be taken to mean a complete sale and to include the agreement of the vendee to purchase as well as agreement to the vendor to sell.⁸⁴ It is also a general rule that where contracts are optional in respect to one party any delay on his part is viewed with especial strictness for the reason that the party seeking to enforce performance was not bound, while the other party was bound.⁸⁵ The mere fact that terms of an alleged contract are contrary to common experience is not as a general rule controlling. But where the evidence is so conflicting that the truth cannot be clearly perceived, the reasonableness or absurdity of what is claimed to have been the conduct of the parties may be of controlling importance.⁸⁶

§ 62. Time and place of contract determined by acceptance.

—As has been seen, no contract is formed until an unconditional assent has been given to the offer. The contract dates from the acceptance. The parties are not bound until that time. And while the acceptance is in the nature of an acknowledgment of an existing agreement it is held by an early English case⁸⁷ that this does not cause the contract to relate back to the date of the proposal,—at least not so as to effect the rights of third persons.⁸⁸

⁸³ Michigan Condensed Milk Co. v. (N. S.) 869, 31 L. J. C. P. 204. Kenneweg Co., 30 App. D. C. 491.

⁸⁴ Stengel v. Sergerant, 74 N. J. Beav. 206; Townley v. Bedwell, 14 Eq. 20, 68 Atl. 1106.

⁸⁵ Jones v. Moncrief-Cook Co., 25 Okla. 856, 108 Pac. 403.

⁸⁶ Patterson v. Mikkelson, 86 Nebr. 512, 125 N. W. 1104.

⁸⁷ Felthouse v. Bindley, 11 C. B. Ohio St. 346, 34 N. E. 159.

⁸⁸ See also, Ex parte Hardy, 30 Ves. Jr. 591; Edwards v. West, L. R. 7 Ch. Div. 858, 26 Weekly Rep. 507; Caldwell v. Frazier, 65 Kans. 24, 68 Pac. 1076; Gilbert v. Port, 28 Ohio St. 276; Smith v. Loewenstein, 50

However, the Supreme Court of California has said that the right to buy land under an option, "when exercised, must necessarily relate back to the time of giving the option."⁸⁹ In this case and the case cited by it, the rights of third persons acquired after the giving of the option but before the right to purchase thereunder had been exercised, were defeated. But in each case the third parties acquired their rights with notice of such option. There seems to be no question as to the correctness of this ruling. Persons having knowledge of the option take subject to it.⁹⁰ But if a third person becomes an innocent purchaser for value of the optioned property specific performance will not be decreed against him.⁹¹ Consequently we do not believe that the true rule is as stated in either the California or English decision. It would be more accurate to say that acceptance does not cause the contract to relate back to the date of the proposal,—at least not so as to affect the rights of third persons,—innocently acquired and without knowledge.

The place of the contract is also usually determined by the place where the acceptance is given.⁹² Thus, an order to make certain bets having been transmitted by postal telegraph from the plaintiff without the city of London to the defendant within it, he telegraphed from the city that the order had been obeyed. It was held

⁸⁹ *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522n. See also, *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150n; *Peoples St. R. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113, 36 Am. St. 22.

⁹⁰ *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 Am. St. 47; *Faraday Coal & Coke Co. v. Owens*, 26 Ky. L. 243, 80 S. W. 1171; *Whited & Wheelless v. Calhoun*, 122 La. 100, 47 So. 415; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Laughead v. Beale*, 24 Pa. Co. Ct. 465; *Jackson v. Groat*, 7 Cow. (N. Y.) 285. If the option is recorded this is sufficient to put creditors of the grantor upon inquiry. *Donnelly v. Parker*, 5 W. Va. 301.

⁹¹ See *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

⁹² *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L.

R. A. 90; *State v. Peters*, 91 Maine 31, 39 Atl. 342; *Mack v. Lee*, 13 R. I. 293; *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969. Perhaps it would give use to less confusion to say that the place of a contract is, as a general rule, the place where the last act necessary to render the contract binding on the parties was done. *Emerson Co. v. Proctor*, 97 Maine 360, 54 Atl. 849; *McGarry v. Nicklin*, 110 Ala. 559, 17 So. 726, 55 Am. St. 40n; *Gipps Brewing Co. v. De France*, 91 Iowa 108, 58 N. W. 1087, 28 L. R. A. 386, 51 Am. St. 329; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Tolman v. Reed*, 115 Mich. 71, 72 N. W. 1104; *Northampton & Co. v. Tuttle*, 40 N. J. L. 476; *Waldron v. Ritchings*, 9 Abb. Pr. (N. Y.) (N. S.) 359.

that the contract of agency was made in the city.⁹³ And where an offer was made in Boston, and accepted by telegram from Providence, it was held that the contract was made in Rhode Island, although to be performed in Massachusetts.⁹⁴ Likewise the contract is made at the place when the acceptance is mailed.⁹⁵ If the communications are had over the telephone the contract is deemed to have been made at the place where the offer of one is accepted by another.⁹⁶ The place of contract is material as *prima facie* denoting the law by which it is to be construed and regulated, and the law by which the capacity of the parties to the contract, as dependent upon infancy, lunacy, marriage, is determined."⁹⁷

§ 63. **Intention to reduce the contract to writing.**—As has already been mentioned, the fact that the parties intended to embody the terms of their contract in a formal written agreement is strong evidence that the negotiations prior to the drawing up of such writing are merely preliminary and not understood or intended to be binding.⁹⁸ And if it is definitely expressed and understood that there is to be no contract until the formal writing is executed no binding agreement is formed until this provision is complied with.⁹⁹ It is also true that if all the terms of the agreement have not been settled and it is understood these unsettled terms are to be determined by the formal contract there is

⁹³ *Cowan v. O'Connor*, L. R. 20 Q. B. D. 640.

⁹⁴ *Perry v. Mount Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. 902. To the same effect, *Tillinghast v. Boston &c. Lumber Co.*, 39 S. Car. 484, 18 S. E. 120, 22 L. R. A. 49.

⁹⁵ *Taylor v. Jones*, L. R. I. C. P. D. 87; *Jameson v. Gregory*, 4 Metc. (Ky.) 363; *Emerson Co. v. Proctor*, 97 Maine 360, 54 Atl. 849.

⁹⁶ *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90.

⁹⁷ *Leake on Contracts*, 49. See also, *Male v. Roberts*, 3 Esp. 163. See further under *Conflict of Laws*.

⁹⁸ *Canning v. Farquhar* (1886), 16 Q. B. Div. 727, 55 L. J. Q. B. 225; *Lyman v. Robinson*, 14 Allen (Mass.) 242; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869; *Methudy v. Ross*, 10

Mo. App. 101; *Irish v. Pulliam*, 32 Nebr. 24, 48 N. W. 963; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Brown v. New York Central R. Co.*, 44 N. Y. 79; *Bryant v. Ondrak*, 87 Hun (N. Y.) 477, 34 N. Y. S. 384, 68 N. Y. St. 316; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888. See ante, § 27, *Nature of Offer—Obligation*.

⁹⁹ *Lloyd v. Nowell* (1895), 2 Ch. 744; *Chinnock v. Marchioness of Ely* (1865), 4 De G. & J. S. 638; *Crossley v. Maycock*, L. R. 18 Eq. 180, 43 L. J. Ch. 379; *Winn v. Bull*, L. R. 7 Ch. Div. 29, 47 L. J. Ch. 139; *Harvey v. Principal &c. Co.*, 50 L. J. Ch. 750; *Honeyman v. Marryatt*, 6 H. L. Cas. 112, 26 L. J. Ch. 619; *Kingston-Upin-Hull &c. v. Petch*, 10 Exch. 610; *Hawkesworth v. Chaffey*, 54 L. T. (N. S.) 72, 55 L. J. Ch. 335; *Spinney v. Downing*, 108 Cal.

no binding obligation until the writing is executed.¹ However, should the parties disregard the provision relative to the execution of a formal writing and act upon the preliminary understanding, such understanding will be treated as a valid and binding contract.² Likewise if the agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing, a binding obligation is fixed on the parties, unless it is understood and intended that such contract shall not become operative unless reduced to writing.³ And the

666, 41 Pac. 797; *Strong v. Trowbridge Co.*, *H. Baars & Co.*, — Fla. —, 54 So. 92; *Weitz v. Des Moines &c. Dist.*, 79 Iowa 423, 44 N. W. 696; *Lynn v. Richardson*, 151 Iowa 284, 130 N. W. 1097; *Fredericks v. Fasnacht*, 30 La. Ann. 117; *Ferre Canal Co. v. Burgin*, 106 La. 309, 30 So. 863; *Mississippi &c. S. S. Co. v. Swift*, 86 Maine 248, 29 Atl. 1063, 41 Am. St. 545; *Wills v. Carpenter*, 75 Md. 80, 25 Atl. 415; *Lyman v. Robinson*, 14 Allen (Mass.) 242; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Edge Moor Bridge Works v. Bristol*, 170 Mass. 528, 49 N. E. 918; *Eads v. Carondelet*, 42 Mo. 113; *Bourne v. Shapleigh*, 9 Mo. App. 64; *Morrill v. Tehama &c. Co.*, 10 Nev. 125; *Water Commissioners v. Brown*, 32 N. J. L. 504; *Donnelly v. Currie Hardware Co.*, 66 N. J. L. 388, 49 Atl. 428; *Brown v. N. Y. Central R. Co.*, 44 N. Y. 79; *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494, 15 N. Y. St. 19; *Nicholls v. Granger*, 7 App. Div. (N. Y.) 113, 40 N. Y. S. 99; *Arnold v. Rothschild's Sons Co.*, 37 App. Div. (N. Y.) 564, 56 N. Y. S. 161, affd. 164 N. Y. 562, 58 N. E. 1085; *Franke v. Hewitt*, 56 App. Div. (N. Y.) 497, 68 N. Y. S. 968; *Sidney Glass Works v. Barnes*, 86 Hun. (N. Y.) 374, 33 N. Y. S. 508; *MacMackin & Young v. Timmins*, 1 Lanc. Law Rev. (Pa.) 176; *Congdon v. Darcy*, 46 Vt. 478; *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457. If it is the intention of the parties that there shall be no contract binding on the parties unto the execution of the formal agreement it must be clearly expressed in such a way as to show that such condition was to be insisted on. *Cochrane*

v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869; *Diskens v. Herter*, 77 N. Y. S. 300, 73 App. Div. (N. Y.) 453, affd. 175 N. Y. 480, 67 N. E. 1081. Whether or not a contract is formed prior to the execution of the formal writing depends on the intention of the parties. *Mississippi &c. Steamboat Co. v. Swift*, 86 Maine 248, 29 Atl. 1063, 41 Am. St. 545.

² *Connery v. Best*, 1 Cab. El. 291; *Hussey v. Horne-Payne*, L. R. 4 App. Cas. 311; *Bristol &c. Co. v. Maggs*, L. R. 44 Ch. Div. 616; *Donnison v. Peoples Cafe Co.*, 45 L. T. (N. S.) 187; *Methudy v. Ross*, 10 Mo. App. 101, affd. 81 Mo. 481; *Bourne v. Shapleigh*, 9 Mo. App. 64; *Boysen v. Van Dorn Iron Works*, 94 App. Div. (N. Y.) 95, 87 N. Y. S. 995; *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494.

³ *Riggins v. Missouri &c. R. Co.*, 73 Mo. 598; *Miller v. McManis*, 57 Ill. 126; *Paige v. Fullerton Woolen Co.*, 27 Vt. 485. In such case there need be no written acceptance. *Sawyer v. Walker*, 204 Mo. 133, 102 S. W. 544. See also, *McKell v. Chesapeake &c. R. Co.*, 175 Fed. 321.

⁴ *Hodges v. Sublett*, 91 Ala. 588, 8 So. 800; *Fredricks v. Fasnacht*, 30 La. Ann. 117; *Mississippi &c. Steamboat Co. v. Swift*, 86 Maine 248, 29 Atl. 1063, 41 Am. St. 545; *Lyman v. Robinson*, 14 Allen (Mass.) 242; *Concannon v. Point Min. & Mill Co.*, 156 Mo. App. 79, 135 S. W. 988; *Pratt v. Hudson River R. Co.*, 21 N. Y. 305; *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Green v. Cole*, 103 Mo. 70, 15 S. W. 317.

mere suggestion that a formal contract be drawn up,⁴ or even an understanding to that effect,⁵ will not render the oral or memorandum agreement unenforceable. The controlling question in this class of cases is whether or not there is a final consent of the parties such that no new terms or variation can be inserted in the formal writing to be prepared.

§ 64. Alteration and filling blanks by consent.—The authority to fill blanks in an instrument does not also confer upon one so authorized the right to do more and to alter or add to it in any material respect.⁶ Any material alteration made without the consent of the parties to the agreement discharges the instrument as to all those not consenting to the change.⁷ However, it is the general rule that if the alteration is made merely in order to correct a mistake in the instrument and make it give effect to the intention of the parties such change will not avoid the agreement even though made without the knowledge or consent of one of the

⁴ *Lewis v. Brass*, L. R. 3 Q. B. Div. 667; *Cayley v. Walpole*, 22 L. T. (N. S.) 900, 39 L. J. Ch. 609; *Dalrymple v. Scott*, 19 Ont. App. 477; *Cheney v. Eastern Transp. Line*, 59 Md. 557; *Green v. Cole*, 103 Mo. 70, 15 S. W. 317.

⁵ *Chinnock v. Marchioness of Ely*, 4 De. G. J. & S. 638; *Thomas v. Dering*, 1 Jur. (O. S.) 211, 1 Keen 729; *Heyworth v. Knight*, 17 C. B. (N. S.) 298; *Rossiter v. Miller*, L. R. 3 App. Cas. 1124; *Cohn v. Plumer*, 88 Wis. 622, 60 N. W. 1000; *Ocala Cooperage Co. v. Florida Cooperage Co.*, 59 Fla. 390, 52 So. 13; *Bell v. Offutt*, 10 Bush. (Ky.) 632; *Avendano v. Arthur*, 30 La. Ann. 316; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 38 Am. St. 460, 23 L. R. A. 707; *Beach & Co. v. American & Co.*, 202 Mass. 177, 83 N. E. 924; *Lowrey v. Danforth*, 95 Mo. App. 441, 69 S. W. 39; *Rankin v. Mitchem*, 141 N. Car. 277, 53 S. E. 854; *Blaney v. Hoke*, 14 Ohio St. 292; *Mackey v. Mackey*, 29 Gratt (Va.) 158; *Lawrence v. Milwaukee & C. R. Co.*, 84 Wis. 427, 54 N. W. 797. Where it is intended to reduce the contract to writing merely for facility of proof failure to draw up such writing does

not avoid the agreement. *Smith v. Kaufman*, 30 Pa. Super. Ct. 265. But see *Cala Cooperage Co. v. Florida Cooperage Co.*, 59 Fla. 390, 52 So. 13. "To be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon, as a result of future negotiations." *St. Louis & C. R. Co. v. Gorman*, 79 Kans. 643, 100 Pac. 647.

⁶ *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. 123.

⁷ *Fitch v. Jones*, 5 El. & Bl. (85 Eng. C. L. 238); *Master v. Miller*, 2 H. Bl. 141; *In re Hood's Appeal* (Pa.), 5 Cent. 851; *Mackay v. Dodge*, 5 Ala. 388; *Carlisle v. Peoples Bank*, 122 Ala. 446, 26 So. 115; *Bedgood-Howell Co. v. Moore*, 123 Ga. 336, 51 S. E. 420; *Monroe v. Paddock*, 75 Ind. 422; *Bowman v. Mitchell*, 79 Ind. 84; *McKinney v. Cabell*, 24 Ind. App. 676, 57 N. E. 598; *Deitz v. Harder*, 72 Ind. 208; *New York Life Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045, 121 Am. St. 362; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 18 Ky. L. 617, 37 S. W. 490; *Northern Bank v. Farmers Bank*, 18 B. Mon. (Ky.) 506, 3 Randolph Com. Paper, 956; *Ver Steeg v.*

contracting parties.⁸ Notwithstanding that it has been rather recently held that, "one party to a written instrument which does not speak the actual contract of the parties does not have the right to alter the instrument to make it accord therewith."⁹ If the parties to the contract consent to the alteration, the instrument as altered is binding, the change in no way affecting its validity.¹⁰ It is immaterial whether such consent is given before or after execution.¹¹ So, the holder of an instrument is usually

Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346; Presbury v. Michael, 33 Mo. 542; Foxworthy v. Colby, 64 Nebr. 216, 89 N. W. 800, 62 L. R. A. 393; Woodworth v. Bank of America, 19 Johns (N. Y.) 391, 10 Am. Dec. 239n; Clute v. Small, 17 Wend. (N. Y.) 238; Nazro v. Fuller, 24 Wend. (N. Y.) 374; Bruce v. Westcott, 3 Barb. (N. Y.) 374; Sturges v. Williams, 9 Ohio St. 443; Southwark Bank v. Gross, 35 Pa. 80; Batchelder v. White, 80 Va. 103. One not assenting to the modification of an agreement to which he is a party is not bound by such modification. Agnew v. Baldwin, 136 Wis. 263, 116 N. W. 641.

⁸Lynch v. Hicks, 80 Ga. 200, 4 S. E. 255; Sanitary Dist. v. Allen, 178 Ill. 330, 53 N. E. 109; Osborn v. Hall, 160 Ind. 153, 66 N. E. 457; Duker v. Franz, 7 Bush. (Ky.) 273, 3 Am. Rep. 314; Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; Kelly v. Thuey, — Mo. —, 37 S. W. 516; Cole v. Hills, 44 N. H. 227; Ames v. Colburn, 11 Gray (Mass.) 390, 71 Am. Dec. 723n; Clute v. Small 17 Wend. (N. Y.) 238; Van Brunt v. Eoff, 35 Barb. (N. Y.) 501; Bechtel's Appeal, 133 Pa. 367, 19 Atl. 412; McClure v. Little, 15 Utah 379, 49 Pac. 298, 62 Am. St. 938; Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389. But a party who does not know of the real contract will be discharged by the alteration. Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12; McMillan v. Hefferlin, 18 Mont. 385n, 45 Pac. 548.

⁹Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217. In the above case it does not appear with certainty just what the agreement actually was. See also, Evans

v. Foreman, 60 Mo. 449; Fay v. Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752. Some states adhere to the rule that a mistake in expression cannot be corrected by one party alone. Murray v. Graham, 29 Iowa 520; Letcher v. Bates, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92; Evans v. Foreman, 60 Mo. 449; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Smith v. Smith, 27 S. Car. 166, 3 S. E. 78, 13 Am. St. 633.

¹⁰Mundy v. Stevens, 61 Fed. 77, 9 C. C. A. 366; State v. Van Pelt, 1 Cart. (Ind.) 304; Busjahn v. McLean, 3 Ind. App. 281, 29 N. E. 494; Walkley v. Clarke, 107 Iowa 451, 78 N. W. 70; Philips v. Crips, 108 Iowa 605, 79 N. W. 373; Hunt v. Nance, 122 Ky. 274, 28 Ky. L. 1188, 92 S. W. 6; Goodwin v. Norton, 92 Maine 532, 43 Atl. 111; Nichols v. Rosenfeld, 181 Mass. 525, 63 N. E. 1063; Love v. Shoape, 1 Walk. (Miss.) 508; Evans v. Foreman, 60 Mo. 449; Martin v. Buffaloe, 121 N. Car. 34, 27 S. E. 995; Reynolds v. Smitz, 18 Ohio C. C. 84, 9 Ohio C. D. 484; Wilson v. Jameson, 7 Pa. St. 126; Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681; Gunter v. Addy, 58 S. Car. 178, 36 S. E. 553; Bryant v. Bank of Charleston, 107 Tenn. 560, 64 S. W. 895; Schmelz v. Rix, 95 Va. 509, 28 S. E. 890.

¹¹Speake v. United States, 13 U. S. (9 Cranch.) 28, 3 L. ed. 645. In the case of Abbott v. Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 470, it is said, "If a deed is altered after delivery by consent of both parties and again delivered after the change, the deed will be valid." It may be given before or at the time of the change but not after. Cleaton v. Chambliss, 6 Rand. (Va.) 86. The consent need

deemed to have been given an implied authority by the maker to fill blanks with the proper terms.¹²

not be in writing. *Stewart v. First National Bank*, 40 Mich. 348.

¹² *Russel v. Langstaffe*, 2 Doug. 514; *Montague v. Perkins*, 22 Eng. L. & Eq. 516; *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. 498, 24 Am. St. 832, 12 L. R. A. 140n; *Visher v. Webster*, 8 Cal. 109; *Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 So. 140, 1 Am. St. 201; *Canon v. Grigsby*, 16 Ill. App. 558; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Grimes v. Piersol*, 25 Ind. 246; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Rainbolt v. Eddy*, 34 Iowa 440, 11 Am. Rep. 152; *Iowa &c. Bank v. Sigstad*, 96 Iowa 491, 65 N. W. 407; *State v. Matthews*, 44 Kans. 596, 25 Pac. 36; *Lowden v. Schoharie County Bank*, 38 Kans. 533, 16 Pac. 748; *Woolfolk v. Bank of America*, 73 Ky. 504; *Jones v. Shelbyville Fire Ins. Co.*, 58 Ky. 58; *Bank of Commonwealth v. McChord*, 4 Dana (Ky.) 191, 29 Am. Dec. 398; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378, 14 Am. St. 371, 3 L. R. A. 576; *Smith v. Crooker*, 5 Mass. 538; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *Wilson v. Henderson*, 17 Miss. 375, 48 Am. Dec. 716; *Capital Bank v. Armstrong*, 62 Mo. 59; *Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Roe v. Town Mutual Fire Ins. Co.*, 78 Mo. App. 452; *Ivory v. Michael*, 33 Mo. 398; *Reed v. Morton*, 24 Neb. 760, 40 N. W. 282, 1 L. R. A. 736, 8 Am. St. 247n; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Bruce v. Westcott*, 3 Barb. (N. Y.) 374; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Campbell v. McArthur*, 2 Hawks. (N. Car.) 33, 11 Am. Dec. 738; *Marshall v. Wilhite*, 4 Ohio C. C. 203, 2 Ohio C. D. 500; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666; *Wessell v. Glenn*, 108 Pa. St. 104; *Witte v. Williams*, 8 S. Car. 290, 28 Am. Rep. 294; *Waldron v. Young*, 9 Heisk. (56 Tenn.) 777; *Butler v. United States*, 21 Wall. (U. S.) 272; *Anale v. North Western Life Ins.*

Co., 92 U. S. 330, 23 L. ed. 556. The above rule applies to instruments required by law to be executed under seal, and to be witnessed and acknowledged. *Friend v. Yahr*, 126 Wis. 291, 104 N. W. 997, 1 L. R. A. (N. S.) 891, 110 Am. St. 924. While it is settled that parol evidence is not admissible to vary the terms of a written agreement, it is generally conceded that the parties to an executory agreement not under seal, have the right at any time before its breach, by a subsequent oral agreement founded on a sufficient consideration, to discharge altogether, waive or annul the prior contract, or add to, subtract from, vary or qualify the terms of such prior contract, and that this new agreement may be proved by parol, whether considered as a substitute for the old or merely an addition or condition attached thereto. *Goss v. Nugent*, 5 Barn. & Adol. 58, 64; *Adler v. Friedman*, 16 Cal. 139; *White v. Soto*, 82 Cal. 654, 23 Pac. 210; *Calliope Min. Co. v. Herzinger*, 21 Colo. 482, 42 Pac. 668; *Michels v. Olmstead*, 14 Fed. 219; *Wilson v. McClenny*, 32 Fla. 363, 13 So. 873; *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; *Simonton v. Liverpool &c. Ins. Co.*, 51 Ga. 76, 80; *Danforth v. McIntyre*, 11 Ill. App. 417; *Morrill v. Colehour*, 82 Ill. 618; *Bowman v. Cunningham*, 78 Ill. 48; *Rigsbee v. Bowler*, 17 Ind. 167; *Loomis v. Donovan*, 17 Ind. 198; *Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83n; *Hubbell v. Ream*, 31 Iowa 289; *Todd v. Allen*, 18 Kans. 543; *Cain v. Pullen*, 34 La. Ann. 511; *Leeds v. Fassman*, 17 La. Ann. 32; *Courtenay v. Fuller*, 65 Maine 156; *Wiggin v. Goodwin*, 63 Maine 389; *Marshall v. Baker*, 19 Maine 402; *Allen v. Sowerby*, 37 Md. 410; *Mactier v. Wirgman*, 4 Har. & J. (Md.) 568, 578; *Creamer v. Stephenson*, 15 Md. 211; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Richardson v. Hooper*, 13 Pick. (Mass.) 446; *Kennebec Co. v. Augusta Ins. &c. Co.*, 6 Gray (Mass.) 204; *Cummings v. Arnold*, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; *Morgan v. Butterfield*, 3

Mich. 615; *Hewitt v. Brown*, 21 Minn. 163; *Chouteau v. Jupiter-Iron Works*, 94 Mo. 388, 7 S. W. 467; *Wharton v. Missouri Car Foundry Co.*, 1 Mo. App. 577; *Vastine v. Wyman*, 5 Mo. App. 598; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233; *Perrine v. Cheeseman*, 11 N. J. L. 174, 19 Am. Dec. 388; *McKinstry v. Runk*, 12 N. J. Eq. 60; *Julliard v. Chaffee*, 92 N. Y. 529; *Brewster v. Countryman*, 12 Wend. (N. Y.) 446; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121n; *Harris v. Murphy*, 119 N. Car. 34, 25 S. E. 708, 56 Am. St. 656n; *Negley v. Jeffers*, 28 Ohio St. 100; *Guthrie v. Thompson*, 1 Ore. 353; *Oregonian Ry. Co. v. Wright*, 10 Ore. 162; *Lauer v. Lee*, 42 Pa. St. 165; *Holloway v. Frick*, 149 Pa. St. 178, 24 Atl. 201; *McCaughey v. Keller*, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. 758; *Smith v. Lilley*, 17 R. I. 119, 20 Atl. 227; *Bryan v. Hunt*, 4 Sneed (Tenn.) 543, 70 Am. Dec. 262; *Cobb v. O'Neal*, 2 Sneed (Tenn.) 438; *Perry v. Central Southern R. Co.*, 5 Cold. (Tenn.) 138; *Hogan v. Crawford*, 31 Tex. 633; *Heatherly v. Record*, 12 Tex. 49; *Flanders v. Fay*, 40 Vt. 316; *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29; *Shepherd v. Wysong*, 3 W. Va. 46; *Bannon v. Aultman*, 80 Wis. 307, 49 N. W. 967, 27 Am. St. 37; *Grace v. Lynch*, 80 Wis. 166, 49 N. W. 751; *Piatt's v. Unted States*, 22 Wall. (U. S.) 496, 22 L. ed. 858; *Emerson v. Slater*, 22 How. (U. S.) 28, 16 L. ed. 360; *Swain v. Seamens*, 9 Wall. (U. S.) 254, 19 L. ed. 554.

CHAPTER IV.

FRAUD AND MISREPRESENTATION.

- | | |
|---|--|
| § 70. Apparent consent may not be real. | § 79. Active concealment. |
| 71. Fraud or misrepresentation as to inducement or collateral matter. | 80. Misleading, partial disclosure. |
| 72. Fraud or misrepresentation as to essential elements of contracts. | 81. False representation. |
| 73. Fraud as to contents or substance of contracts. | 82. Must be as to facts. |
| 74. Fraud where there is a fiduciary or confidential relation. | 83. Promise or representations of intentions as to future. |
| 75. Constructive fraud. | 84. Opinions and predictions. |
| 76. Fraud in execution. | 85. Misrepresentations as to law. |
| 77. Negligence. | 86. Materiality. |
| 78. Fraud of third persons. | 87. Falsity. |
| | 88. Knowledge and intention. |
| | 89. Reliance on false statement. |
| | 90. Must mislead. |
| | 91. Must result in damage or injury. |
| | 92. Parties in <i>pari delicto</i> . |

§ 70. **Apparent consent may not be real.**—As was stated in the preceding chapter no contract is formed until one party has given an unqualified and unconditional assent to the offer of another.¹ But the offer and acceptance may be apparently complete in every respect, and notwithstanding this the contract be voidable at the option of one of the parties. This occurs when the assent of the parties is apparent but not real. Chief among the ways by which apparent consent may be induced are fraud and misrepresentation. Fraud as to material matter will vitiate, or render voidable any contract,² for good faith is to this extent, at least, one of the essential elements of an

¹ See ante, ch. 3, Offer and Acceptance.

² *Chesterfield v. Janssen*, 1 Atk. 340, 2 Ves. Sr. 155; *Williams v. Moore-Grant Co.*, 3 Ga. App. 756, 60 S. E. 372. "Whatever fraud creates justice will destroy." *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188; *Jones v. Emery*, 40 N. H. 348. See also, *Buck v. Vories*, 89 Ind. 116, 117. See also, *Nelson v. Nelson*, 111 Minn. 183, 126

N. W. 731, 137 Am. St. 549; *Olston v. Oregon &c. R. Co.*, 52 Ore. 343, 97 Pac. 538; *Le Vine v. Whitehouse*, 37 Utah 260, 109 Pac. 2. Fraud renders the contract voidable at the option of the party defrauded. *Eldorado Jewelry Co. v. Darnell*, 135 Iowa 555, 113 N. W. 344; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 123 Am. St. 609. See also, *Richardson v. Vick*, — Tenn. —, 145 S. W. 174.

agreement.³ If one is induced to go through the form of making a contract because of some fraud or misrepresentation made by the other party or his agent, relative to a material element of the agreement, such that if he had known the truth he would not have given his assent, the contract may be avoided by him. There can be no real assent when it is induced by fraud. Misrepresentation is sometimes distinguished from fraud where there is no evil intent. But actual fraud may consist either in the statement of what is false, *suggestio falsi*, or in the concealment of what is true, *suppressio veri*. However, in those jurisdictions where the distinction between sealed and unsealed instruments has not been abolished, a contract under seal, which is induced by fraud cannot be avoided by setting up such fraud as a defense in an action at law. It is only available in equity.⁴ It is otherwise if this distinction has been abolished. In such jurisdictions an instrument under seal may be attacked for fraud in an action at law for affirmative relief.⁵

§ 71. Fraud or misrepresentation as to inducement or collateral matter.—As a general rule representations which relate to matters that are merely collateral to an agreement are not material, and do not affect the validity of the contract.⁶ However, if there is a false representation made relative to a collateral but material matter, it will vitiate the contract if the person defrauded relied upon such representation and would not have entered into the contract but for it.⁷ Thus, representations by the seller of an agency right to sell a certain article, as to the

³ *Campion v. Marston*, 99 Maine 410, 59 Atl. 548.

⁴ *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198.

⁵ *Olston v. Oregon &c. R. Co.*, 52 Ore. 343, 97 Pac. 538.

⁶ *Blair v. Buttolph*, 72 Iowa 31, 33 N. W. 349; *Palmer v. Bell*, 85 Maine 352, 27 Atl. 250; *O'Brien v. Luques*, 81 Maine 46, 16 Atl. 304; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Clark v. Everhart*, 63 Pa. St. 347; *Fulton v. Hood*, 34 Pa. St. 365, 75 Am. Dec. 664; *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. 926. A misrepresentation by the seller of a horse as to where he purchased it is

not material. *Gaddes v. Pennington*, 5 Dow. 159. Nor is a statement of a vendor relative to the expense incurred in acquiring the property material unless shown to affect the value thereof. *Bowman v. Branson*, 111 Mo. 343, 19 S. W. 634. Nor are misrepresentations as to rival companies' stocks of goods such fraud as will avoid a sale of the line of goods sold by the one making such representations. *Stone v. Robie*, 66 Vt. 245.

⁷ *Canham v. Berry*, 15 C. B. 597, 80 B. C. L. 597; *Stewart v. Lester*, 49 Hun (N. Y.) 58; *Valton v. National Fund &c. Co.*, 20 N. Y. 32.

number of family rights others had sold and the profits derived therefrom, have been held material, and, if false, constitute such fraud as will justify a rescission of the contract of sale.⁸ Likewise, when the seller of territory for the sale of a book falsely represented that such book had been copyrighted, and thus induced the defendant to buy the territory offered for sale, this was held a good defense to an action by an assignee to collect the notes given in payment for the right to sell the book in the territory bargained for.⁹

A representation, trivial in character, which does not influence the actions of the other party, is immaterial although false, and known so to be by the party making it.¹⁰ False representations as to an immaterial matter do not constitute a fraud in contemplation of law,¹¹ no matter how reprehensible such conduct may be in morals,¹² for, independent of all moral considerations, if one has not been damaged by the false representation there has been no fraud.¹³ Fraud and injury must con-

⁸ *Crooker v. White*, 162 Ala. 476, 50 So. 227.

⁹ *Coffey v. Hendrick*, 23 Ky. L. 1328, 65 S. W. 127. The fraudulent representation may relate to matters not embodied in the written contract. *Watson v. Kirby*, 116 Ala. 557, 23 So. 61.

¹⁰ *Smith v. Chadwick*, 20 Ch. Div. 27, 51 L. J. Ch. 597; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. 137; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Hall v. Johnson*, 41 Mich. 286, 2 N. W. 55; *Seeley v. Price*, 14 Mich. 541; *Whiting v. Hill*, 23 Mich. 398; *Mizner v. Kussell*, 29 Mich. 229.

¹¹ *Sprague v. Taylor*, 58 Conn. 542, 20 Atl. 612; *Ruff v. Jarrett*, 94 Ill. 475; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Braley v. Powers*, 92 Maine 203, 42 Atl. 362; *Cook v. Gill*, 83 Md. 177, 34 Atl. 248; *Safford v. Grout*, 120 Mass. 20; *Windram v. French*, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; *Roberts v. French*, 153 Mass. 60, 26 N. E. 416, 10 L. R. A. 656, 25 Am. St. 611; *Marshall v. Gilman*, 52 Minn. 88, 53 N. W. 811; *Morgan v. Skiddy*, 62 N. Y. 319; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Kley v. Healy*, 127 N. Y. 555, 28 N. E.

593; *Handy v. Waldron*, 19 R. I. 618, 35 Atl. 884; *James v. Hodsden*, 47 Vt. 127, 137.

¹² *Fuchs & Lang Mfg. Co. v. Kittedge*, 242 Ill. 88, 89 N. E. 723.

¹³ *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788, 11 Am. St. 281; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Nelson County v. Northcote*, 6 Dak. 378, 43 N. W. 897, 6 L. R. A. 230n; *Loewer v. Harris*, 57 Fed. 368, 6 C. C. A. 394; *Bigby v. Powell*, 25 Ga. 244, 71 Am. Dec. 168; *Bartlett v. Blaine*, 83 Ill. 25, 25 Am. Rep. 346; *Wharf v. Roberts*, 88 Ill. 426; *Hale v. Philbrick*, 47 Iowa 217; *Danforth v. Cushing*, 77 Maine 182; *First National Bank v. Maxfield*, 83 Maine 576, 22 Atl. 479; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726n; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. 404; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Lorenzen v. Kansas City Inv. Co.*, 44 Nebr. 99, 62 N. W. 231; *Dung v. Parker*, 52 N. Y. 494; *Fagan v. Newson*, 12 N. Car. 20; *Parrar v. Alston*, 12 N. Car. 69; *Walsh v. Hall*, 66 N. Car. 233; *Whitson v. Gray*, 40 Tenn. 441; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *Crispil v. Cain*, 19 W. Va. 438.

cur in order to furnish ground for judicial action.¹⁴ A sufficient defense cannot be predicated on fraud, unless such fraud resulted in some injury. Both fraud and injury must exist.¹⁵ Fraud or misrepresentation, to be material, must be as to some essential element or relate to the negotiation in some manner, so as to form an inducement to enter into the agreement. But while it must form an inducement and be acted upon it is not necessary for it to be the sole inducement for the agreement before it can be avoided for this reason.¹⁶ A representation is material when but for it the contract would not have been made.¹⁷ This test cannot, however, be taken as conclusive in all cases.¹⁸ Whether or not a given course of conduct has been fraudulent will, in the end, depend upon the circumstances of each particular case.¹⁹

§ 72. Fraud or misrepresentation as to essential elements of contracts.—If under certain circumstances false repre-

¹⁴ *Freeman v. McDaniel*, 23 Ga. 354; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Bartlett v. Blaine*, 83 Ill. 25, 25 Am. Rep. 346; *Werden v. Graham*, 107 Ill. 169; *Lewis v. Brookdale Land Co.*, 124 Mo. 672, 28 S. W. 324; *Hanson v. Edgerly*, 29 N. H. 343; *Taylor v. Guest*, 58 N. Y. 262; *Nye v. Merriam*, 35 Vt. 438.

¹⁵ *Bowen v. Waxelbaum*, 2 Ga. App. 521, 58 S. E. 784; *Power v. Turner*, 37 Mont. 521, 97 Pac. 950. In the above case the defendant sought damages by way of counterclaim. *Nelson v. Grondahl*, 12 N. Dak. 130, 96 N. W. 299. See also, *Conklin v. Benson*, 159 Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537n.

¹⁶ *Jordan v. Pickett*, 78 Ala. 331; *Winter v. Bandel*, 30 Ark. 362; *Sprague v. Taylor*, 58 Conn. 542, 20 Atl. 612; *Sioux Nat. Bank v. Norfolk State Bank*, 56 Fed. 139, 5 C. C. A. 448; *Savage v. Jackson*, 19 Ga. 305; *Ruff v. Jarrett*, 94 Ill. 475; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Thorne v. Prentiss*, 83 Ill. 99; *Hale v. Philbrick*, 47 Iowa 217; *Braley v. Powers*, 92 Maine 203, 42 Atl. 362; *Cook v. Gill*, 83 Md. 177, 34 Atl. 248; *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Windram v. French*, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; *Roberts v. French*, 153 Mass. 60, 26

N. E. 416, 10 L. R. A. 656, 28 Am. St. 611; *Safford v. Grout*, 120 Mass. 20; *Marshall v. Gilman*, 52 Minn. 88, 53 N. W. 811; *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. 1138; *Burr v. Wilson*, 22 Minn. 206; *Morgan v. Skiddy*, 62 N. Y. 319; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Handy v. Waldron*, 19 R. I. 618, 35 Atl. 884; *Lebby v. Ahrens*, 26 S. Car. 275, 2 S. E. 387; *James v. Hodsden*, 47 Vt. 127; *Gates v. Moldstad*, 14 Wash. 419, 44 Pac. 881. The false representation must be proximate, immediate and material, and must affect its very essence and substance. *McAleer v. Horsey*, 35 Md. 439; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771.

¹⁷ *Thomas v. Grise*, 1 Penn. (Del.) 381, 41 Atl. 883; *McAleer v. Horsey*, 35 Md. 439.

¹⁸ *Hall v. Johnson*, 41 Mich. 286, 2 N. W. 55.

¹⁹ Evidence of fraud which tends to vary the terms of the contract and make a different agreement from that executed by the parties, and which does not relate to material facts, is inadmissible. *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N. W. 343, 112 N. W. 708.

sentations as to collateral matters may be grounds for avoiding the agreement, it is obvious that a misrepresentation relative to an essential element will be cause for avoidance if relied on by the promisor.²⁰ The truth will be demonstrated by reference to the following particular classes of contracts: (1) Contracts for sale of land. (2) Fraud in the purchase of personal property. (3) Insurance contracts. The special forms of contracts above set out will be briefly treated in the order named. Any false representation as to the title to real estate, made as a fact or without regard to its truth or falsity, and in order to induce another to purchase the same, constitutes actionable fraud, when such representations are relied on and induce the contract to purchase, and injury results therefrom. If the purchaser acts with reasonable promptness after discovering the fraud he may maintain an action for the fraud and deceit or a rescission of the sale.²¹ Nor

²⁰Crooker v. White, 162 Ala. 476, 50 So. 227; Water Commissioners v. Robbins, 82 Conn. 623, 74 Atl. 938. In the above case the plaintiff brought action to recover on a bond given by defendants, Robbins & Potter, for the faithful performance of certain work. The defendants filed a counterclaim and recovered damages thereon. In this case a false representation consisted in statements relative to the character and kind of work to be done, alleging that it had been estimated by the board's engineer and was approximately correct. But in connection with this case, see Ricker v. Sanitary District of Chicago, 91 Fed. 833, reversing 98 Fed. 251. Engeman v. Taylor, 46 W. Va. 669, 33 S. E. 922.

²¹Young v. Harris, 2 Ala. 108; Meeks v. Garner, 93 Ala. 17, 8 So. 378, 11 L. R. A. 196; Fitzhugh v. Davis, 46 Ark. 337; Muller v. Palmer, 144 Cal. 305, 77 Pac. 954; Linn v. Green, 17 Fed. 407; Crutchfield v. Danilly, 16 Ga. 432; Fenley v. Moody, 104 Ga. 790, 30 S. E. 1002; Eames v. Morgan, 37 Ill. 260; Drake v. Latham, 50 Ill. 270; Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315; James v. Lawrenceburgh Ins. Co., 6 Blackf. (Ind.) 525; Anderson v. Buck, 66 Iowa 490, 24 N. W. 10; Riley v. Bell, 120 Iowa 618, 95 N. W. 170; Carpen-

ter v. Wright, 52 Kans. 221, 34 Pac. 798; Provident Loan Trust Co. v. McIntosh, 68 Kans. 452, 75 Pac. 498, 1 A. & E. Ann. Cas. 906; Young v. Hopkins, 6 T. B. Mon. (Ky.) 18; Campbell v. Whittingham, 5 J. J. Marsh (Ky.) 96, 20 Am. Dec. 241; Breckinridge v. Moore, 3 B. Mon. (Ky.) 629; Fristoe v. Laytham, 18 Ky. L. 157, 36 S. W. 920; Skinner v. Brigham, 126 Mass. 132; Stockham v. Cheney, 62 Mich. 10, 28 N. W. 692; Reynolds v. Franklin, 39 Minn. 24, 38 N. W. 636; Haight v. Hayt, 19 N. Y. 464; Updike v. Abel, 60 Barb. (N. Y.) 15; Jenkinson v. Stoneman, 4 Ohio Dec. 289; Babcock v. Case, 61 Pa. St. 427, 100 Am. Dec. 654; In re Wilson's Appeal, 109 Pa. St. 606, 7 Atl. 88; Leird v. Abernathy, 10 Heisk. (Tenn.) 626; Corbett v. McGregor (Tex. Civ. App.), 84 S. W. 278; Morris v. Brown, 38 Tex. Civ. App. 266, 85 S. W. 1015; Koepke v. Winterfield, 116 Wis. 44, 92 N. W. 437. A positive statement that a title is good may be somewhat a matter of opinion, but it also implies that there are no facts affecting its validity within the knowledge of the vendor making the representation, and a purchaser is entitled to rely thereon. Burns v. Dockray, 156 Mass. 135, 30 N. E. 551. See also, Buchanan v. Burnett, 52 Tex. Civ. App. 68, 114 S. W. 406, affd.

is the right of the purchaser to rescind necessarily defeated by the fact that the statement made as to the character of the vendor's title was honestly or mistakenly made.²² Representations that land is free and clear of encumbrances may be relied upon, and the person to whom it is made is not required to examine the records.²³ The constructive notice furnished by the records will not relieve the party from the consequences of positive statements fraudulently made as to the land being unencumbered.²⁴ Likewise, a fraud may be predicated upon misrepresentations as to boundaries²⁵ or the quantity of land in a farm or tract.²⁶

Fraud in the purchase of personal property may be practiced in many ways. Thus, if one induces another to sell

102 Tex. 492, 119 S. W. 1141, 132 Am. St. 900. See, however, *Conwell v. Clifford*, 45 Ind. 392, where it is held that a false representation by the vendor, who had a good title to certain land, is no defense to an action, by the person making the representations, upon notes given for the purchase-price.

²² It is immaterial whether the vendor knew the representations to be false, if the misrepresentation is in relation to a material matter and a purchaser is misled thereby. *Lanier v. Hill*, 25 Ala. 554; *Bailey v. Jordan*, 32 Ala. 50; *Lindsey v. Veasy*, 62 Ala. 421; *Kiefer v. Rogers*, 19 Gil. (Minn.) 14; *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403; *Rimer v. Dugan*, 39 Miss. 477, 77 Am. Dec. 687; *Zunker v. Kuehn*, 113 Wis. 421, 88 N. W. 605. A vendor who represents his title as being a freehold when it is only a copy-hold is guilty of fraud, where the purchaser relies upon the representation, and this is true even though the vendor believed in the truth of his statement. *Hart v. Swaine*, L. R. 7 Ch. Div. 42. The vendor is bound to make the preparation, no matter whether the representation is made with or without his knowledge of its falsity. *Buchanan v. Burnett*, 52 Tex. Civ. App. 68, 114 S. W. 406, *affd.* 102 Tex. 492, 119 S. W. 1141, 132 Am. St. 900. "The assertion is equivalent to an assumption of its truth" *Piche v. Robbins*, 24 R. I. 325, 53 Atl. 92. Where one

who held a tax title falsely represented such title to be perfect, there is such a fraud in law as will entitle the one defrauded to rescind a contract induced thereby, even though the one making the representation believed it to be true. *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201. The mere fact, however, that the vendors refer to it as "my property" does not sufficiently establish fraud. *Reuter v. Lawe*, 86 Wis. 106, 56 N. W. 472. See also, *Brown v. Manning*, 3 Minn. 35, 74 Am. Dec. 736; *Buchal v. Higgins*, 109 App. Div. (N. Y.) 607, 96 N. Y. S. 241.

²³ *Linn v. Green*, 17 Fed. 407; *Carpenter v. Wright*, 52 Kans. 221, 34 Pac. 798.

²⁴ A representation by an executor that land is unencumbered may render him personally liable for damages, though he did not know the representations were false. *West v. Wright*, 98 Ind. 335; *Weber v. Weber*, 47 Mich. 569, 11 N. W. 166.

²⁵ *Camp v. Camp*, 2 Ala. 632, 36 Am. Dec. 423; *Weatherford v. Fishback*, 3 Scam. (Ill.) 170; *Cowger v. Gordon*, 4 Blackf. (Ind.) 110; *Hook v. Bowman*, 42 Nebr. 87, 60 N. W. 391.

²⁶ *Gauldin v. Shehee*, 20 Ga. 531. See also, *Hervey v. Parry*, 82 Ind. 263; *Boody v. Henry*, 126 Iowa 31, 101 N. W. 447. But compare *Wamsley v. Currence*, 25 W. Va. 543.

him property on credit, concealing the fact of his insolvency, and having no intention of paying, he is guilty of fraud; and the vendor may disaffirm the contract and recover the goods, providing the rights of third parties have not intervened.²⁷ The mere insolvency of a purchaser does not of itself render the contract voidable. It must usually be coupled with the intention not to pay.²⁸ This intention must relate to the time the contract is made, and not the time when the goods are delivered, in order to render the sale of goods fraudulent on the ground of intent not to pay for them.²⁹ On the other hand, a purchaser of goods usually has a right to rely on the seller's representation as to ownership,³⁰ but he has no right to rely on what amounts to a mere prediction or an opinion of the seller.³¹

²⁷ *Wright v. Brown*, 67 N. Y. 1; *Des Farges v. Pugh*, 93 N. Car. 31, 53 Am. Rep. 446n; *Ditton v. Purcell*, — N. Dak. —, 132 N. W. 347, 36 L. R. A. (N. S.) 149. See also *Ayres v. French*, 41 Conn. 142; *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Buckley v. Artcher*, 21 Barb. (N. Y.) 585; *Mulliken v. Millar*, 12 R. I. 296; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993. The vendee's knowledge that he will not be able to pay for the goods purchased is equivalent to an intention not to pay. *Elsass v. Harrington*, 28 Mo. App. 300.

²⁸ *Morrill v. Blackman*, 42 Conn. 324; *Houghtaling v. Hills*, 59 Iowa 287, 13 N. W. 305; *Kelsey v. Harrison*, 29 Kans. 143; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Shipman v. Seymour*, 40 Mich. 274; *Zucker v. Karteles*, 88 Mich. 413, 50 N. W. 373; *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519; *Bidault v. Wales*, 19 Mo. 36, 59 Am. Dec. 327; *Klopenstein v. Mulcahy*, 4 Nev. 296; *Nichols v. Pinner*, 18 N. Y. 295; *Hennequin v. Naylor*, 24 N. Y. 139; *Morris v. Talcott*, 96 N. Y. 100; *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501n; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. 112, 2 Am. St. 905; *Biggs v. Barry*, 2 Curt. (U. S.) 259, Fed. Cas. No. 1402; *Garbutt v. Bank*, 22 Wis. 384; *Consolidated Milling Co.*

v. Fogo, 104 Wis. 92, 80 N. W. 103. See also, *Ex parte Whittaker*, L. R. 10 Ch. App. 446. But the fact that the purchaser cannot reasonably hope to pay may give rise to an inference that there was no intention of paying. *Wilk v. Key*, 117 Ala. 285, 23 So. 6; *Burchinell v. Hirsch*, 5 Colo. App. 500, 39 Pac. 352; *Deere v. Morgan*, 114 Iowa 287, 86 N. W. 271; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. 637; *Sinnott v. German-American Bank*, 164 N. Y. 386, 58 N. E. 286. Where a person desiring credit, on being asked "how he stood," correctly stated what he had in business and property, but was silent as to the fact that he owed about two-thirds as much as he possessed, the court said: "To tell half a truth only is to conceal the other half. Concealment of this kind, under the circumstances, amounts to a false representation." *Newell v. Randall*, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562.

²⁹ *Whitten v. Fitzwater*, 129 N. Y. 626, 29 N. E. 298. On this subject see also, post, § 88, Knowledge and Intention.

³⁰ *Hale v. Philbrick*, 42 Iowa 81.

³¹ See post, § 84, Opinions and Predictions. See also, *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Collins v. Jackson*, 54 Mich. 186, 19 N. W. 947.

The promoters of an enterprise or the agents of a corporation are guilty of fraud if they induce a person to subscribe for shares of stock by representing that other well-known business men, prominent in the community, have subscribed for stock, when such subscriptions were made merely for the purpose of influencing others, and under a secret agreement that they would not be required to pay for their stock, or that, in case of payment, the money would be refunded to them. The courts have held that such a secret agreement is a fraud on the rights of the one to whom it is represented that others have subscribed for stock, and that because of this fraud the subscriber is entitled either to rescind the contract or to defeat a recovery on notes he may have given in payment for the stock.⁸² It is immaterial whether or not the persons represented as subscribers were active in securing subscriptions.⁸³ Thus, where the appellant, who was a banker and well-known business man, represented that he was one of the joint purchasers of a certain patent right, and was executing his notes for the same, but did not disclose that they were executed with the secret understanding that if he would induce the appellee and others to purchase said patent right then the notes executed by appellee for a part of the purchase-money thereof were to be returned to him, this secret agreement was held to be a fraud on the rights of appellee.⁸⁴ Likewise, if a book agent induces a subscription

⁸² *Gilpin v. Netograph Mach. Co.*, 25 Okla. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477. In the above case it was held that the execution of renewal notes before the discovery of the fraud practiced did not constitute a waiver of such fraud. *Byers v. Maxwell*, 32 Tex. Civ. App. 269, 54 S. W. 789.

⁸³ *Henderson v. Lacon*, L. R. 5 Eq. 249; *Alabama Foundry & Works v. Dallas*, 127 Ala. 513, 29 So. 459; *Coles v. Kennedy*, 81 Iowa 360, 46 N. W. 1088, 25 Am. St. 503; *State Bank v. Cook*, 125 Iowa 111, 100 N. W. 72; *Cox v. Cline*, 147 Iowa 353, 126 N. W. 330; *Talmage v. Sanitary Security Co.*, 31 App. Div. (N. Y.) 498, 52 N. Y. S. 139; *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068.

⁸⁴ *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739. Where one induced a

stock subscription by representing that an application for a patent had been allowed by the patent office as originally filed, such statement being made without any knowledge that they were untrue, and without intent to deceive, the court held that the reckless assertion of that which was untrue, and which deceived the party subscribing for stock, was a fraud which entitled the subscriber to defeat an action to collect such subscription. *Foulk's Accelerating Air Motor Co. v. Thies*, 26 Nev. 158, 65 Pac. 373, 99 Am. St. 684. Where a father purchased a certificate of tuition for his daughter in a business college on being told that several of her classmates were going to attend plaintiff's college, he had a right to rescind the agreement when it appeared that such classmates had not purchased certificates of tuition.

by misrepresenting the contents and scope of a book to be published, the subscriber being in no position to ascertain the truth of the representations, the subscription so induced cannot be enforced.³⁵ Should the agent represent that the books sold are a special, limited, extra-illustrated edition, which fact, if true, would have added greatly to the value of such books, it has been held that a note given in payment therefor cannot be enforced when the representations prove false.³⁶

The concealment or misstatement of material facts will avoid a contract of insurance. Thus in life insurance contracts the insured must disclose all facts known to him affecting the life upon which the insurance is placed,³⁷ and if the statement is a warranty (not merely a representation), and is positive and unqualified, the contract is avoided by any part of the statement being in fact untrue,³⁸ even though the insured did not know the statement was false.³⁹

Brown v. Search, 131 Wis. 109, 111 N. W. 210.

³⁵ *Greenleaf v. Gerald*, 94 Maine 91, 46 Atl. 799, 50 L. R. A. 542, 80 Am. St. 377; *History Co. v. Durham* (Tex.), 23 S. W. 327; *History Co. v. Flint*, 4 Wills. (Tex. Civ. App.) Cas., § 224, 15 S. W. 912.

³⁶ *Schultheis v. Sellers*, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210.

³⁷ *London Assurance Co. v. Mansel*, 11 Ch. Div. 363, 48 L. J. Ch. 331; *Lycoming Ins. Co. v. Rubin*, 79 Ill. 402; *Walden v. Louisiana Ins. Co.*, 12 La. 134; *New York Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 351; *Burritt v. Saratoga Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345n; *Smith v. Aetna Life Ins. Co.*, 49 N. Y. 211; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546. See also, *Locke v. N. American Ins. Co.*, 13 Mass. 61; *Clark v. Union Mut. Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507, 9 L. ed. 512.

³⁸ *Alabama Ins. Co. v. Garner*, 77 Ala. 210; *Rice v. Fidelity & Co.*, 103 Fed. 427, 43 C. C. A. 270; *Supreme Lodge v. McLaughlin*, 108 Ill. App. 85; *Cushman v. United States Life Ins. Co.*, 63 N. Y. 444; *Jef-*

fries v. Life Ins. Co., 22 Wall. (U. S.) 47; *Aetna Life Ins. Co. v. France*, 91 U. S. 510. As to when a statement in an insurance contract is to be construed as a warranty or a representation, see *Goff v. Supreme Lodge Royal Achates*, 90 Nebr. 578, 134 N. W. 239, 37 L. R. A. (N. S.) 1191.

³⁹ *Bloomington Benefit Assn. v. Cummings*, 53 Ill. App. 530; *Continental Inv. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810n; *Glade v. Germania Fire Ins. Co.*, 56 Iowa 400, 9 N. W. 320; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525; *Goddard v. Monitor Mutual Fire Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307; *Campbell v. New England Life Ins. Co.*, 98 Mass. 381; *Seal v. Farmers' & C. Ins. Co.*, 59 Nebr. 253, 80 N. W. 807; *Clemans v. Supreme Assembly Royal Society*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450; *Cushman v. United States Life Ins. Co.*, 63 N. Y. 404; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 35 Am. Rep. 623n; *Connecticut Mut. Life Ins. Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Bloomington Grove v. McAnerney*, 102 Pa. St.

§ 73. **Fraud as to contents or substance of contracts.**—As a general rule the mind must accompany the act of signing a contract in writing. If one is induced to sign an instrument by a fraudulent reading or statement of its contents or substance, un-mixed with any fault or negligence in himself or his agents, and he believes he is assenting to a contract of different import from that which he actually signs, he is not bound. It makes no difference whether such misstatement or misreading of the contents or substance was made by the party who seeks to enforce the obligation or by a stranger who acted for him.⁴⁰ Thus far all authorities agree. They also agree that if one to whom the instrument is falsely read, or its contents misstated, is on an unequal footing with the party who reads the instrument or makes the statements as to its contents he is not guilty of negligence in signing the instrument because of a rightful reliance on such party. So when the party defrauded by such means is illiterate and unable to read,⁴¹ reads with difficulty, has defective eye-

335, 48 Am. Rep. 209; Freedman v. Providence Ins. Co., 182 Pa. St. 64, 37 Atl. 909; Standard &c. Ins. Co. v. Lauderdale, 94 Tenn. 635, 30 S. W. 732; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837; Powers v. North Eastern Mut. Life Ins. Co., 50 Vt. 630; Ryan v. Springfield Fire Ins. Co., 46 Wis. 671, 1 N. W. 426.

⁴⁰In *re* Thorogood's Case, 2 Coke 9; Foster v. Mackimon, 38 L. J. C. P. 310; Sementek v. Cornhauser, 17 Ill. App. 266; Rockford &c. R. Co. v. Shunick, 65 Ill. 223; Strong v. Linnington, 8 Ill. App. 436; Alfred Shrimpton v. Philbrick, 53 Minn. 366, 55 N. W. 551; Cotterill v. Crum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. 549n; Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458; Albany City Saving Inst. v. Burdick, 87 N. Y. 40. See also, *Case Mill Mfg. Co. v. Vickers*, 147 Ky. 396, 144 S. W. 76. As to the right, as against a subsequent bona fide purchaser, to avoid a deed because of a false impression, induced by fraud, as to the contents or character of the paper signed, see *Conklin v. Benson*, 159 Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537, and note.

⁴¹*Jones v. Austin*, 17 Ark. 498;

Alexander v. Dickinson (Ark.), 101 S. W. 739; *American Standard Jewelry Co. v. Witherington*, 81 Ark. 247, 98 S. W. 695; *Metropolitan Loan Assn. v. Esshe*, 75 Cal. 513, 17 Pac. 675; *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Skym v. Weske Consolidated Co.*, 115 Cal. 17, 47 Pac. 116; *Hawkins v. Hawkins*, 50 Cal. 558; *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782; *Wilson v. Moriarty*, 77 Cal. 596, 20 Pac. 134, 88 Cal. 207, 26 Pac. 85; *Meyer v. Hass*, 126 Cal. 560, 58 Pac. 1042; *May v. Seymour*, 17 Fla. 725; *Grimsley v. Singletary*, 133 Ga. 56, 65 S. E. 92, 134 Am. St. 196; *Chicago &c. R. Co. v. Lewis*, 109 Ill. 120; *Rockford &c. R. Co. v. Shunick*, 65 Ill. 223; *Union &c. Ins. Co. v. Huyck*, 5 Ind. App. 474, 32 N. E. 580; *Green v. Wilkie*, 98 Iowa 74, 66 N. W. 1046, 36 L. R. A. 434, 60 Am. St. 184; *Winfield National Bank v. Corco*, 46 Kans. 620, 26 Pac. 939; *Sibley v. Holcomb*, 104 Ky. 670, 47 S. W. 765; *Trambley v. Ricard*, 130 Mass. 259. In the above case the party signing the contract failed to have it read or explained to him, supposing that it contained the terms of their oral agreement. *Mullen v. Old Colony Co.*, 127 Mass. 86, 34 Am. Rep. 349;

sight,⁴² or cannot understand the language in which it is written.⁴³

Some courts lay down the rule that the carelessness or negligence of a party in signing a contract does not estop him from afterward setting up that it does not contain the true agreement of the parties, in a suit thereon between the original parties to such contract, or their privies, where the party seeking enforcement practiced fraud or deception in order to induce the other to sign.⁴⁴ The rule laid down by the foregoing cases seems correct in principle, for if one signs an agreement, relying on the

Schaller v. Borger, 47 Minn. 357, 50 N. W. 247; Campbell v. Doggett (Miss.), 23 So. 371; Vandergrif v. Brock, 89 Mo. App. 411; Birdsall v. Coon, 157 Mo. App. 439, 139 S. W. 243; Spelts v. Ward (Nebr.), 96 N. W. 56; Decker v. Hardin, 5 N. J. L. 579; Mason v. Postal Tel. Cab. Co., 71 S. Car. 150, 50 S. E. 781. The same rule applies even though the representation be made by one not a party to the agreement, but acting for one who is a party to the contract. Fenter v. Obough, 17 Ark. 71; Schuykill Co. v. Copley, 67 Pa. St. 386, 5 Am. Rep. 441. But the mere fact that the party signing is illiterate does not excuse him from exercising due diligence under the circumstances. Montgomery v. Scott, 9 S. Car. 20, 30 Am. Rep. 1. The failure of an illiterate person to have a contract read to him before signing it will ordinarily estop him from avoiding the contract. This is not true, however, where he was induced to sign by false representations as to its contents. Baldwin v. Postal Tel. Cable Co., 78 S. Car. 419, 59 S. E. 67.

⁴²Loucks v. Taylor, 23 Ind. App. 245, 55 N. E. 238; Dashiell v. Harshman, 113 Iowa 283, 85 N. W. 851; St. Louis Jewelry Co. v. Bennett, 75 Kans. 743, 90 Pac. 246. In the above case the defendant's daughter was present and would have read the instrument to him had he requested her so to do. His failure to have the instrument read by her did not prevent him from setting up the fraud practiced in procuring his signature. Winfield Nat. Bank v. Croco, 46 Kans. 620, 26 Pac. 939; Stewart v. Roberts,

33 Ky. L. 332, 110 S. W. 340; First Nat. Bank v. Deal, 55 Mich. 592, 22 N. W. 53. See also, Winter v. Johnson, — S. D. —, 131 N. W. 1020. Here plaintiff was old and his eyesight defective.

⁴³Alexander v. Dickinson (Ark), 101 S. W. 739; Meyer v. Hass, 126 Cal. 560, 58 Pac. 1042; Adolph v. Minneapolis R. Co., 58 Minn. 178, 59 N. W. 959; Beck & C. Lith. Co. v. Obert, 54 Mo. App. 240. If an instrument is signed under such circumstances as to prevent the one signing from gaining knowledge of its contents he is not bound. Chapman v. Atlantic Guano Co., 91 Ga. 821, 18 S. E. 41.

⁴⁴Moline Jewelry Co. v. Crew, 171 Ala. 415, 55 So. 144; Shook v. Puritan Mfg. Co., 75 Kans. 301, 89 Pac. 653, 8 L. R. A. (N. S.) 1043; St. Louis Jewelry Co. v. Bard, 75 Kans. 837, 90 Pac. 783; Eggelston v. Advance Thresher Co., 96 Minn. 241, 104 N. W. 891; Woodbridge v. DeWitt, 51 Neb. 98, 70 N. W. 506; Ward v. Spelts, 39 Nebr. 809, 58 N. W. 426. In this case it is said, "the doctrine that the carelessness or negligence of a party in signing the writing estops him from afterward disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto, when the defense is that such writing, by reason of fraud, does not embrace the contract actually made." Griffin v. Roanoke R. & Co., 140 N. Car. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463; Weil & Co. v. Hendrick Mfg. Co., — R. I. —, 80 Atl. 447. See also, Van Metre v. Nunn, — Minn. —, 133 N. W. 1012.

statement of the other party as to its contents, which statement proves false, the contract should be voidable as between the parties or their privies, for the defrauded party should not be permitted to take advantage of his own wrong, or to say that the other party was negligent in believing him. A majority of the courts take this view of the subject.⁴⁵ This rule, however, is not universal. Other courts hold that if the defrauded party could read, or if by the exercise of reasonable diligence he might have discovered the deception, he is bound by the contract, his own negligence defeating his right to avoid the agreement.⁴⁶ But on

⁴⁵ *Prestwood v. Carlton*, 162 Ala. 327, 50 So. 254; *Bates v. Harte*, 124 Ala. 427, 26 So. 898, 82 Am. St. 186; *Beck & Co. Lith. Co. v. Houppert*, 104 Ala. 503, 16 So. 522, 53 Am. St. 77; *Tillis v. Austin*, 117 Ala. 262, 22 So. 975; *Cannon v. Lindsey*, 85 Ala. 198, 3 So. 676, 7 Am. St. 38; *Davis v. Snider*, 70 Ala. 315; *Foster v. Johnson*, 70 Ala. 249; *Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404; *McBride v. Macon Tel. Co.*, 102 Ga. 422, 30 S. E. 999; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *New v. Wambach*, 42 Ind. 456; *Givan v. Masterson*, 152 Ind. 127, 51 N. E. 237; *Burlington Lumber Co. v. Evans Lumber Co.*, 100 Iowa 469, 69 N. W. 558; *Western Mfg. Co. v. Cotton*, 31 Ky. L. 1130, 104 S. W. 758, 12 L. R. A. (N. S.) 427. In the above case the contract contained this statement: "I have read this contract." The court held, however, that this did not prevent the one signing the contract from setting up fraud in an action brought to enforce it, and stated "the law is not designed to protect the vigilant or the tolerable vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous as against the machinations of the designedly wicked." *Tanton v. Martin*, 80 Kans. 22, 101 Pac. 461; *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. 262; *Freedley v. French*, 154 Mass. 339, 28 N. E. 272; *First National Bank v. Deal*, 55 Mich. 592, 22 N. W. 53; *Anderson v. Walter*, 34 Mich. 113; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; *Birdsall v. Coon*, 157 Mo. App. 439, 139 S. W. 243; *Story v. Gam-*

mell, 68 Nebr. 709, 94 N. W. 982; *Cole Bros. v. Williams*, 12 Nebr. 440, 11 N. W. 875; *Alexander v. Brogley*, 62 N. J. L. 584, 41 Atl. 691, affd. 63 N. J. L. 307, 43 Atl. 888; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258, 30 Am. St. 617; *Monnett v. Columbus & Co. R. Co.*, 26 Ohio Cir. Ct. 469; *Charleston & Co. R. Co. v. Devlin*, 85 S. Car. 128, 67 S. E. 149. The fraud practiced relates to the time the instrument is signed, and fraud practiced at that time will not excuse the failure to observe open and apparent departures in the thing delivered from that bargained for, within a reasonable time after delivery. *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246, 89 N. W. 538, 67 L. R. A. 705. See also, Cases cited in the preceding note. But see *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. 121; *Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170; *McKenzie v. Planters' Ins. Co.*, 9 Heisk. (Tenn.) 261. Whether the signor was guilty of negligence in signing is a question of fact for the jury. *Voyles v. Postal Tel. Co.*, 78 S. Car. 430, 59 S. E. 68. As to whether fraud in procurement of a negotiable instrument will entitle the maker to a void payment when such instrument is in the hands of an innocent purchaser, see under title "Bills and Notes." As a general rule it is no defense, although there are jurisdictions which hold otherwise.

⁴⁶ *Toledo Computing Scale Co. v. Garrison*, 28 App. D. C. 243; *Dunham Lumber Co. v. Holt*, 123 Ala. 336, 26 So. 663; *Kimmell v. Skelly*, 130 Cal.

examining the above cases it will be found that they, in the main, give illustrations of gross negligence on the part of the party defrauded, while on the other hand, little, if any, actual fraud was practiced by the adverse party. Thus in one of them the facts showed that plaintiff's agent, who solicited an order for a certain article from defendant, did nothing whatever to induce him to sign the order without reading it, no false representations as to its contents were made, but the agent simply, silently, rapidly and somewhat illegibly wrote the order, with a pencil, and then silently placed it immediately and quickly before the defendant, who signed the same without reading it.⁴⁷ In another it appears that the signer was a highly educated man, and that the instrument sought to be avoided consisted of one sentence of three lines, legibly written, so far as appears, and that the part which was claimed to have been fraudulently inserted was in the last line and immediately above his signature.⁴⁸

It goes without saying that, if the party is capable of reading the instrument understandingly and actually does read it, he can-

555, 62 Pac. 1067; Hazard v. Griswold, 21 Fed. 178; Taylor v. Fleckenstein, 30 Fed. 99; Chicago Building &c. Co. v. Summerour, 101 Ga. 820, 29 S. E. 291; Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030; McCormack v. Molburg, 43 Iowa 561; Wallace v. Chicago &c. R. Co., 67 Iowa 547, 25 N. W. 772; Reid v. Bradley, 105 Iowa 220, 74 N. W. 896; Bannister v. McIntire, 112 Iowa 600, 84 N. W. 707; Maine Mut. Marine Ins. Co. v. Hodgkins, 66 Maine 109; Johnston v. Covenant Mut. Life Ins. Co., 93 Mo. App. 580; McNinch v. Northwest Thresher Co., 23 Okla. 386, 100 Pac. 524, 138 Am. St. 803n. The decision in the above case is based on the ground that "the execution of a contract in writing superseded all oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument, in the absence of fraud or mistake of fact; and any representation made prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change or add to the terms plainly

incorporated into and made a part of the written contract." Farlow v. Chambers, 21 S. Dak. 128, 110 N. W. 94; Gibson v. Brown (Tex. Civ. App.), 24 S. W. 574; Dowagiac Mfg. Co. v. Schroeder, 108 Wis. 109, 84 N. W. 14; Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N. W. 923, 105 Am. St. 1016. In the case of Phillips v. Gallant, 1 Hun (N. Y.) 528, 3 Thomp. & C. 618, the defendant was held bound, although misinformed as to the terms of the contract by an interpreter.

⁴⁷ Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030.

⁴⁸ Farlow v. Chambers, 21 S. Dak. 128, 110 N. W. 94. It is not claimed, however, that in all cases cited negligence of the defrauded party was so apparent. For instance, in one of them a deed was presented to the defendant for signature while he was at work in the woods, and did not have his spectacles with him. He did not have the deed read to him, and signed it under a misrepresentation as to its contents. The plaintiff was the defendant's step-son. Gibson v. Brown (Tex. Civ. App.), 24 S. W. 574.

not complain of false representations as to its contents.⁴⁹ Or, if he is given ample opportunity to familiarize himself with its terms, and if he does in fact actually counsel with a business man of experience, and on his advice signs the contract, although not reading it himself, he is bound, and cannot maintain an action in equity to rescind the same, even though the other party to the contract had misrepresented its terms.⁵⁰

§ 74. Fraud where there is a fiduciary or confidential relation.—Where a confidential relation exists between the parties to an agreement it is the duty of the dominant party to make a full and clear statement of all facts which relate to the subject-matter of the contract. Not only this, but such party will be required to fully establish the agreement and remove from it every element of doubt or suspicion that may attach to its execution. The law thus rightfully places the burden upon him of proving the righteousness of his conduct and the validity of the contract.⁵¹ The one standing in a confidential relation who conceals or fails to make a full disclosure of facts which are within his knowledge, knowing the other party to be ignorant of those facts, is guilty of fraud both in law and in equity.⁵²

Confidential relations have been held to exist between trustee and cestui que trust, principal and agent, attorney and client, physician and patient, husband and wife, parent and child, guardian and ward, partners, clergyman and parishioners, and some others. These relations will be very briefly considered in the order named. A trustee may not purchase the trust estate from his cestui que

⁴⁹ *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *James v. Dalbey*, 107 Iowa 463, 78 N. W. 51; *Nicol v. Young*, 68 Mo. App. 448.

⁵⁰ *Magee v. Verity*, 97 Mo. App. 486, 71 S. W. 472.

⁵¹ *Bowen v. Kutzner*, 167 Fed. 281, 93 C. C. A. 33. See also, *Huguenin v. Baseley*, 13 Ves. 105; *Wright v. Proud*, 13 Ves. 136; *Edmonds v. Meyrick*, 2 Hare 60; *Harris v. Tremenhoe*, 15 Ves. 34; *Hunter v. Atkins*, 3 Myl. & K. 113; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Nesbit v. Lockman*, 35 N. Y. 167; *Sears v. Shafer*, 2 Seld. (N. Y.) 268.

⁵² *Miller v. Whelan*, 158 Ill. 544, 42

N. E. 59; *Mason v. Bauman*, 62 Ill. 76. See also, *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. 137; *Daniel v. Brown*, 33 Fed. 849; *Green v. Peeso*, 92 Iowa 261, 60 N. W. 531; *Purslow v. Jackson*, 93 Iowa 694, 62 N. W. 12; *Finegan v. Thiesen*, 92 Mich. 173, 52 N. W. 619; *Zahn v. McMillin*, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; *Mallory v. Leach*, 35 Vt. 156, 82 Am. Dec. 625; *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. 934; *Bell v. Bell*, 3 W. Va. 183; *Wells v. McGesck*, 71 Wis. 196, 35 N. W. 769.

trust. The law regards with a jealous eye all transactions between persons occupying confidential relations. As a general rule a court of equity will avoid a contract altogether without proof of fraud, and will never sustain it except where the trustee clearly proves the fairness of such transaction, and that it was advantageous to the cestui que trust.⁵³ Consequently, if the trustee attempts to gain an interest in the trust property without disclosing his identity he will continue to hold as trustee.⁵⁴ Nor can he purchase at his own sale as trustee,⁵⁵ unless he obtains special permission from a court of competent jurisdiction.⁵⁶ While a trust remains unperformed a trustee has no right to purchase the trust property unless he discloses his identity, obtains the consent of the beneficiaries, and make a full disclosure of everything that relates to it.⁵⁷ Courts will even look with suspicion upon a purchase by a former trustee after the termination of the trust

⁵³ *Saunders v. Richard*, 35 Fla. 28, 16 So. 679. See also, *Dwight v. Blackmar*, 2 Mich. 330; *Terwilliger v. Brown*, 44 N. Y. 237; *Graves v. Waterman*, 63 N. Y. 657; *Spencer & Newbold's Appeal*, 80 Pa. St. 317. The transactions will not be sustained if the trustee has taken advantage of any information received by him in such capacity, nor if the cestui que trust entered into the transaction in ignorance of her legal rights. *McCants v. Bee*, 1 McCord Equity (S. Car.) 383, 16 Am. Dec. 610.

⁵⁴ *Mareck v. Minneapolis Trust Co.*, 74 Minn. 538, 77 N. W. 428; *Newman v. Newman*, 152 Mo. 398, 54 S. W. 19; *Shelby v. Creighton*, 65 Neb. 485, 91 N. W. 369, 101 Am. St. 630; *Bohle v. Hassel Broch*, 64 N. J. Eq. 334, 51 Atl. 508; *Trustees of Oberlin College v. Blair*, 45 W. Va. 812, 32 S. E. 203. This is true notwithstanding a fair and adequate price is paid for the property so purchased. *Smith v. Miller*, 98 Va. 535, 37 S. E. 10. The trustee is not permitted to make a profit for himself out of the trust property. *Frazier v. Jeakins*, 64 Kans. 615, 68 Pac. 24, 57 L. R. A. 575. To

avoid a purchase by a trustee of property involved in the trust it is sufficient for the cestui que trust to show the trustee's relation to property and to them. *Wilson v. Brookshire*, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792.

⁵⁵ *St. Paul Trust Co. v. Strong*, 85 Minn. 1, 88 N. W. 256; *Torrey v. Bank of Orleans*, 9 Paige (N. Y.) 649; *Scholle v. Scholle*, 101 N. Y. 167, 4 N. E. 334; *Davoue v. Fanning*, 4 Johns. Ch. (N. Y.) 199; *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. 1331.

⁵⁶ *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. 1331. In Texas the trustee may purchase at a judicial sale over which he has no control, and which was not brought about by himself. *Goodgame v. Rushing*, 35 Tex. 722; *Scott v. Mann*, 36 Tex. 157; *Howard v. Davis*, 6 Tex. 174; *Erskine v. Dela Baum*, 3 Tex. 406, 49 Am. Dec. 751.

⁵⁷ *Ward v. Armstrong*, 84 Ill. 151; *Woodridge v. Bockes*, 170 N. Y. 596, 63 N. E. 362; *In re Brownfield's Estate*, 193 Pa. St. 151, 44 Atl. 246; *Brown v. Brown*, 107 Tenn. 349, 65 S. W. 413.

relation.⁵⁸ These principles do not apply, however, in matters outside the trust.⁵⁹

As between principal and agent, the agent occupies a confidential relation and is required to exercise the highest faith toward, and to secure the best terms for his principal.⁶⁰ An agent cannot assume incompatible relations nor place his interests in conflict with those of his principal;⁶¹ nor can he purchase the principal's property without disclosing his identity and getting his principal's assent.⁶² The agent is bound to exercise the most perfect good faith to keep his principal informed of facts coming to his knowledge affecting his rights and interests.⁶³

The same general principles above stated apply to relations between attorney and client. Thus it has been that fraudulently representing the value of his service to procure the execution of a note constituted fraud, and is a defense available against a note given for excessive fees.⁶⁴ It has even been held that he is not entitled to accept a gift from the client during the continuance of the confidential relation.⁶⁵ Where the attorney purchases property at a price much less than its value, the client having no knowledge of the value except what the attorney told him, the burden rests upon the attorney to establish perfect fair-

⁵⁸ *Tate v. Williamson*, L. R. 2 Ch. App. 55. In the above case it is said: "The broad principle on which the courts act in cases of this description is that, whereby there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert an undue influence over the person trusting him, the court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. See also, *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429, 22 S. W. 786.

⁵⁹ *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146; *Kern v. Kern*, 36 Ore. 5, 58 Pac. 527; *Fuller v. Abbe*, 105 Wis. 235, 81 N. W. 401.

⁶⁰ *Cheney v. Gleason*, 125 Mass. 166.

⁶¹ *Bent v. Priest*, 86 Mo. 475; *Le Gendre v. Byrnes* (N. J.), 12 Cent. Rep. 815; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *O'Grady v. Coe*, 13 Hun (N. Y.) 598.

⁶² *Dodge v. Black*, 21 Ky. L. 992, 53 S. W. 1039; *Louisville Bank v. Gray*, 84 Ky. 565. See also, *Adams v. Sayre*, 70 Ala. 318; *Francis v. Kerker*, 85 Ill. 198; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Michoud v. Girod*, 4 How. (U. S.) 503.

⁶³ *Holmes v. Cathcart*, 88 Minn. 213, 92 N. W. 956, 60 L. R. A. 733, 97 Am. St. 513.

⁶⁴ *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74.

⁶⁵ *In re Greenfield's Estate*, 14 Pa. St. 489, 506. As between attorney and client, in matters of a gift, a contract must be carried on with the greatest fairness. *Jennings v. McConnel*, 17 Ill. 148; *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

ness, accuracy and equity; and it makes no difference that the transaction was through a third person.⁶⁶ The general rule may be stated that an attorney must make a full and fair disclosure of all material facts to his client,⁶⁷ and any doubt as to the fairness of an agreement must be resolved in favor of the client.⁶⁸

The relation of physician and patient is confidential in its nature.⁶⁹ Thus, where it appeared that the donor was very old and sick much of the time, weak in mind, and broken down generally, that she made a gift of a large portion of her estate to the defendant, who was not a relative but her physician, that he had charge of all her affairs and was her only adviser, and that the gift was made without consulting any one else and was kept secret until after her death, it was declared void.⁷⁰

Confidential relations exist between husband and wife.⁷¹ Contracts entered into subsequent to the marriage, which are disadvantageous to the wife, are presumed to be fraudulent.⁷² As a

⁶⁶ *Edwards v. Meyrick*, 2 Hare 60; *Zeigler v. Hughes*, 55 Ill. 288; *Howell v. Ranson*, 11 Paige (N. Y.) 538.

⁶⁷ *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. Rep. 401n; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Beedle v. Crane*, 91 Mich. 429, 51 N. W. 1070; *Rose v. Mynatt*, 7 Yerg. (Tenn.) 30; *Baker v. Humphrey*, 101 U. S. 494, 25 L. ed. 1065; *Vanesse v. Reid*, 111 Wis. 303, 87 N. W. 192.

⁶⁸ *Cassem v. Heustis*, 201 Ill. 208, 66 N. E. 283, 94 Am. St. 160. If the fairness of an agreement cannot be made to conclusively appear the contract will be presumed to be fraudulent. *Willin v. Burdett*, 172 Ill. 117, 49 N. E. 1000; *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. 150; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564; *Gray v. Emmons*, 7 Mich. 533; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Rose v. Mynatt*, 7 Yerg. (Tenn.) 30.

⁶⁹ *Dent v. Bennett*, 4 Myl. & C. 269; *Unruh v. Lukens*, 166 Pa. St. 324, 31 Atl. 110.

⁷⁰ *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep.

479n. The above case is one of undue influence, yet the general principles announced by it are also applicable to the case of fraud.

⁷¹ *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65; *In re Darlington's Appeal*, 86 Pa. St. 512, 27 Am. St. 726. The relations no longer continue after the wife has commenced suit for divorce; after this she is under the necessity of making the efforts to test the truth of representation made by the husband the same as any other person. *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. 126.

⁷² *Witbeck v. Witbeck*, 25 Mich. 439; *Hovorka v. Havlik*, 68 Neb. 14, 93 N. W. 990, 110 Am. St. 387; *Farmer v. Farmer*, 39 N. J. Eq. 211; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907. "The rule of equity that 'he who bargains, in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence' (*Gibson v. Jeyes*, 6 Ves. 266), applies with peculiar force to a transaction by which a husband secures from his wife a portion of her estate. The most dominant of all relations is that of the husband over the wife. There are, of course, exceptional cases when the will of

general rule voluntary transfers made by the wife to the husband, especially if made under circumstances such as give rise to a suspicion of unfairness,⁷³ as where made just prior to her death,⁷⁴ are presumed fraudulent.⁷⁵

the woman may control. The relation is so close, the trust of the wife so absolute, her dependence so entire, it may be, her fear so abject, while the dominion of her husband is so complete, his influence so insidious yet so controlling, that equity regards all such transactions with a jealous care and subjects them to the severest scrutiny. The greater the affection, the more submissive the dependence; the stronger the trust, the more liable is the wife to be subject to the control of the husband, and the more vigilant should the court be in protecting the weak. *Farmer v. Farmer*, 39 N. J. Eq. 211, 216; *May, Fraud. Conv. (Text-Book Series)*, 483; *Black v. Black*, 30 N. J. Eq. 215, 219; *Boyd v. De La Montagnie*, 73 N. Y. 502; *Weeks v. Haas*, 3 Wills & S. 520; *Campbell's Appeal*, 80 Pa. St. 298; *Darlington's Appeal*, 86 Pa. St. 512; *McRae v. Battle*, 69 N. Car. 98; *Witbeck v. Witbeck*, 25 Mich. 439; *Smyley v. Reese*, 53 Ala. 89; *Shaffer v. Kugler*, 107 Mo. 58, 17 S. W. 698. Chief Justice Gibson says, in *Watson v. Mercer*, 6 Serg. & R. (Pa.) 49, with reference to transfers obtained from the wife for the purpose of vesting the estate in the husband: 'What honest mind would feel regret that, in the hurry of accomplishment, some circumstance, merely formal, was omitted by which the wife and her family were rescued from his rapacity?' This deed was executed at a critical period of Mrs. Otterson's life. She was in extremely delicate health; it was doubtful if she could survive the peril of her approaching confinement. She was a refined lady, unacquainted with business, relying for its care first on her agents and then on her husband, who, after their marriage, became her agent and was entrusted by her with the entire management of her estate and exclusively of the property in question in short; she was most dependent on and devoted to him and his interests, her affection for and attention to him

were marked, as was her anxiety to please him. He was a prominent lawyer; so was the selected trustee, who was the husband's intimate friend; and so was also the officer who took the acknowledgment. So far as the evidence shows, this inexperienced lady, she being without any competent independent adviser, was surrounded by these gentlemen, of whose legal ability she must have been aware, in one of whom she reposed the most implicit confidence. It is a case in which the court should be alert to require the observance of all the technical rules applicable. In all transactions between persons occupying relations, whether legal, natural, or conventional in their origin, in which confidence is naturally inspired, is presumed, or in fact, reasonably exists the burden of proof is thrown upon the person in whom confidence is reposed, and who has acquired an advantage, to show affirmatively, not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood. *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Gibson v. Jevess*, 6 Ves. 266." *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197.

⁷³ *Way v. Union Cent. Life Ins. Co.*, 61 S. Car. 501, 39 S. E. 742.

⁷⁴ *Lewis v. McGrath*, 191 Ill. 401, 61 N. E. 135.

⁷⁵ But there is no presumption of fraud in conveyances made by the husband to a wife. *McDougall v. McDougall*, 135 Cal. 316, 67 Pac. 778; *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543; *Ford v. Ford*, 193 Pa. St. 530, 44 Atl. 561. However, she may be guilty of fraudulent conduct. This fact may be shown in an action to avoid the conveyance. *Lins v. Linhardt*, 127 Mo. 271, 29 S. W. 1025; *Birdsong v. Birdsong*, 2 Head. (Tenn.) 289. See also, *Stone v. Wood*, 85 Ill. 603. It has been held that under the California Code a wife who brings an action to enforce a

Equity scrutinizes with special care transactions between parents and their children. "Everybody will affirm that if there be a pecuniary transaction between parent and child just after the child attained the age of twenty years, and prior to what may be called complete emancipation, without any benefits moving to the child, the presumption is that undue influence has been exercised to procure that liability, and it is a business and duty of the party who endeavors to maintain that transaction to show that the presumption is adequately rebutted, and that it may be adequately rebutted is clear."⁷⁶ A conveyance of land made by a young girl to her grandparents, with whom she has resided from infancy and who have had entire control of her person and property, and have purposely kept her in ignorance of her rights, is fraudulent and will be set aside by a court of equity.⁷⁷ Contracts and conveyances whereby benefits are secured by the children to their parents must be entered into with scrupulous good faith, and must be reasonable under the circumstances; unless this is true they will be set aside, except, perhaps, where the rights of innocent third parties have intervened.⁷⁸ On the other hand, conveyances or other transactions by the parent which are beneficial to the child are not presumed to be fraudulent;⁷⁹ but if it appears that the child was the dominant party the burden may be upon such child to explain any circumstances which give rise to suspicion.⁸⁰

The relations among the members of a firm are also confidential, and they sustain a trust relation toward each other with reference to partnership matters.⁸¹ Each partner is under an

contract against the husband, which contract was entered into by him in order to induce her to dismiss a divorce suit, must show that it is fair in its terms. *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231.

⁷⁶ *Archer v. Hudson*, 7 Beav. 551.

⁷⁷ *Brown v. Burbank*, 64 Cal. 99, 27 Pac. 940.

⁷⁸ *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593.

⁷⁹ *Carney v. Carney*, 196 Pa. St. 34, 46 Atl. 264.

⁸⁰ See *Wilcox v. Mann*, 115 Iowa 91, 87 N. W. 748; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *American*

Notes in 2 White and Tudor's Leading Cases in Equity (fourth edition), 1206. If, under such circumstances, a son obtains a conveyance from a parent, this court will not permit it to stand, unless such son establishes by abundant proof that the contract was not only free, but fair, and made with the utmost good faith." *Sands v. Sands*, 112 Ill. 225; *Jacox v. Jacox*, 40 Mich. 473, 29 Am. Rep. 547. See also, *Dick v. Albers*, 243 Ill. 231, 90 N. E. 683, 134 Am. St. 369.

⁸¹ *Goldsmith v. Eichold*, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; *Caldwell v. Davis*, 10 Colo. 481, 15 Pac. 696, 3

obligation to make a full and fair disclosure to the others of all material facts which are known to him and not to the others.⁸² This relation of trust and confidence relates only to the partnership business, however, and a partner may engage in an enterprise outside of and not connected with the partnership.⁸³ He is under no obligation to account to the partnership for the profits derived from such outside business, even though the partnership agreement provided that he should not engage in any other business.⁸⁴

The same general rules governing the relation of trustee and cestui que trust control transactions between guardian and ward; a relation of trust and confidence exists.⁸⁵ The guardian cannot acquire the property of the ward at his own sale without disclosing his identity and gaining the consent of the ward after he has attained his majority.⁸⁶ He must also make a full and complete disclosure as to all material facts.⁸⁷ These principles are held to apply in a proper case, even after the ward has acquired the capacity to contract and the guardianship relation has terminated. Thus, where a ward a few days after attaining her majority, and before her guardian has made his final report, conveyed her land to the guardian's wife, who is her elder sister, and with whom she is living, it was held the burden was on the guardian to show

Am. St. 599; *Raymond v. Vaughn*, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; *Bennett v. McMillin*, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811; *Sexton v. Sexton*, 9 Grat. (Va.) 204; *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769.

⁸² *Baker v. Cummings*, 4 App. D. C. 230; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Warren v. Schainwald*, 62 Cal. 56; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 177, *affd.* 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. 47; *Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459n; *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811.

⁸³ *Sullivan v. Louisville & C. R. Co.*, 128 Ala. 99, 30 So. 528; *Belcher v. Whittemore*, 134 Mass. 330. See also, *Aas v. Benham* (1891), 2 Ch. 244,

245; *Latta v. Kilbourn*, 150 U. S. 524, 37 L. ed. 11, 14 Sup. Ct. 206.

⁸⁴ *Dean v. MacDowell*, 8 Ch. Div. 345; *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. 750, 36 Am. St. 478; *Murrell v. Murrell*, 33 La. Ann. 1233; *Latta v. Kilbourn*, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201.

⁸⁵ *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. 587.

⁸⁶ *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490; *Frazier v. Jeakins*, 64 Kans. 615, 68 Pac. 24, 57 L. R. A. 572; *Dickinson v. Durfee*, 139 Mass. 232, 1 N. E. 416; *Mann v. McDonald*, 10 Humph. (Tenn.) 275.

⁸⁷ *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. 219; *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. 587; *Berkmeyer v. Kellerman*, 32 Ohio St. 239, 30 Am. Rep. 577.

good faith and the absence of undue influence. Settlements between guardian and ward, and transactions between those who have relations of mutual confidence, are watched jealously by the courts.⁸⁸ However, if a sale is made after the relation has terminated, and a full disclosure of all material facts is made, and the full market value paid, the mere fact that the property subsequently greatly increases in value is not ground for avoiding such sale.⁸⁹

The foregoing are the most important illustrations of parties who sustain relations of trust and confidence one to the other. In addition to these, clergyman and parishioner,⁹⁰ joint owners,⁹¹ promoters of corporations and the corporation and stockholders they represent,⁹² persons under contract to marry, and a few others,⁹³ have been held to sustain confiden-

⁸⁸ *McFarland v. Larkin*, 155 Ill. 84, 39 N. E. 609. See also, *Tucke v. Buchholz*, 43 Iowa 415; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Williams v. Powell*, 1 Ired. Eq. (N. Car.) 460.

⁸⁹ *Kirschner v. Kirschner*, 113 Mo. 290, 20 S. W. 791.

⁹⁰ *Finegan v. Theisen*, 92 Mich. 173, 52 N. W. 619.

⁹¹ *Teachout v. Van Hoesen*, 76 Iowa 113, 40 N. W. 76, 14 Am. St. 206; *Turner v. Sawyer*, 150 U. S. 578. See also, *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. 241; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 43 Pac. 1016, 55 Am. St. 118; *Boyd v. Boyd*, 176 Ill. 40, 51 N. E. 782, 68 Am. St. 169; *Loyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Bissell v. Foss*, 114 U. S. 252, 29 L. ed. 126, 5 Sup. Ct. 851; *Downer v. Smith*, 31 Vt. 1, 76 Am. Dec. 148; *Cedar Canyon & Co. v. Yarwood*, 27 Wash. St. 271, 67 Pac. 749, 91 Am. St. 841; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216.

⁹² *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218; *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 73, 118; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259,

17 Am. St. 149. The management of the business and property of a corporation is entrusted to its officers, and they are empowered to act for the whole body of stockholders. They therefore occupy the position of trustees for the stockholders as a body, in respect to such business and property and cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 45, 106 Am. St. 170. See also, *Pacific Vinegar & C. Works v. Smith*, 145 Cal. 352, 78 Pac. 550, 104 Am. St. 42; *Crichton v. Webb Press Co.*, 113 La. Ann. 167, 36 So. 926, 67 L. R. A. 76, 104 Am. St. 500; *Scott v. Farmers' & C. Bank*, 97 Tex. 31, 104 Am. St. 835. A director, however, does not sustain that relation to an individual stockholder with respect to his stock, over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. 170. See, however, *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

⁹³ *Fisher v. Koontz*, 110 Iowa 498, 80 N. W. 551; *Peet v. Peet*, 81 Iowa 172, 46 N. W. 1051; *Simpson v. Simpson*, 94 Ky. 586, 23 S. W. 361; *In re Pulling's Estate*, 93 Mich. 274, 52 N. W. 1116; *Pierce v. Pierce*, 71 N. Y.

tial relations to each other. However, it is not always necessary that a definitely recognized relation of trust and confidence exist to render the rules governing relations of trust and confidence applicable; for where actual trust and confidence is reposed in another, and this fact is known to that other, any misrepresentations by the party confided in, relative to a material fact and which are an inducement to the contract, may be regarded as fraud.⁹⁴ A relation of trust and confidence will arise when it is known to the parties that actual trust and confidence is reposed each in the other, and the failure to disclose a material fact will amount to fraud.⁹⁵ In this connection it might not be out of place to mention that gifts between persons occupying confidential relations toward each other are always closely scrutinized by a court of law or equity when their validity is attacked. Unless the gift is voluntarily made, without any compulsion whatever and with a full understanding of the facts, it will be invalidated, especially when its validity is attacked by the donor. Many cases go to the extent of holding that independent advice from a disinterested third person must be sought by the donor before making the gift, or it will be invalidated.⁹⁶

154, 27 Am. Rep. 22n; *In re Kline's Estate*, 64 Pa. St. 122.

⁹⁴ *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Hanger v. Evins*, 38 Ark. 334; *Baum v. Holton*, 4 Colo. App. 406, 36 Pac. 154; *Nolte v. Reichelm*, 96 Ill. 425; *Shaeffer v. Sleade*, 7 Blackford (Ind.) 178; *Peter v. Wright*, 6 Ind. 183; *Harris v. McMurry*, 23 Ind. 9; *King v. Sioux City Loan Co.*, 76 Iowa 11, 39 N. W. 919; *Bean v. Herrick*, 12 Maine 262, 28 Am. Dec. 176; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506; *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *Cahn v. Reid*, 18 Mo. App. 115; *Smith v. Countryman*, 30 N. Y. 655; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258, 30 Am. Rep. 617; *Drake v. Grant*, 4 N. Y. S. 899; *Smith v. Griswold*, 6 Ore. 440; *Fisher v. Budlong*, 10 R. I. 525.

⁹⁵ *Emmons v. Moore*, 85 Ill. 304; *Shaeffer v. Sleade*, 7 Blackf. (Ind.) 178; *Peter v. Wright*, 6 Ind. 183; *Davis v. Heard*, 44 Miss. 50; *Hall v. Thompson*, 1 Smedes & M. (Miss.)

443; *Forworth v. Bullock*, 44 Miss. 457; *Bennett v. McMillin*, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; *Friend v. Lamb*, 152 Pa. St. 529, 25 Atl. 577, 34 Am. St. 672; *Cooper v. Lee*, 1 Tex. Civ. App. 9, 21 S. W. 998. In the above case one of the parties was a son-in-law of the other. Brothers may stand in a confidential relation, one to the other. *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257. The relation extends to all persons who occupy a position of trust and confidence, of influence and independence in fact, although not, perhaps, in law. *Nelson v. Brown*, 164 Ala. 397, 51 So. 360, 137 Am. St. 61. To same effect, *Dick v. Albers*, 243 Ill. 231, 90 N. E. 683, 134 Am. St. 369.

⁹⁶ *Rhodes v. Bate*, 12 Jur. (N. S.) 178; *Broun v. Kennedy*, 9 Jur. (N. S.) 1163; *Morgan v. Minett*, L. R. 6 Ch. Div. 638; *Liles v. Terry* (1895), 2 Q. B. 679; *Prideaux v. Lonsdale*, 1 DeG. J. & S. 433; *Powell v. Powell* (1900), L. R. 1 Ch. Div. 243; *Bainbrigge v. Browne*, L. R. 18 Ch. Div. 188. See, however, the case of *Hunter*

Certain cases in this country adopted the early English doctrine and hold that the advice of the third person is necessary;⁹⁷ but as a general rule the courts of this country do not declare the advice of a third person absolutely necessary.⁹⁸ Most of them merely hold that the burden is on the donee to establish to the full satisfaction of the court that the gift was a free, voluntary unbiased act of the donor.⁹⁹

§ 75. Constructive fraud.—The term “constructive fraud” is one which has been loosely used, and has been applied not only to cases such as those treated in the last preceding section, but to almost every case of fraud imaginable, but it is usually used to denote cases of innocent misrepresentation or unintentional negligence. Thus, in a recent case where it appeared that a vendor sold the plaintiff a certain tract of land, and subsequently sold it a second time to another, the court said that, “the defendant was guilty of such gross negligence as to amount in law to ‘constructive fraud.’”¹ But to use the term in this vague and indefinite manner serves no good purpose and tends only to confusion. It has been condemned by the majority of text writers.² The

v. Atkins, 3 Myl. & K. 113, where it is said: “There are certain relations known to the law, as attorney, guardian, trustee; if a person standing in these relations to client, ward or cestui que trust, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. * * * This appears to me a much more intelligible and sound principle than that to which reference is made by the master of the rolls in his judgment, and which, in cases of this description, will sometimes be alluded to,—that a third person ought to be interposed. I say you will see it alluded to, for I can nowhere find it established as the rule.” See also, Allcard v. Skinner, L. R. 36 Ch. Div. 145; Wright v. Carter (1903), 1 Ch. Div. 27; Bury v. Oppenheim, 26 Beav. 594; Savery v. King, 5 H. L. Cas.

627; Consett v. Bell, 1 Young & C. Ch. Cas. 569. The law presumes the exercise of undue influence in transactions inter vivos where confidential relations exist between the parties, and puts upon the donee, when shown to be the dominant party in the transaction, the burden of repelling this presumption. Nelson v. Brown, 164 Ala. 397, 51 So. 360, 137 Am. St. 61.

⁹⁷ Gillespie v. Holland, 40 Ark. 28, 48 Am. Rep. 1; Albert v. Haeberly, 68 N. J. Eq. 664, 61 Atl. 380, 111 Am. St. 652; Slack v. Rees, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393.

⁹⁸ Zimmerman v. Frushour, 108 Md. 115, 69 Atl. 796, 16 L. R. A. (N. S.) 1087 and note.

⁹⁹ Todd v. Grobe, 33 Md. 188.

¹ Madden v. Caldwell Land Co., 16 Idaho 59, 100 Pac. 358, 21 L. R. A. (N. S.) 332. In the above case it appeared that the defendant made the second conveyance through mistake, and without any intention of committing a fraud.

² See Wald Pollock on Contracts.

term constructive fraud "negatives actual fraud but affirms that the actual conditions will have similar consequences,"³ that is to say, the law will infer fraud from the relationship of the parties and the circumstances that surround them, independent of the intention.⁴ The term "from the relationship of the parties" contemplates a special relationship, and this relationship cannot be logically applied to any other than confidential relations, for it is only in relations of this kind that the law presumes fraud,—i. e. from the relationship of the parties the law gives the transaction that construction. Unless the term "constructive fraud" is limited in this manner it had better not be used at all, for if it is used so as to make it apply to all cases of innocent misrepresentations the distinction between fraud and innocent misrepresentation is thereby broken down, and the rights and remedies of the parties confused. By giving the term constructive fraud a loose application every misrepresentation becomes fraudulent. For this reason the only cases to which the term "constructive fraud" will be applied are those where a confidential relation existed between the parties. Cases of this character will be found in the preceding section.

§ 76. Fraud in execution.—No principle of law is more firmly established than that fraud in the execution of an instrument renders it voidable at the option of the party defrauded, and that courts of law have concurrent jurisdiction with courts of equity to prevent its use as evidence, thereby preventing the fraudulent party from obtaining any advantage by it.⁵ Consequently, if the owner's signature to a contract is obtained by trickery and fraud he may properly deny its execution and plead affirmatively the fraud practiced upon him by which he was induced to apparently execute it.⁶ Thus, where a contract was

3rd edition, pp. 647, 648; Hammon on Contracts, p. 124; 1 Page on Contracts, 281, 282; 14 Am. & Eng. Ency. of Law 21, § 3. See also, Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. 651.
³ Wald's Pollock on Contracts, 3rd Edition, p. 647.

⁴ Smith on Law of Fraud, § 1, p. 3.

⁵ Sass v. Thomas, 6 Ind. Ter. 60, 89 S. W. 656, 11 L. R. A. (N. S.) 261,

affd. 152 Fed. 627. In the above case it was held by the territorial court that the fraudulent execution of a lease may be shown by oral proof in an action of unlawful detainer. See also, Clark v. Evans, 138 Ill. App. 56; Western Mfg. Co. v. Cotton & Long, 31 Ky. L. 1130, 104 S. W. 758, 12 L. R. A. (N. S.) 427.

⁶ If one, by some artifice, prevents or induces another to enter into a

hastily signed by defendant because plaintiff represented that he was in a hurry, as he desired to catch a train that was about to leave the city, the court held that a palpable fraud was perpetrated on the defendant.⁷ Likewise, obtaining a release for all damages resulting from personal injuries sustained in a railroad accident, executed while the injured person was still dazed from the shock,⁸ or writing the terms of the agreement in small type,⁹ have been held to be such fraud as would render the contract voidable.

§ 77. **Negligence.**—The cases on this branch of the subject will be classified under two general heads, the first being those instances where the party committing the fraud seeks to enforce the contract and sets up negligence on the part of his adversary in an attempt to defeat the plea of fraud, or pleads it by way of defense when sued by the defrauded party; the second being those cases wherein the defrauded party seeks either to rescind or avoid the agreement or to recover damages for the fraud perpetrated on him. It may be stated as a general rule

contract in ignorance of its contents or character such conduct amounts to fraud. *Henderson v. Henshall*, 54 Fed. 320, 4 C. C. A. 357; *Davis v. Jackson*, 22 Ind. 233; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *McKnight v. Thompson*, 39 Nebr. 752, 58 N. W. 453; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166. The doctrine that a party is conclusively presumed to know the contents of an instrument signed by him does not obtain as against fraud. *Vaillancourt v. Grand Trunk R. Co.*, 82 Vt. 416, 74 Atl. 99; *Loveland v. Jenkins-Boys Co.*, 49 Wash. 369, 95 Pac. 490.

⁷ *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422, 30 S. E. 999. To the same effect, *Wood v. Cincinnati Safe Lock Co.*, 96 Ga. 120, 22 S. E. 909. In the above cases the contents of the instrument signed were misrepresented. See, however, the case of *United Breeders Co. v. Wright*, 139 Mo. App. 195, 122 S. W. 1105, where the court held that a competent business man, laboring under no disability, had no business signing a contract without reading it merely because the man who asked him to sign

was in a hurry to catch a train, and that if he signed under such circumstances he was inexcusably negligent in so doing. A statement of facts is not given in the above opinion, it being the second appeal of the case, but the opinion in the former appeal, reported in, *United Breeders Co. v. Wright*, 134 Mo. App. 717, 115 S. W. 470, shows that the character of the instrument was misrepresented. See also, *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. 1116, where it is held that failure to read a contract where one was requested to do so, and when a casual glance would have apprised the signer that the instrument was not of the character he claimed it was represented, is inexcusable negligence.

⁸ *Bliss v. N. Y. Cent. & C. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. 504. See also, *Och v. Missouri R. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Larsted v. Chicago & C. R. Co.*, 71 Wis. 391, 36 N. W. 857. See also, 44 Cent. L. J. 70.

⁹ *Keller v. Equitable & C. Ins. Co.*, 28 Ind. 170.

that the one guilty of fraud cannot urge negligence on the part of the one defrauded, if he relied on the representation and acted as a reasonably prudent man, either to assist him to recover on the contract,¹⁰ or in defense of an action brought by the defrauded party.¹¹ Thus, where a vendor of real estate makes false representations with reference to the title thereto, the vendee has a right to rely on such representations. Consequently, it is no defense that the vendee might have searched the records or sought other information and thereby discovered the falsity of the representations,¹² for "no man can complain that another has too implicitly relied on the truth of what he himself has stated."¹³

On the other hand fraud is never presumed,¹⁴ but is a question

¹⁰ *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 104 S. W. 758, 12 L. R. A. (N. S.) 427; *Warder & Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540.

¹¹ *Wilson v. Moriarty*, 88 Cal. 207, 26 Pac. 85; *Davis v. Forman*, 229 Mo. 52, 129 S. W. 213; *Cole Bros. v. Williams*, 12 Nebr. 440, 11 N. W. 875; *Griffin v. Roanoke & Co. Lumber Co.*, 140 N. Car. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748.

¹² *Carpenter v. Wright*, 52 Kans. 221, 34 Pac. 798; *Young v. Hopkins*, 6 T. B. Mon. (Ky.) 18; *Campbell v. Whittingham*, 5 J. J. Marsh (Ky.) 96, 20 Am. Dec. 241; *Pryse v. McGuire*, 81 Ky. 608, 5 Ky. L. 716; *Kiefer v. Rogers*, 32 Gil. (Minn.) 14; *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403; *Blumenfeld v. Stine*, 96 App. Div. (N. Y.) 160, 89 N. Y. S. 85; *In re Wilson's Appeal*, 109 Pa. St. 606, 7 Atl. 88; *Vernam v. Wilson*, 31 Pa. Super. Ct. 257; *Griffeth v. Hanks*, 46 Tex. 217; *Morris v. Brown*, 38 Tex. Civ. App. 266, 85 S. W. 1015. See also, *Watson v. Atwood*, 25 Conn. 313. The vendee is not bound under the law to go to the extent of verifying the truth or falsity of the vendor's representations (*Wilson v. Higbee*, 62 Fed. 723), and even though the vendee makes a partial examination of the abstracts, it does not defeat his right to avoid the sale for misrepresentation on the part of the vendee. *Buchanan v. Burnett*, 52 Tex. Civ. App. 68, 114 S. W. 406, *affd.* 102

Tex. 492, 119 S. W. 1141, 132 Am. St. 900. But see, in this connection, *Warner Elevator Co. v. Guthrie*, 7 Ohio N. P. 200; *Simmang v. Harris* (Tex. Civ. App.), 27 S. W. 786.

¹³ *Reynell v. Sprye*, 1 DeG. M. & G. 660; *Price v. Macauley*, 2 DeG. M. & G. 339. When such a plea is set up by the defrauded party has a right to reply, "You, at least, who have stated what is untrue or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." *Central R. Co. v. Kirch*, L. R. 2 H. L. 99, 6 Eng. Rul. Cas. 759; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377. To same effect, see *Graham v. Thompson*, 55 Ark. 296, 18 S. W. 58, 29 Am. St. 40; *Buckley v. Acme Food Co.*, 113 Ill. App. 210; *Linnington v. Strong*, 107 Ill. 295; *Kirkland v. Lott*, 3 Ill. 13; *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. 623; *Carmichael v. Vandebur*, 50 Iowa 651; *Young v. Hopkins*, 6 T. B. Mon. (Ky.) 18; *Bristol v. Braidwood*, 28 Mich. 191; *Kiefer v. Rogers*, 32 Gil. (Minn.) 14; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Wilder v. DeCou*, 18 Minn. 470; *Martindale v. Harris*, 26 Ohio St. 379; *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808; *Warder & Co. v. Whitish*, 77 Wis. 433, 46 N. W. 540.

¹⁴ *Marsh v. Cramer*, 16 Colo. 331, 27 Pac. 169; *Walker v. Collins*, 59 Fed. 70; *McCann v. Preston*, 79 Md.

of fact. When it is pleaded at law or in equity, the facts out of which it is supposed to arise must be stated. A mere general averment of fraud, without a statement of the facts, is not sufficient.¹⁵ The evidence adduced must be sufficient to overcome the legal presumption of honesty.¹⁶ Not only this, but the defrauded party can neither defeat an action on the contract nor recover in a suit brought by himself, if he was guilty of negligence in relying on the false representations of the adverse party. But he is not required to show an extraordinary degree of diligence. If he is able to prove that he exercised ordinary care, or such care as would be exercised by an ordinarily prudent man under like circumstances, it will absolve him from the charge of negligence.¹⁷ It is usually the duty of one who is about to con-

223, 28 Atl. 1102; *Redpath Bros. v. Lawrence*, 48 Mo. App. 427; *Guidet v. New York & C. R. Co.*, 120 N. Y. 649, 24 N. E. 1102; *Eaton v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389. The rule that fraud is never presumed is not without its exceptions, for, as has been seen in a prior section, fraud may be presumed where a confidential relation exists between the parties. See ante, § 74.

¹⁵ *Stouffer v. Smith-Davis Hardware Co.*, 154 Ala. 301, 45 So. 621, 129 Am. St. 59; *Loucheim v. First National Bank*, 98 Ala. 521, 13 So. 374; *Truitt-Silvey Hat Co. v. Callaway*, 130 Ga. 637, 61 S. E. 481; *Studabaker v. Faylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; *Lindsay v. Kroeger*, 37 Mont. 231, 95 Pac. 839. "The burden of charging as well as proving fraud is on the party alleging it, and facts constituting the alleged fraud must be set forth in order to entitle a party to introduce evidence of it; mere conclusions of law are not enough." *Eppley v. Kennedy*, 131 App. Div. (N. Y.) 1, 115 N. Y. S. 360.

¹⁶ *London & C. Bank v. Lempriere*, L. R. 4 P. C. 572; *Smith v. Chadwick*, L. R. 9 App. Cas. 187; *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271; *Prentice v. Crane*, 234 Ill. 302, 84 N. E. 916; *Bowden v. Bowden*, 75 Ill. 143; *Hill v. Reifsnider*, 46 Md. 555; *Baldwin v. Buckland*, 11 Mich. 389; *Hildreth v. Sands*, 2 Johns. Ch.

(N. Y.) 35; *Devoe v. Brandt*, 53 N. Y. 462; *Kaine v. Weigley*, 22 Pa. St. 179. These general statements must not, however, be given too strong an application. They merely mean that every contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial. *Smith on the Law of Contracts*, § 266. The circumstances may be so strong that no other reasonable conclusion than that of fraud can be drawn from them. *Paxton v. Boyce*, 1 Tex. 317.

¹⁷ *Camp v. Camp*, 2 Ala. 632, 36 Am. Dec. 423; *Belfast v. Boon*, 41 Ala. 50; *Newsom v. Jackson*, 26 Ga. 241, 71 Am. Dec. 206; *Eames v. Morgan*, 37 Ill. 260; *Grier v. Puterbaugh*, 108 Ill. 602; *Hutchinson Furnace & C. Co. v. Lyford*, 123 Ill. 300, 13 N. E. 844; *Gee v. Moss*, 68 Iowa 318, 27 N. W. 268; *Jackson v. Collins*, 39 Mich. 557; *Osborne v. Missouri Pac. R. Co.*, 71 Nebr. 180, 98 N. W. 685; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Brown v. Post*, 1 Hun (N. Y.) 303; *Wheeler v. Robinson*, 86 Hun (N. Y.) 561; *Fagan v. Newson*, 1 Dev. (N. Car.) 21; *Bank of North America v. Sturdy*, 7 R. I. 109. The courts do not require caution, but only the absence of negligence. *Hoitt v. Holcomb*, 32 N. H. 185. The mere fact that the victim has proved himself a fool will not entitle the defrauding party to retain that which

summate a contract, in the absence of any confidential relation, to prosecute a reasonably diligent inquiry as to its terms and contents.¹⁸ This rule may be interpreted as meaning that if the means of information as to the matter represented are equally accessible to both parties, and they are on an equal footing with each other, they will be presumed to have informed themselves, and if they neglect to do so each must abide the consequences of his own carelessness.¹⁹ "The common law," says Chancellor Kent, "affords to every one a reasonable protection against fraud in dealings, but does not go to the romantic length of giving an indemnity against the consequence of indolence and folly, or a

he has received. *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832. However, folly alone does not necessarily show fraud. *Equitable Loan & Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 97 Am. St. 177, 62 L. R. A. 93. A defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud. *Smith v. Werkheiser*, 152 Mich. 177, 115 N. W. 964, 15 L. R. A. (N. S.) 1092, 125 Am. St. 406. That one may reasonably act, not knowing that facts involved himself, on the faith of representation by another, is a matter too elemental for discussion. *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201.

¹⁸ *Baily v. Merrell*, 3 Bulst. 94; *Burk v. Johnson*, 146 Fed. 209, 76 C. C. A. 567; *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, 132 Am. St. 484; *Long v. Warren*, 68 N. Y. 426; *Anderson v. Rainey*, 100 N. Car. 321, 5 S. E. 182; *Slaughter v. Gerson*, 13 Wall. (U. S.) 379; *First National Bank v. Swan*, 3 Wyo. 356, 23 Pac. 473. There is an indisposition on the part of the courts to extend legal immunity for the falsehood of vendors in the course of negotiations for sales beyond the bounds already established. *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, 23 L. R. A. (N. S.) 487n, 132 Am. St. 484. In a recent case it is said: "Where a party is induced to refrain from making an examination of a paper given him by another, through misrepresentation as to its purport, it would be an extreme case that

would warrant a court holding that there was an assent to the contents of the document before such contents were in fact known." *Lotter v. Knospe*, 144 Wis. 426, 129 N. W. 614. In some jurisdictions it is held that the purchaser of real estate must exercise ordinary diligence in investigating the truth or falsity of the vendor's representations as to title. *Steele v. Kinkle*, 3 Ala. 352; *Grosjean v. Galloway*, 82 App. Div. (N. Y.) 380, 81 N. Y. S. 871; *Andrus v. St. Louis Smelting & Co.*, 130 U. S. 643. But see *Haight v. Hayt*, 19 N. Y. 464n. If the facts cannot be ascertained by the exercise of ordinary diligence equity will grant relief for the injury suffered, or the vendees may maintain an action in deceit against the vendor. *Fenley v. Moody*, 104 Ga. 790, 30 S. E. 1002.

¹⁹ *Delaney v. Jackson*, 95 Ark. 131, 128 S. W. 859. See also, *Reynolds v. Palmer*, 21 Fed. 433; *American Ins. Co. v. Crawford*, 7 Ill. App. 29; *Foley v. Cowgill*, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49; *Gatling v. Newell*, 9 Ind. 572; *Moore v. Turbeville*, 2 Bibb. (Ky.) 602, 5 Am. Dec. 642; *Salem India Rubber Co. v. Adams*, 23 Pick. (Mass.) 256; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Hall v. Thompson*, 1 S. & M. (Miss.) 443; *Anderson v. Burnett*, 5 How. (Miss.) 165, 35 Am. Dec. 425; *Arthur v. Wheeler & Co.*, 12 Mo. App. 335; *Leavitt v. Fletcher*, 60 N. H. 182; *Hanson v. Edgerly*, 29 N. H. 343; *Page v. Parker*, 40 N. H. 47; *Saunders v. Hatterman*, 2 Ired. L. (N. Car.) 32; *Farrar v. Alston*, 12 Dev. (N. Car.) 69; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Fulton v.*

careless indifference to the ordinary and accessible means of information."²⁰

§ 78. Fraud of third persons.—Fraud by a stranger to the contract will not ordinarily be ground for an avoidance of the agreement, nor render the party benefited liable for damages.²¹ Before the false representation of a third person will work this result he must either act under authority of,²² in collusion with,²³

Hood, 34 Pa. St. 365, 75 Am. Dec. 664. Courts of equity do not sit for the purpose of relieving parties who, under ordinary circumstances, refuse to exercise a reasonable diligence. Tuck v. Downing, 76 Ill. 71, 99. See also, post, § 89, Reliance on false statement.

²⁰ 2 Kent's Commentaries, 485. This pithy statement of the law was quoted with approval in *Smith v. Richards*, 13 Pet. (U. S.) 26; and in the subsequent case of *Slaughter v. Gerson*, 13 Wall. (U. S.) 379, it was laid down as the established doctrine, in conformity with the authorities already cited, that where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentation; that if, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. Bishop tersely states the rule deducible from the authorities to be that "the law, departing from the rule in morals, tolerates a good deal of lying in trade, when in the nature of merely puffing one's own goods or depreciating those of another, provided the thing bargained about reveals its own qualities and is open to the parties' equal inspection."

²¹ *Wheelton v. Hardisty*, 8 El. & Bl. 232; *In re Smith's Case*, 2 Ch. App. 604, 616; *Sturge v. Starr*, 2 Myl. & K. 195; *Lindsey v. Veasy*, 62 Ala. 421; *Bradford v. Bush*, 10 Ala.

386; *Schultz v. McLean* (Cal.), 25 Pac. 427; *Strong v. Smith*, 62 Conn. 39, 25 Atl. 395; *In re The Segurancra*, 70 Fed. 258; *Hayner v. McIlwain*, 53 Ill. App. 652; *Whitesides v. Taylor*, 105 Ill. 496; *Gatling v. Rodman*, 6 Ind. 289; *Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119, 3 L. R. A. 440, 10 Am. St. 40; *Jones v. Swift*, 94 Ind. 516; *Belau v. Bryan*, 89 Iowa 348, 56 N. W. 512; *Roach v. Karr*, 18 Kans. 529, 26 Am. Rep. 778; *Equitable Life Assur. Society Co. v. Cosby* (Ky.), 126 S. W. 142; *Fightmaster v. Levi*, 13 Ky. 412, 17 S. W. 195; *Prescott v. Cooper*, 37 La. Ann. 553; *Martin v. Campbell*, 120 Mass. 126; *Nash v. Minnesota &c. Ins. Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. 489; *Williamson v. Raney*, *Freem. Ch.* (Miss.) 112; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Vass v. Riddick*, 89 N. Car. 6; *Kingsland v. Pryor*, 33 Ohio St. 19; *Trevitt v. Converse*, 31 Ohio St. 60; *Dangler v. Baker*, 35 Ohio St. 673; *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89; *Layne v. Bone*, 12 Lea (Tenn.) 667; *Kuhn v. Foster*, 16 Tex. Civ. App. 465, 41 S. W. 716; *Atkinson v. Reed* (Tex. Civ. App.), 49 S. W. 260; *American National Bank v. Cruger* (Tex. Civ. App.), 44 S. W. 1057; *Law v. Grant*, 37 Wis. 548. But in certain instances the contract so induced may be avoided on the ground of mistake. See post, ch. 5, Mistake.

²² *Glaspie v. Keator*, 56 Fed. 203, 5 C. C. A. 474; *Stiles v. White*, 11 Metc. (Mass.) 356, 45 Am. Dec. 214; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

²³ Thus, if representations are made by a third person, who is in conspiracy with the vendors of an article, as to the value of such article, an actionable fraud is committed, and

or as the agent for a party to the contract.²⁴ This is true even though the principal may be innocent of fraud, provided the false statements of the agent were made within the scope of his authority.²⁵ The principal is generally presumed to know what the agent knows.²⁶ On the other hand, if the false representations made by the agent are not within the scope of his authority, and the principal has no knowledge of such misrepresentation and does not adopt them as his own, he is not liable.²⁷ Representations

fraud grows out of the artifice of the seller in procuring the representation to be made by an apparently disinterested party, thereby throwing the purchaser off his guard. *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Manning v. Albee*, 11 Allen (Mass.) 520; *Adams v. Soule*, 33 Vt. 538. See also, *Bagshaw v. Seymour*, 18 C. B. 903; *Davis v. Jackson*, 22 Ind. 233; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726. Should one party refer the other to a third person for information he is liable for such third person's fraud in giving false information. *Ashner v. Abenheim*, 19 Misc. (N. Y.) 282, 43 N. Y. S. 69. The fraud of a third person which induces the purchase of goods will not give the purchaser a right to rescind the contract. If the seller is not a party to the fraud the contract will stand. *Nash v. Minn. & Co. Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. 489.

²⁴ *Maggart v. Freeman*, 27 Ind. 531; *Watson v. Crandall*, 7 Mo. App. 233, affd. 78 Mo. 583. See also, *Rhoda v. Annis*, 75 Maine 17, 46 Am. Rep. 354; *Bennett v. Judson*, 21 N. Y. 238; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476. The principal may become responsible by ratification of agent's fraud. *Reser v. Walton*, 78 Cal. 490; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. 701. See also, *infra*, note 23. So, by referring to third person for information, *Chadsey v. Greene*, 24 Conn. 562; *Witherwax v. Riddle*, 121 Ill. 140, 13 N. E. 545; *Beebe v. Young*, 14 Mich. 136.

²⁵ *Weir v. Bell*, 3 Exch. Div. 238; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay v. Commer-*

cial Bank, L. R. 5 P. C. 394; *Swire v. Francis*, 3 App. Cas. 106; *Udell v. Atherton*, 7 Hurl. & N. 172; *Binghampton Trust Co. v. Auten*, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. 295; *Western Md. R. Co. v. Franklin Bank*, 60 Md. 36; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162, 36 Am. Rep. 595; *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46.

²⁶ *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Sutton v. Dillaye*, 3 Barb. (N. Y.) 529; *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26; *Jackson v. Sharp*, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267. See also, *Lilly v. Hamilton Bank*, 178 Fed. 53, 102 C. C. A. 1, 29 L. R. A. (N. S.) 558, and note; *Emerado Farmers' Elev. Co. v. Farmers' Bank*, 20 N. Dak. 270, 127 N. W. 522, 29 L. R. A. (N. S.) 567.

²⁷ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Lynch v. Mercantile Trust Co.*, 18 Fed. 486. In the above case it is held that the acts of the agent were ratified. *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40; *Scofield Rolling Mill Co. v. State*, 54 Ga. 635; *Rhoda v. Annis*, 75 Maine 17, 46 Am. Rep. 354; *Lamm v. Port Deposit Homestead Assn.*, 49 Md. 233, 33 Am. Rep. 246; *Jewett v. Carter*, 132 Mass. 335; *Concord Bank v. Gregg*, 14 N. H. 331; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Erie City Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508; *Henderson v. San Antonio & C. R. Co.*, 17 Tex. 560, 67 Am. Dec. 675; *Law v. Grant*, 37 Wis. 548. And see *Kennedy v. McKay*, 43 N. J. L. 288, 39 Am. Rep. 581, where it is said "that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale." *Aldrich v. Scribner* (Mich.), 117 N. W. 581,

made by a third person without any authority whatever may, however, be ratified by accepting the benefits or otherwise, and if this is done the result may be the same as if the beneficiary had expressly authorized the mis-statements.²⁸ In most cases the party defrauded would have a right of action against the third person for the fraud and deceit practiced by him and the injury resulting therefrom. Such third person has been held liable for false affirmations, if made with the intent to defraud, which affirmations would not be actionable if made by one of the parties to the contract, because the stranger stands in the situation of a disinterested person, in the light of a friend who has no motive or intention to defraud or tell an untruth, and who does throw the vendee off his guard and exposes him to be misled by the deceitful representation.²⁹ Nor does the statute of frauds apply

18 L. R. A. (N. S.) 379. In the above case the principal, who had never seen the land and knew nothing about it, stated that the representations made by the agent were true. It was held that he had adopted the agent's estimate as his own. To same effect, *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940.

²⁸ *Pilmore v. Hood*, 35 E. C. L. 62; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. 698; *Morse v. Ryan*, 26 Wis. 356. Should the vendor ratify a sale made by an agent he cannot escape responsibility for false representations of the agent made to induce the sale. *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Presby v. Parker*, 56 N. H. 409; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. 701; *Krumm v. Beach*, 96 N. Y. 398; *Barnard v. Roane Iron Co.*, 85 Tenn. 139, 2 S. W. 21; *Veazie v. Williams*, 8 How. (U. S.) 134; *Ladd v. Lord*, 36 Vt. 194; *Crump v. United States Min. Co.*, 7 Grat. (Va.) 352. The principal cannot accept the benefits and avoid the liability resulting from the statements of his agent; *O'Leary v. Tillinghast*, 22 R. I. 161, 46 Atl. 754; *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46. The principal cannot affirm the action of the agent in making the sale and not assume responsibility for his rep-

resentations. *Schulteis v. Sellers*, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210.

²⁹ *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; *Hoitt v. Holcomb*, 32 N. H. 185. See also, *Eames v. Morgan*, 37 Ill. 260; *Carpenter v. Wright*, 52 Kans. 221, 34 Pac. 798; *Kennedy v. McKay*, 14 Vroom (N. Y.) 288, 39 Am. Rep. 581. One who executed a deed, leaving the name of the grantee blank, and thus made it possible for the holder to deceive another as to his title, is liable for the fraud so practiced. *Baker v. Hallam*, 103 Iowa 43, 72 N. W. 419. But the mere silence of a third person does not render him liable, although he was present at the time the sale was consummated and knew of the defect in the seller's title. *Littlejohn v. Drennon*, 95 Ga. 743, 22 S. E. 657. A merchant may rely on a letter written by a third person relative to the credit of one who wishes to purchase goods. *Einstein v. Marshall*, 58 Ala. 153, 25 Am. St. 729. To same effect, *Daniel v. Robinson*, 66 Mich. 296, 33 N. W. 497. Such third person cannot insist that he was not a person upon whose opinion the other had a right to rely. *Runge v. Brown*, 23 Nebr. 817, 37 N. W. 660. He may be liable even though he derived no benefit from the fraud and did not collude with the person benefited. *Endsley v.*

and prevent recovery because the representations are not in writing. Representations as to the character, conduct, credit, ability, trade or dealings of a third person, when the primary purpose for which such representations are made is not to induce the extension of credit or the delivery of money or goods to the person concerning whom they are made, but to secure the execution of a contract to which the person making them is a party, are not within the terms of the statute and need not be in writing in order to be actionable.³⁰

§ 79. Active concealment.—The law distinguishes between passive concealment and active concealment. Passive or innocent nondisclosure does not, as a general rule, amount to fraud. The seller, it is said may let the buyer cheat himself ad libitum, but must not actively assist him in cheating himself.³¹ On the other hand, active concealment is usually held to amount to fraud.³² The term “active concealment” may be properly applied to any form of conduct which under the circumstances prevents the other party from gaining knowledge of a material fact.³³ A concealment sufficient to justify the rescission of an executory contract must

Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572. A real estate broker is not liable to the vendee of land sold by such broker because he misrepresents the minimum price at which the vendor will sell. *Ripy v. Cronan*, 131 Ky. 631, 115 S. W. 791, 21 L. R. A. (N. S.) 305. To same effect, *Merryman v. David*, 31 Ill. 404.

³⁰ *St. John v. Hendrickson*, 81 Ind. 350; *Hassinger v. Newman*, 83 Ind. 124, 43 Am. Rep. 64; *Grover v. Cavanaugh*, 40 Ind. App. 340, 82 N. E. 104. But see *Knight v. Rawlings*, 205 Mo. 412, 104 S. W. 38, 13 L. R. A. (N. S.) 212 and note.

³¹ *Wilson v. Higbee*, 62 Fed. 723. Mere silence is not necessarily fraudulent, even though inquiry is made, so long as there is no absolute duty to speak, and failure to speak does not lead the other to believe he is without knowledge on the subject inquired about. *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, 4 L. ed. 214.

³² *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 32 L. ed.

439, 9 Sup. Ct. 101; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. 881. Where the defendants actively concealed the condition of a mine they wished to sell and adopted means to thwart investigation and inquiry, they cannot complain that the purchaser failed to exercise common prudence. *Tooker v. Alston*, 159 Fed. 599, 86 C. C. A. 425, 16 L. R. A. (N. S.) 818n. See also, *Wainscott v. Occidental & Loan Association*, 98 Cal. 253, 33 Pac. 88; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Bowman v. Bates*, 2 Bibb (Ky.) 47, 4 Am. Dec. 677; *Brady v. Finn*, 126 Mass. 260, 38 N. E. 506; *Gottschalk v. Kircher*, 109 Mo. 170, 17 S. W. 905; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302; *Clark v. Clark*, 55 N. J. Eq. 814, 42 Atl. 98; *Brotherton v. Reynolds*, 164 Pa. St. 134, 30 Atl. 234; *Merchants Bank v. Campbell*, 75 Va. 455.

³³ *Wald's Pollock on Contracts*, p. 681.

be a wilful suppression of facts in regard to the subject-matter of the agreement which the party guilty of the suppression is bound to disclose.³⁴ This principle finds its most usual application in the purchase and sale of property, real or personal. For the sake of convenience, the cases which illustrate active concealment on the part of the vendor will be grouped separately from those which show instances of concealment on the part of the purchaser. The concealment of material facts by the vendor may sometimes be fraudulent, as well as positive mis-statements, at least,³⁵ if done with the intention to deceive.³⁶ Thus, failure to disclose a material fact known to the vendor, and which cannot be discovered by the buyer, as, for instance, hidden diseases in animals sold, may be fraud.³⁷ The fact that the purchaser might have weighed cattle which he bought does not defeat his right to take advantage of an overestimate by the seller of their weight, when at the time the seller made the statement he had weighed

³⁴ *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448. "A suppression of the truth may amount to a suggestion of falsehood; and if with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of, and equivalent to, a false representation." *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232; *Turner v. Ware*, 2 Ga. App. 57, 58 S. E. 310. In equity all the material facts must be known to both parties to render the agreement just and fair in all its parts, and if there be any intentional misrepresentation or concealment of facts in the making of contracts, in cases in which the parties have not equal access to the means of information, it will vitiate and void the contract. *Seal v. Holcomb*, 48 Tex. Civ. App. 330, 107 S. W. 916; *Rison v. Newberry*, 19 Va. 513, 18 S. E. 916.

³⁵ *Prentiss v. Russ*, 16 Maine 30; *Milliken v. Chapman*, 75 Maine 306, 46 Am. Rep. 386.

³⁶ *Hanson v. Edgerly*, 29 N. H. 343; *Binnard v. Spring*, 42 Barb. (N. Y.) 470.

³⁷ *Downing v. Dearborn*, 77 Maine 457, 1 Atl. 407; *Duvall v. Medtart*, 4 Har. & J. (Md.) 14; *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421;

McAdams v. Cates, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530; *Stevens v. Fuller*, 8 N. H. 463; *Dixon v. McClutchey*, Add. (Pa.) 322; *Hough v. Evans*, 4 McCord (S. C.) 169; *Cardwell v. McClelland*, 3 Sneed. (Tenn.) 150; *Paddock v. Strobbridge*, 29 Vt. 470. And see *Stewart v. Wyoming Cattle Rancho Co.*, 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. 101. The sale, for breeding purposes, of an impotent horse has been held to be a fraud, unless the fact is disclosed to the buyer. *Raeseide v. Hamm*, 87 Iowa 720, 54 N. W. 1079; *Hadley v. Clinton County Imp. Co.*, 13 Ohio St. 502, 82 Am. Dec. 454; *Maynard v. Maynard*, 49 Vt. 297. For the holder of a check to sell it, when he knows that other checks of the maker have been protested and that he is insolvent, has been held a fraud. *Sebastian May Co. v. Codd*, 77 Md. 293; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404. For the vendor to allege that his horse has distemper, when in fact he has glanders, a deadly disease. *George v. Johnson*, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; *Howard v. Gould*, 28 Vt. 523, 67 Am. Dec. 728, or that he has him hitched close in order to keep him from rubbing his saddle when he has him so tied to prevent him

the cattle and knew their weight.³⁸ A bill for the rescission of the purchase of a silver mine, on the ground of fraud, alleged that the defendant represented that the ore therein contained a certain average of pure silver, making it very valuable, whereas in fact the average was so low that it was worthless; that the defendant "salted" the samples which plaintiff took from the mine, by fraudulently mixing native silver therewith, and upon the faith of this analysis, the purchase was made. It was held that where the latter allegation is sustained the defendant cannot shelter himself behind the plea that his representations were mere expressions of opinion as to the value of the mine.³⁹ The vendor has been held guilty of fraud where he packed goods so that its defects would be concealed.⁴⁰ The vendor of real estate must not intentionally conceal defects in his title, where he knows the vendee is purchasing in ignorance of such defect and will be injured thereby.⁴¹

But active concealment is not confined to the vendor alone; the vendee may be guilty of fraud. Thus the vendee has

from "cribbing" or "stump-sucking," *Croyle v. Moses*, 90 Pa. St. 250, 35 Am. Rep. 654, or that a mule kicked and thus prevents the discovery of defective hind legs (*Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615), is a fraud.

³⁸ *Birdsey v. Butterfield*, 34 Wis. 52.

³⁹ *Mudsill Mining Co. v. Watrous*, 61 Fed. 163, 9 C. C. A. 415.

⁴⁰ *Roseman v. Canovan*, 43 Cal. 110; *Singleton's Admr. v. Kennedy*, 9 B. Mon. (Ky.) 222.

⁴¹ *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725; *Bryant's Exr. v. Boothe*, 30 Ala. 311, 68 Am. Dec. 117; *Prout v. Roberts*, 32 Ala. 427; *Strong v. Lord*, 107 Ill. 25; *Devers v. Dallam*, 6 T. B. Mon. (Ky.) 102; *Pauls-rud v. Peterson*, 109 Minn. 524, 121 N. W. 898, 122 N. W. 874; *Johnson v. Pryor*, 5 Hayw. (Tenn.) 243; *Ingram v. Morgan*, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626; *Napier v. Elam*, 6 Yerg. (Tenn.) 108. It is a fraud for the vendors of real estate to represent their title as good, and conceal the fact that one of the grantors is insane, where such insanity clouds the title. *Anderson v. Buck*, 66 Iowa 490, 24 N. W. 10. The vendee may

rescind where the vendor concealed an outstanding adverse title not shown by the abstract. *Anderson v. Buck*, 66 Iowa 490, 24 N. W. 10. Likewise, a vendor who sells the coal underlying land and then sells the land in fee to another, without any reservations, is guilty of fraud. *Vernam v. Wilson*, 31 Pa. Super. Ct. 257. But silence by the vendor is not fraudulent where he has no knowledge of any cloud on his title. *Harland v. Eastland*, *Hardin* (Ky.) 590. In the following case the defendants were held not guilty of fraud for failing to disclose information as to the true value of certain timber sold, when there was no demand for such information and the sale was consummated through plaintiff's agent, who was an experienced lumberman and whom the defendant supposed had examined the timber and estimated its value, the defendants having no definite information as to its value. *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 695. In the above case it appeared that plaintiff's agent was intoxicated at the time he purchased the timber. The court stated, "The rule deductible * * * from all the

been held guilty of fraudulent conduct where he pays with the notes of a third person whom he knew to be insolvent, but of whose insolvency the vendor knew nothing;⁴² where he gives in exchange stolen property;⁴³ or where he buys a judgment of over \$7,000 for \$400, without making it known that the judgment debtor has died and left an estate worth \$6,000, but instead represented that the judgment debtor was alive and judgment proof.^{43a} One seeking to purchase real estate from the owner may be guilty of fraudulently misrepresenting its value or location, when the sale is made in reliance upon such representations, the vendor being ignorant as to its value or location, and the vendee having information concerning these matters.⁴⁴ It is a fraud for the purchaser to misrepresent and conceal the fact that valuable mineral exists in the land when the vendor is ignorant of such fact and relies on the representations of the vendee.⁴⁵

authorities, is that the contract of a person partially intoxicated at the time will not be set aside because of his intoxication. That the condition results from his own act and entitles him to no consideration whatever in either a court of law or of equity. It is not because of his intoxication that courts will annul the contract, but because of some fraud or imposition perpetrated by the person who takes advantage of his condition to make a contract with him. The courts merely grant relief from the fraud or imposition perpetrated. Therefore, while the inadequacy or excessiveness of the consideration for the contract may be a circumstance tending to establish the perpetration of a fraud, it does not, of itself, when good faith is affirmatively shown, constitute such a fraud or imposition as will afford grounds for setting aside a contract.⁴⁶ Citing, *Birdsong v. Birdsong*, 2 Head (Tenn.) 290.

⁴² *Henry v. Allen*, 93 Ala. 197, 9 So. 579. To same effect, *Sebastian May Co. v. Codd*, 77 Md. 293.

⁴³ *Titcomb v. Wood*, 38 Maine 561.

^{43a} *Gottschalk v. Kircher*, 109 Mo. 170, 17 S. W. 905.

⁴⁴ *Culley v. Jones*, 164 Ind. 168, 73 N. E. 94. In the above case the representations relate to a deaf mute mentally weak and ignorant of the value of the lands conveyed. *Moun-*

tain v. Day, 91 Minn. 249, 97 N. W. 883; *Lolgren v. Peterson*, 54 Minn. 343, 56 N. W. 44; *Morgan v. Dinges*, 23 Nebr. 271, 36 N. W. 544, 8 Am. St. 121; *Manley v. Carl*, 20 Ohio C. C. 161, 11 Ohio C. D. 1. However, if the parties are on an equal footing, and have an equal opportunity for knowledge, statements as to the value of land are usually considered as mere expressions of opinion, and must be grossly and palpably false to authorize inference of fraud therefrom which would entitle the vendor to rescind. *People v. Tynon*, 2 Colo. App. 131, 29 Pac. 809; *Marshall v. Lewis*, 4 Litt. (Ky.) 140. See also, *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39. In the above case it was held that a lawyer who knew that a deed given by a married woman for land worth over \$200,000 was void, because it was unacknowledged, did not commit fraud by procuring her to convey such land on the payment of \$500 to her, even though he misrepresented that she was merely conveying her dower right, she not believing that she had any right whatever to such land.

⁴⁵ *Stackpole v. Hancock*, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814. In this case the land contained deposits of phosphate. *Bowman v. Bates*, 2 Bibb (Ky.) 47, 4 Am. Dec. 677. In this case the land contained salt de-

Or the vendee may be guilty of fraud if he misrepresents to the owner of real estate the extent of his interest therein.⁴⁶ It has been held that the purchaser was guilty of fraud where he misrepresented the value of standing timber⁴⁷ by stating that he had not measured all the timber standing on certain land, and representing that what he had measured indicated that it amounted to about what the vendor had estimated it, when in fact the quantity was about double that amount, and the vendee had in fact measured all the timber.⁴⁸ One who procures the appointment of his partner as appraiser of land he intends to purchase has been held guilty of fraud.^{48a} It must be borne in mind, however, that in common-law jurisdictions the mere failure of a purchaser to disclose something extrinsic or intrinsic to the thing bought, known to him and not known to the seller, is not generally, in a legal sense, fraud.⁴⁹ Active concealment has been held to be fraud both in law and in equity, and may give rise to an action of deceit,⁵⁰ or for rescission.⁵¹

posits. The vendee also induced the vendor's agent not to send his principal information in regard thereto. *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.) 390, reversed on other grounds, 9 Wend. (N. Y.) 511. The land contained deposit of iron ore. *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748. In the above case the land contained valuable stone deposits. *Merchants' Bank v. Campbell*, 75 Va. 455, concealing a cave in land. *Dunlap v. Richmond & C. R. Co.*, 81 Ga. 136, 7 S. E. 283. In the above case the vendee denied knowledge of the existence of an oil well on the land when asked by the vendor if he knew of any oil well.

⁴⁶ *Wilson v. Nichols*, 72 Conn. 173, 43 Atl. 1052; *Hays v. Meyers*, 32 Ky. 832, 107 S. W. 287, 17 L. R. A. (N. S.) 284. In the above case the land purchased was held by one as a life tenant. When this life tenant was on his death-bed the defendant went to the remainderman and purchased his interest in such land, misrepresenting the condition of the life tenant's health. To same effect, *Obney v. Obney*, 26 Pa. Super. Ct. 116. See also, *Faxon v. Baldwin*, 136 Iowa 519, 114 N. W. 40.

⁴⁷ *Garr v. Alden*, 139 Mich. 440, 102

N. W. 950. In the above case the purchaser induced the vendor not to investigate the value of the timber.

⁴⁸ *Prescott v. Wright*, 4 Gray (Mass.) 461.

^{48a} *Haywood v. Marsh*, 6 Yerg. (Tenn.) 69. See also, *Fox v. Mackreth*, 2 Bro. Ch. 400.

⁴⁹ *Dolman v. Nokes*, 22 Beav. 402; *Pratt Land & Co. v. McClain*, 135 Ala. 452, 33 So. 185, 93 Am. St. 35; *Mitchell v. Macdougall*, 62 Ill. 498; *Burt v. Mason*, 97 Mich. 127, 56 N. W. 365; *Smith v. Beatty*, 2 Ired. Eq. (N. Car.) 456, 40 Am. Dec. 435; *Harrison v. Tyson*, 34 Pa. St. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634; *Guaranty Safe Deposit & Co. v. Leibold*, 207 Pa. 399, 56 Atl. 951; *Standard Steel Car Co. v. Stamm*, 207 Pa. 419, 56 Atl. 954; *Boyd v. Leith* (Tex. Civ. App.), 50 S. W. 618; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748.

⁵⁰ *Roseman v. Canovan*, 43 Cal. 110; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Singleton v. Kennedy*, 9 B. Mon. (Ky.) 222; *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. 101; *Howard v. Gould*, 28 Vt. 523, 67 Am. Dec. 728.

⁵¹ *Bowman v. Bates*, 2 Bibb (Ky.) 47; 4 Am. Dec. 677; *Gottschalk v.*

§ 80. **Misleading, partial disclosure.**—The telling of a half-truth in such form as to mislead the party to whom the statement is made, and which deceives and throws him off his guard, constitutes fraud equally as objectionable as any other form.^{51a} A representation may be absolutely true, and yet if it is made with a fraudulent intent to deceive and accomplishes its purpose,

Kircher, 109 Mo. 170, 17 S. W. 905; Clark v. Clark, 55 N. J. Eq. 814, 42 Atl. 98; Merchants' Bank v. Campbell, 75 Va. 455. For further cases illustrating the truth of this see the other cases cited in this section.

^{51a} Peek v. Gurney, L. R. 6 H. L. 377, 7 Eng. Rul. Case 527; Arkwright v. Newbold, 17 Ch. Div. 301; Stevenson v. Marble, 84 Fed. 23. In the above case the seller of bonds stated that there was but one mortgage on them. This was true, but he did not disclose that there were other liens prior to the mortgage. Moncrief v. Wilkinson, 93 Ala. 373, 9 So. 159; Camp v. Camp, 2 Ala. 632, 36 Am. Dec. 423; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 736; Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315. In the above case an heir made representations as to his share in his father's estate without disclosing that it had been advanced to him during his father's lifetime. Coles v. Kennedy, 81 Iowa 360, 46 N. W. 1088, 25 Am. St. 503. In the above case a promoter represented that a certain person was a subscriber for stock, but did not disclose that such person was not to pay for it. One who quits claims land set off to him by a judgment, and conceals the fact that an appeal from this judgment is pending, is guilty of fraud and liable in damages. Atwood v. Chapman, 68 Maine 38, 28 Am. Rep. 5; Tyron v. Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; Kidney v. Stoddard, 7 Metc. (Mass.) 252; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551. In the above case the vendors showed an apparently good title without disclosing that one of the grantors was insane. Van Houton v. Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. 373, 26 L. R. A. 430. The above case had to do with a marriage contract. The court held that while the one making the disclosure might not be under any obligation to make such

disclosure, yet if she undertook to state the facts she must state them fully, and not give one a partial and misleading statement. Potts v. Chapin, 133 Mass. 276. A disclosure of the list of subscribers to a certain stock, without also revealing that one of them has subscribed conditionally, has been held a fraud. Zabel v. New State Tel. Co., 127 Mich. 402, 86 N. W. 949; Traber v. Hicks, 131 Mo. 180, 32 S. W. 1145; Lomerson v. Johnson, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. 410; Clark v. Clark, 55 N. J. Eq. 814, 42 Atl. 98; Haviland v. Willets, 141 N. Y. 35, 35 N. E. 958; Nickley v. Thomas, 22 Barb. (N. Y.) 652. In the above case the seller of a horse on inquiry stated that "he had balked with a man I had him of once," and did not tell that he had bought him as a balky horse and had used him very carefully. Gough v. Dennis, Hill. & Den. (N. Y.) 55; Croyle v. Moses, 90 Pa. St. 250, 35 Am. Rep. 654; Baker v. Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724; George v. Johnson, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; White v. Cox, 3 Hayw. (Tenn.) 79; Wintz v. Morrison, 17 Tex. 372, 67 Am. Dec. 658; Chamberlin v. Fuller, 59 Vt. 247. For stating that there was one lien on the property without disclosing that there were several others also, see Spencer v. Sandusky, 46 W. Va. 582, 33 S. E. 221. For failure to give a complete statement of the liabilities of a third party, see Remington & Co. v. Kezertee, 49 Wis. 409, 5 N. W. 809. "The old adage applies that a half truth is a lie." Gluckstein v. Barnes (1900), App. Cas. 240; Henry v. Vance, 23 Ky. L. 491, 63 S. W. 273, 111 Ky. 72; Newell v. Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625.

it may be fraudulent.⁵² It may be presented in such a way as to create a false impression.⁵³

§ 81. False representation.—At this point it will be well to gain a more or less comprehensive and general idea of the meaning of fraud and its associate, misrepresentation; consequently the definition commonly given, with slight changes, will be stated. Fraud, either at law or in equity, is a false representation of a material fact made by word or conduct with knowledge of its falsehood or in reckless disregard of its truth, in order to induce and actually inducing another to act thereon to his injury.⁵⁴ Misrepresentation is in the main inclusive of the term fraud. Practically every fraud is a misrepresentation, but every misrepresentation is not fraudulent. Thus a misrepresentation as to the subject-matter of or parties to a contract may be innocently made, and if so it does not amount to fraud, but is a misrepresentation. Misrepresentations are made without knowledge of falsity. This demonstrates the distinction between the two.⁵⁵ Perhaps the distinction between fraud and misrepresentation can be more accurately stated by saying that a false representation will be considered as fraudulent only when it gives rise to an action *ex delicto*, the action of deceit.⁵⁶ There are, however, instances in

⁵² *Mulligan v. Bailey*, 28 Ga. 507; *Denny v. Gilman*, 26 Maine 149.

⁵³ *Lomerson v. Johnston*, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. 410. "A false representation may be made by presenting that which is true, so as to create an impression which is false, and then profiting by the false impression thus created." *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

⁵⁴ See *Anson on contracts*; *Prentice v. Crane*, 234 Ill. 302, 84 N. E. 916; *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646n, 124 Am. St. 933; *Byard v. Holmes*, 34 N. J. L. 296; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Arthur v. Griswold*, 55 N. Y. 400; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. 881. This definition is not given in the belief that it is all inclusive and that it properly excludes everything. It is intended merely as a general statement which will give a fairly accurate conception of fraud, for, as has

been said, it would be dangerous and unwise to give a definition of fraud so inclusive and exclusive as to fix definite bounds, since the ingenuity of man would find means of evasion. 1 *Hov. on Frauds* 13; *Kerr on Fraud and Mistake*.

⁵⁵ See *Farjeon v. Indian Territory Illuminating Oil Co.*, 120 N. Y. S. 298.

⁵⁶ *Derry v. Peek*, 14 App. Cas. 337; *Angus v. Clifford* (1891), 2 Ch. 449; *Le Lievre v. Gould* (1893), 1 Q. B. 491; *Elwell v. Russell*, 71 Conn. 462, 42 Atl. 862; *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646n, 124 Am. St. 933. See also, *Hiner v. Richter*, 51 Ill. 299; *Holdom v. Ayer*, 110 Ill. 448; *Boddy v. Henry*, 113 Iowa 462, 85 N. W. 771; *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833; *Stevens v. Allen*, 51 Kans. 144, 32 Pac. 922; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861; *Cowley v. Dobbins*, 136 Mass. 401; *Nash v. Minne-*

which it can hardly be said that the fraud practiced amounts to a misrepresentation, as where one enters into an agreement with a collateral wrongful or unlawful purpose,⁵⁷ or with no intention of performing it, as where one buys goods with no intention of paying for them.⁵⁸

§ 82. **Must be as to facts.**—As appears from a reading of the definition given in the preceding section a false representation sufficient to avoid a contract must be a positive statement of fact.⁵⁹ The succeeding sections will demonstrate the truth of the statement.

§ 83. **Promise or representations of intentions as to future.**—Not only must the representation be the affirmation of a fact, but it must relate to some existing condition or present fact, and not be the mere expression of a future intention;⁶⁰ for a mere

sota &c. Trust Co., 163 Mass. 574, 40 N. E. 1039; Hedin v. Minneapolis Med. &c. Inst., 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. 628; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Haven v. Neal, 43 Minn. 315, 45 N. W. 612; Dunn v. White, 63 Mo. 181; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Wakeman v. Dalley, 51 N. Y. 27; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236. In the case of Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. 652, it is said, "The principle (that only fraud can give rise to an action for deceit) has been obscured by the use by judges of the phrase 'legal fraud,' which has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit." Dilworth v. Bradner, 85 Pa. St. 238; Lamberton v. Dunham, 165 Pa. St. 129, 30 Atl. 716. See also, Montreal Riv. Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Krause v. Busacker, 105 Wis. 350, 81 N. W. 406. But see Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497; Totten v. Burhans, 91 Mich. 495, 51 N. W. 1119; Johnson v. Gulick, 46 Nebr. 817, 65 N. W. 883, 50 Am. St. 629; Piche v. Robbins, 24 R. I. 325, 53 Atl. 92.

⁵⁷ Evans v. Carrington, 2 DeG. F. & J. 481, 30 L. J. Ch. 364; Feret v. Hill, 15 C. B. 207.

⁵⁸ See post, § 88, Knowledge and Intention.

⁵⁹ See ante, § 81, False Representations. See also, in this connection, Hecht v. Metzler, 14 Utah 408, 48 Pac. 37, 60 Am. St. 906.

⁶⁰ Johanson v. Stephanson, 154 U. S. 625, 38 L. ed. 1009, 14 Sup. Ct. 1180. Representations as to what defendant would or would not do in the future are merely promissory in character, and even if not carried out could not form the basis of a suit to set aside a contract or false representation entered into before such promise was broken. Huber v. Guggenheim, 89 Fed. 598; Miller v. Sutliff, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735; Casselberry v. Warren, 40 Ill. App. 626; Hartsville University v. Hamilton, 34 Ind. 506; Welshbillig v. Dienhart, 65 Ind. 94. Representations which will give rise to an action in fraud must relate to an existing fact or to a fact alleged to exist, and not be a mere promise to do something afterward. Fouty v. Fouty, 34 Ind. 433. To same effect, State v. Prather, 44 Ind. 287; Smith v. Parker, 148 Ind. 127, 45 N. E. 770; Kelty v. McPeake, 143 Iowa 567, 121 N. W. 529; Wheeler v. Mowers, 16 Misc. (N. Y.) 143, 38 N. Y. S. 950;

breach of contract does not amount to fraud, and consequently does not entitle the injured party to bring either an action of deceit or to rescind a contract induced by the promise.⁶¹ Any other holding would, on principle, render the nonperformance of any agreement fraud, and thus make nugatory laws relative to exemption. There is a conflict of authority as to whether the promise is fraudulent if made without any intention of fulfilling it. Some jurisdictions hold that if the promise to perform some act in the future is made with the design and intention of the promisor to disregard it, and with no intention to perform it, and was made to deceive and entrap the other party, then such promise, in case the refusal to perform takes place, will amount to actual fraud.⁶² Others hold that if a promise is made to do something

Clark v. Rice, 127 Wis. 451, 106 N. W. 231.

⁶¹ Freeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. 162; Harrington v. Rutherford, 38 Fla. 321, 21 So. 283; Weigand v. Cannon, 118 Ill. App. 635; Slatten v. Konrath, 1 Kans. App. 636, 42 Pac. 399; Bœttger &c. Co. v. Electrical Audit &c. Co., 115 N. Y. S. 1102; Crampton v. McLaughlin Realty Co., 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823n.

⁶² Nelson v. Shelby Mfg. &c. Co., 96 Ala. 515, 11 So. 695, 38 Am. St. 116; Ansley v. Bank of Piedmont, 113 Ala. 467, 21 So. 59, 59 Am. St. 122; Newman v. Smith, 77 Cal. 22, 18 Pac. 791; Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. 29; Russ Lumber &c. Co. v. Muscupiabe Land &c. Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. 186; Langley v. Rodriquez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. 70; Rogers v. Virginia-Carolina Chem. Co., 149 Fed. 1, 78 C. C. A. 615; National Bank v. Mackey, 5 Kans. App. 436, 49 Pac. 324; Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738; Gross v. McKee, 53 Miss. 536; Abbott v. Abbott, 18 Nebr. 503, 26 N. W. 361; Pollard v. McKenney, 69 Nebr. 742, 96 N. W. 679, 101 N. W. 9; Cerny v. Paxton &c. Co., 78 Nebr. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640. See, however, Perkins v. Lougee, 220 N. H. 485; Goodwin v. Horne, 60 N. H. 485; Troxler v. New Era Bldg. Co., 137 N. Car. 51, 49 S. E. 58;

Braddy v. Elliott, 146 N. Car. 578, 60 S. E. 507, 16 L. R. A. (N. S.) 1121, 125 Am. St. 523; American Hosiery Co. v. Baker, 18 Ohio C. C. 604; Mutual Reserve Life Ins. Co. v. Seidell, 52 Tex. Civ. App. 278, 113 S. W. 945. In the above case it is said, "It is a general rule that a promise to perform some act in the future will not amount to fraud in the eyes of the law; and although it may have been the inducement to the execution of the contract, and though it may have been totally disregarded, it could not be the basis for an action. There is, however, an exception to the rule recognized in Texas." (The exception is that stated in the text.) Scoggin v. Mason, 46 Tex. Civ. App. 480, 103 S. W. 831; M. T. Jones Lumber Co. v. Villegas, 8 Tex. Civ. App. 669, 28 S. W. 558; Touchstone v. Staggs (Tex. Civ. App.), 39 S. W. 189. Thus it has been held that an action for damages for deceit will lie where the buyer purchased a slave and agreed not to sell her out of the state or out of the neighborhood. Oldham v. Bentley, 6 B. Mon. (Ky.) 428; Price v. Read, 2 Harr. & G. (Md.) 291; Adams v. Anderson, 4 Har. & J. (Md.) 558; Fenwick v. Grimes, 5 Cranch (U. S.) 603, Fed. Cas. No. 4734. While conceding that fraud cannot be founded solely upon a promise not performed, even if the promisor never intended to fulfil it, it is held in Adams v. Tillig, 131 App. Div. (N. Y.) 494, 115 N. Y. S. 909,

in the future, and at the time it is not intended to perform the promise, that fact does not constitute fraud in law or equity.⁶³

§ 84. **Opinions and predictions.**—Mere expressions of opinions and predictions are not generally considered as representations of fact. Consequently they are not fraudulent, and are insufficient for the purpose of maintaining an action of deceit,⁶⁴ or

that fraud may be predicated on a present existing intent, and that a statement and representation by purchaser that he intended to erect a dwelling house on the land bought when he had in fact already formed the intention to build a garage was fraudulent. The intention to disregard the promise must exist at the time it is made in order to constitute fraud. *Chicago &c. R. Co. v. Titterton*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. 39; *McFarland v. McGill*, 16 Tex. Civ. App. 298, 41 S. W. 402.

⁶³ *Farris v. Strong*, 24 Colo. 107, 48 Pac. 963; *Miller v. Sutliff*, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735; *Weigand v. Cannon*, 118 Ill. App. 635; *Murray v. Smith*, 42 Ill. App. 548; *Gage v. Lewis*, 68 Ill. 604; *Chambers v. Mitchell*, 123 Ill. App. 595; *Bethell v. Bethell*, 92 Ind. 318; *Burt v. Bowles*, 69 Ind. 1; *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519; *Ayres v. Blevins*, 28 Ind. App. 101, 62 N. E. 305; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Reagan v. Hadley*, 57 Ind. 509; *State v. Carlisle*, 21 Ind. App. 438, 52 N. E. 711; *Noble v. State*, 39 Ind. 352. In the case of *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269, it is said, "Counsel also reminds us that representations upon which an action of fraud can be predicated must be of alleged existing facts, and not upon a promise to do something in the future, although the party promising had no intention of fulfilling the promise at the time it was made. * * * The foregoing principles enunciated by counsel are elemental." *Younger v. Hoge*, 211 Mo. 444, 111 S. W. 20, 18 L. R. A. (N. S.) 94; *Gallager v. Brunel*, 6 Cow. (N. Y.) 346; *Fisher v. New York Common Pleas*, 18 Wend. (N. Y.) 608; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992. See also, *In re Harker's Estate*, 113 Iowa 584, 85 N. W. 786.

⁶⁴ *Pasley v. Freeman*, 3 T. R. 51, 1 R. R. 634; *Jendwine v. Slade*, 2 Esp. N. P. 572, 5 R. R. 754; *Haycroft v. Creasy*, 2 East 92, 6 R. R. 380; *Harvey v. Young*, Yelv. 21; *Bayly v. Merrel*, 3 Bulst. 94, Cro. Jac. 386; *Bellairs v. Tucker*, 13 Q. B. Div. 562; *Munroe v. Pritchett*, 16 Ala. 785, 50 Am. Dec. 203; *Foster v. Kennedy's Admr.*, 38 Ala. 359, 81 Am. Dec. 56; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 22 P. 515, 6 L. R. A. 219n; *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40; *Hedin v. Minneapolis Medical &c. Ins.*, 62 Minn. 146, 64 N. W. 158; 35 L. R. A. 417, 54 Am. St. Rep. 628; *Gordon v. Butler*, 105 U. S. 553, 26 L. ed. 1166. And see *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271; *Bull v. Pratt*, 1 Conn. 342; *Williams v. McFadden*, 23 Fla. 143, 11 Am. St. 345; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; *Tuck v. Downing*, 76 Ill. 71; *State Bank v. Hamilton*, 2 Ind. 457; *Sieveling v. Litzler*, 31 Ind. 13; *Hartman v. Flaherty*, 80 Ind. 472; *Bondurant v. Crawford*, 22 Iowa 40; *Longshore v. Jack*, 30 Iowa 298; *Moore v. Turbeville*, 2 Bibb (Ky.) 602, 5 Am. Dec. 642; *Bishop v. Small*, 63 Maine 12; *Atwood v. Chapman*, 68 Maine 38, 28 Am. Rep. 5; *Holbrook v. Conner*, 60 Maine 578, 11 Am. Rep. 212; *Long v. Woodman*, 58 Maine 49; *Thompson v. Phoenix Ins. Co.*, 75 Maine 55, 46 Am. Rep. 357; *Buschman v. Codd*, 52 Md. 202; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Mooney v. Miller*, 102 Mass. 217; *Parker v. Moulton*, 114 Mass. 99, 1 Am. Rep. 315; *Barnard v. Coffin*, 138 Mass. 37; *Nash v. Minnesota Title Ins. &c. Co.*, 159 Mass. 437, 34 N. E. 625; *Collins v. Jackson*, 54 Mich. 186, 19 N. W. 947; *Anderson v. McPike*, 86 Mo. 293; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Banta v. Savage*, 12 Nev. 151; *Morrill v. Wallace*, 9 N. H. 111;

for the purpose of rescinding a contract at law,⁶⁵ or in equity.⁶⁶

Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172; Messer v. Smyth, 59 N. H. 41; Bradbury v. Haines, 60 N. H. 123; State v. Cass, 52 N. J. L. 77, 18 Atl. 972; Davis v. Meeker, 5 Johns. (N. Y.) 354; Starr v. Bennett, 5 Hill (N. Y.) 303; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Hubbell v. Meigs, 50 N. Y. 480; Duffany v. Ferguson, 66 N. Y. 482; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Saunders v. Hat-terman, 2 Ired. L. (N. Car.) 32, 37 Am. Dec. 404; Credle v. Swindell, 63 N. Car. 305; Walsh v. Hall, 66 N. Car. 233; Belmont Min. Co. v. Rog-ers, 10 Ohio Cir. Ct. 305, 6 Ohio Cir. Dec. 619. And see Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Lyons v. Briggs, 14 R. I. 222, 51 Am. Rep. 372; Handy v. Waldron, 18 R. I. 567, 29 Atl. 143, 49 Am. St. 794; Hecht v. Metzler, 14 Utah 408, 48 Pac. 37, 60 Am. St. 906; Jude v. Woodburn, 27 Vt. 415; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; Warner v. Benja-min, 89 Wis. 290, 62 N. W. 177.

⁶⁵ Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Cooke v. Cook, 100 Ala. 175, 14 So. 171; Davis v. Betz, 66 Ala. 206; Brown v. Freeman, 79 Ala. 406; Moses v. Katzenberger, 84 Ala. 95, 4 So. 237; Griel v. Lo-max, 94 Ala. 641, 10 So. 232; Bain v. Withey, 107 Ala. 223, 18 So. 217; Georgia Home Ins. Co. v. War-ten, 113 Ala. 479, 22 So. 288, 59 Am. St. 129; Ansley v. Bank of Pied-mont, 113 Ala. 467, 21 So. 59, 59 Am. St. 122; Rendell v. Scott, 70 Cal. 514, 11 Pac. 779; Cooper v. Hunter, 8 Colo. App. 101, 44 Pac. 944; Greene v. Societe &c., De St. Denis, 81 Fed. 64; Bond v. Ramsey, 89 Ill. 29; Wash-ington v. Louisville &c. R. Co., 34 Ill. App. 658, affd. 136 Ill. 49; Mus-ick v. Gatzmeyer, 47 Ill. App. 329; Foley v. Cowgill, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49; Gatling v. Newell, 9 Ind. 572; Bish v. Bradford, 17 Ind. 490; Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385; Curry v. Keyser, 30 Ind. 214; Hunter v. Mc-Laughlin, 43 Ind. 38; Adkins v. Ad-kins, 48 Ind. 12; Shade v. Creviston, 93 Ind. 591; Conant v. National State Bank, 121 Ind. 323, 22 N. E. 250; Bondurant v. Crawford, 22 Iowa 40;

Van Vechten v. Smith, 59 Iowa 173, 13 N. W. 94; Swan v. Mathre, 103 Iowa 261, 72 N. W. 522; Scroggin v. Wood, 87 Iowa 497, 54 N. W. 437; Merritt v. Dufur, 99 Iowa 211, 68 N. W. 533; Marshall v. Peck, 1 Dana (Ky.) 609; English v. Thomasson, 82 Ky. 280, 6 Ky. L. 267; Head v. Dant, 14 Ky. L. 742, 21 S. W. 528; Jaffray v. Moss, 41 La. Ann. 548, 6 So. 520; Dennison v. Thomaston Mut. Ins. Co., 20 Maine 125, 37 Am. Dec. 42; Page v. Bent, 2 Metc. (Mass.) 371; Pike v. Fay, 101 Mass. 134; Milliken v. Thorndike, 103 Mass. 382; Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677; Bristol v. Braidwood, 28 Mich. 191; Wilder v. DeCou, 18 Minn. 470; Cochrane v. Halsey, 25 Minn. 52; Wilkinson v. Clauson, 29 Minn. 91; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Anderson v. Bur-nett, 5 How. (Miss.) 165, 35 Am. Dec. 425; Anderson v. Hill, 12 Sm. & M. (Miss.) 679, 51 Am. Dec. 130; Walker v. Mobile &c. R. Co., 34 Miss. 245; Selma &c. R. Co. v. An-derson, 51 Miss. 829; Saunders v. McClintock, 46 Mo. App. 216; Rem-ington v. Van Ingen, 9 Misc. (N. Y.) 128, 29 N. Y. S. 301, 59 N. Y. St. 704, affg. 6 Misc. (N. Y.) 215, 26 N. Y. S. 878, 56 N. Y. St. 600; Ætna Ins. Co. v. Reed, 33 Ohio St. 283; Smith v. Griswold, 6 Ore. 440; Banfield v. Banfield, 24 Ore. 571, 34 Pac. 659; Rockafellow v. Baker, 41 Pa. St. 319, 80 Am. Dec. 624; Fulton v. Hood, 34 Pa. St. 365, 75 Am. Dec. 664; Watts v. Cummins, 59 Pa. St. 84; Byrne v. Stewart, 124 Pa. St. 450, 17 Atl. 19; Jackson v. Stock-bridge, 29 Tex. 394, 94 Am. Dec. 290; Barrett v. Featherstone, 89 Tex. 567, 35 S. W. 11; Blake v. Peck, 11 Vt. 483; Rison v. Newberry, 90 Va. 513, 18 S. E. 916; Watkins v. West Wytheville Land &c. Co., 92 Va. 1, 22 S. E. 554; West Seattle Land &c. Co. v. Herren, 16 Wash. 665, 48 P. 341; Maltby v. Austin, 65 Wis. 527, 27 N. W. 31; Montreal River Lum-ber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Fromer v. Stanley, 95 Wis. 56, 69 N. W. 820; Morrison v. Koch, 32 Wis. 254; Cheyenne First National Bank v. Swan, 3 Wyo. 356, 23 Pac. 743.

⁶⁶ Denton v. Macneil, L. R. 2 Eq.

In the sale or transfer of real or personal property it is not always easy to determine whether the language used by the seller should be construed as a warranty or as the mere expression of an opinion.⁶⁷ One must exercise care and not confuse statements of opinions and predictions with warranties. In determining whether an affirmation was intended as a warranty, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely state an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is generally a warranty, in the latter not.⁶⁸

Before a representation will be considered fraudulent it must be in regard to a matter susceptible of approximate accurate knowledge. It must import knowledge and be made as a statement of fact.⁶⁹ Thus a statement by one of the parties to a

352; *Crown v. Carriger*, 66 Ala. 590; *Lockwood v. Fitts*, 90 Ala. 150, 7 So. 467; *Dugan v. Cureton*, 1 Ark. 31, 31 Am. Dec. 727; *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. 29; *People v. Tynon*, 2 Colo. App. 131, 29 Pac. 809; *Banque Franco-Egyptienne v. Brown*, 34 Fed. 162; *Reeves v. Corning*, 51 Fed. 774; *Payne v. Smith*, 20 Ga. 654; *Drake v. Latham*, 50 Ill. 270; *Douglass v. Littler*, 58 Ill. 342; *Warren v. Doolittle*, 61 Ill. 171; *Tuck v. Downing*, 76 Ill. 71; *Dillman v. Nadleoffer*, 119 Ill. 567, 7 N. E. 88; *Brady v. Cole*, 164 Ill. 116, 45 N. E. 438; *Crocker v. Manley*, 164 Ill. 282, 45 N. E. 577, 56 Am. St. 196; *Swanson v. Fisher*, 148 Ill. App. 104; *Sieveking v. Litzler*, 31 Ind. 13; *McClanahan v. McKinley*, 52 Iowa 222, 2 N. W. 1101; *Lucas v. Crippen*, 76 Iowa 507, 41 N. W. 205; *Chambers v. Baptist Education Soc.*, 1 B. Mon. (Ky.) 215; *Seng v. Keller* (Ky.), 37 S. W. 581; *Carlton v. Rockport Ice Co.*, 78 Maine 49, 2 Atl. 676; *Commonwealth v. Mechanics' Mut. Fire Ins. Co.*, 120 Mass. 495; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Hall v. Thompson*, 1 Sm. & M. (Miss.) 443; *Reel v. Ewing*, 4 Mo. App. 570; *Moore v. Scott*, 47 Nebr. 346, 66 N. W. 441; *Wise v. Fuller*, 29 N. J. Eq. 257;

Norfolk &c. Hosiery Co. v. Arnold, 49 N. J. Eq. 390, 23 Atl. 514; *Banfield v. Banfield*, 24 Ore. 571, 34 Pac. 659; *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624; *Maney v. Porter*, 3 Humph. (Tenn.) 347; *Leiker v. Henson* (Tenn. Ch.), 41 S. W. 862, *affd. orally* by the Supreme Court; *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051; *Johanson v. Stephanson*, 154 U. S. 625, 38 L. ed. 1009, 14 Sup. Ct. 1180; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. 881; *Stebbins v. Eddy*, 4 Mason (U. S.) 414; *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916; *Max Meadows Land &c. Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *English v. Grinstead*, 12 Wash. 670, 42 Pac. 121; *Whitaker v. Southwest Virginia Imp. Co.*, 34 W. Va. 217.

⁶⁷ *Hazelton Boiler Co. v. Fargo Gas Co.*, 4 N. Dak. 365, 61 N. W. 151.

⁶⁸ *Pasley v. Freeman*, 3 T. R. 51, 1 R. R. 634; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; *Shippen v. Bowen*, 122 U. S. 575; *Benjamin on Sales*, 7th ed., pp. 612, 664.

⁶⁹ Statements by a vendor of a mining lease that it had never been mined, but that prospecting shafts had been dug to the ore and then

contract relative to the depth of a certain kind of sand, when neither of the parties was in position to know its depth, was held not to be a false representation or warranty, but a mere opinion or estimate.⁷⁰ Likewise, statements that one has wells which will supply water sufficient for a certain number of cattle,⁷¹ or as to the amount of wood the timber on certain property would make,⁷² have been held expressions of opinion. In matters of opinion every one is presumed to rely on his own judgment.⁷³ Not only are expressions of opinion relative to indefinite matters not considered fraudulent, but under ordinary circumstances dealers' talk or statements "puffing" trade are held to be mere expressions of opinion and do not avoid the contract.⁷⁴ Mere expressions of belief or opinion on the part of the vendor as to the value of articles sold by him, even though false and in a sense fraudulent, cannot be made the basis of an action for fraud, and this has been held true in many cases, even though strong and positive language has been used. This principle is expressed in the old maxim, *Simplex commendatio non obligat*.⁷⁵ Thus the mere ex-

left, are statements of fact and not merely opinions. *Kendrick v. Ryus*, 225 Mo. 150, 123 S. W. 937, 135 Am. St. 585. See also, *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59, 59 Am. St. 122; *McCormick v. Jordon*, 65 W. Va. 86, 63 S. E. 778; *Cleavenger v. Sturm*, 59 W. Va. 658, 53 S. E. 593.

⁷⁰ *McCormick v. Jordon*, 65 W. Va. 86, 63 S. E. 778.

⁷¹ *Bonbourt v. Crawford*, 22 Iowa 40.

⁷² *Longshore v. Jack*, 30 Iowa 298.

⁷³ *Smith v. Richards*, 38 U. S. (13 Pet.) 26. There can be no reliance on the expression of an opinion in reference to a matter equally open to the inquiry of both parties. *Davis v. Betz*, 66 Ala. 206; *Crown v. Car-riger*, 66 Ala. 590; *Townsend v. Cowles*, 31 Ala. 428; *Dawson v. Graham*, 48 Iowa 387; *Cornwall v. McFarland Real Estate Co.*, 150 Mo. 377, 51 S. W. 736; *Williams v. Dair-ker*, 33 Misc. (N. Y.) 70, 68 N. Y. S. 348, *affd.* 63 App. Div. (N. Y.) 614, 71 N. Y. S. 247.

⁷⁴ *Dugan v. Cureton*, 1 Ark. 31, 31 Am. Dec. 727. "Puffing mining claims, or making glowing predic-

tions as to how such claims will 'pan out' does not amount to such false representation as will authorize a court of chancery to set aside a sale of stock in a mining company, where the parties are *compos mentis* and deal at arm's length." *Burwash v. Ballou*, 230 Ill. 34, 82 N. E. 255, 15 L. R. A. (N. S.) 409n; *Schramm v. O'Conner*, 98 Ill. 539; *Allen v. Hart*, 72 Ill. 104; *Bridges v. Robinson*, 2 Tenn. Ch. 720; *Vernon v. Keys*, 12 East 632.

⁷⁵ A misrepresentation by the vendor as to the total cost of certain articles sold is not ground for avoiding the sale, where no confidential relation exists between the parties, and the vendee was experienced in the business and might have calculated the cost, the price per lb. being fixed and the weight ascertained. *Dalhoff Const. Co. v. Block*, 157 Fed. 227, 85 C. C. A. 25, 17 L. R. A. (N. S.) 419n. See also, *Gustafson v. Rust-meyer*, 70 Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. 92; *Sher-wood v. Salmon*, 5 Day (Conn.) 439, 5 Am. Dec. 167. A statement by a book agent as to the book's value may be and usually is the expression

pression of opinion by the vendor of real estate as to his title when based upon the facts truthfully stated, or which are within

of an opinion. *Patterson v. Barrie*, 30 App. D. C. 531; *Terhune v. Coker*, 107 Ga. 352, 33 S. E. 394; *Strubhar v. Shorthose*, 78 Ill. App. 394. A statement by a book agent that Balzac's works were "nice books that her children would love to read, and that they would be nice to have in the library," has been held the expression of an opinion, and not such a fraud as would entitle the purchaser to rescind the contract. *Barrie v. Jerome*, 112 Ill. App. 329. Representations as to the richness of a mine which are mere opinions are not ground for the rescission of a contract for the purchasing of stock in such mine. *Crocker v. Manley*, 164 Ill. 282, 45 N. E. 577, 56 Am. St. 196; *Noetling v. Wright*, 72 Ill. 390; *Ellefritz v. Taylor*, 84 Ill. App. 396; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Kennedy v. Richardson*, 70 Ind. 524; *Cagney v. Cusson*, 77 Ind. 494; *Hartman v. Flaherty*, 80 Ind. 472; *Hoffman v. Wilhelm*, 68 Iowa 510, 27 N. W. 483; *Lucas v. Crippen*, 76 Iowa 507, 41 N. W. 205; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Veasey v. Doton*, 3 Allen (Mass.) 380; *Homer v. Perkins*, 124 Mass. 431, 26 Am. Rep. 677; *Bristol v. Braidwood*, 28 Mich. 191; *Collins v. Jackson*, 54 Mich. 186, 19 N. W. 947; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Brownlow v. Wollard*, 61 Mo. App. 124; *Nostrum v. Halliday*, 39 Nebr. 828, 58 N. W. 429; *Canon v. Farmers' Bank*, 3 Nebr. 348, 91 N. W. 585; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Speiglemyer v. Crawford*, 6 Paige Ch. (N. Y.) 254; *Hutchinson v. Brown*, *Clarke Ch.* (N. Y.) 408; *Weidner v. Phillips*, 39 Hun (N. Y.) 1; *Saunders v. Hatterman*, 2 Ired. L. (N. Car.) 32, 37 Am. Dec. 404; *Handy v. Waldron*, 18 R. I. 567, 29 Atl. 143, 49 Am. St. 794, per *Tillinghast, J.*: "It is based upon the universal practice of the seller to recommend the article or thing offered for sale, and to employ more or less extravagant language in connection therewith. As said by Benjamin on Sales (Vol. 1, § 508), 'the buyer is always anxious

to buy as cheaply as he can, and is sufficiently prone to find imaginary fault in order to get a good bargain; and the vendor is equally at liberty to praise his merchandise, in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have an opportunity of inspection, and no means are used for hiding the defects.' And the common experience of mankind is that an ordinarily prudent buyer will not rely upon such statements to his hurt. The law, therefore, recognizes the fact that men will naturally overstate the value and qualities of the article which they have to sell, and that a buyer has no right to rely thereon. *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113. Indeed, the decisions have gone so far, under this principle, as to hold that, as said by *Holmes, J.*, in *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 'the law does not exact good faith from a seller, in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217), and as to which it has always been understood, the world over, that such statements are to be distrusted.' But while the law thus countenances a certain degree of misrepresentation, sometimes termed 'privileged fraud,' in commercial transactions, yet it holds the seller responsible if he falsely represents a particular fact (other than the price he paid, or an offer to him) affecting the value, quality or condition of the property in question. *Grinnell on Deceit*, § 28, and cases cited. If there is an express warranty as to quality or value, the thing sold not being open to the inspection of the buyer, or if any trick or device is employed by the seller to prevent such inspection, and the buyer relies upon the warranty or false representations of the seller, and is injured thereby, the matter may be held liable." See also, *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. 881;

the knowledge of the vendee, do not constitute fraud even though the opinion may not be well founded, the vendee not being entitled to rely thereon.⁷⁶

There are instances, though, where misrepresentations as to value may amount to fraud. The parties themselves may make value the principal element in a contract, and there are many cases where articles possess a standard commercial value, in which it is the chief criterion of quality for those who are not experts. Thus, where a seller falsely warrants bonds to be of a certain value, and the buyer, having no knowledge of their real value nor any present means of learning it, relies solely on such statement, the rule of caveat emptor does not apply. A stockholder's false statement that the stock he is offering has always paid a certain rate in dividends is a positive statement of a material fact, on which the buyer has a right to rely, and the rule of caveat emptor does not apply although there was no express warranty.⁷⁷ But an assertion that stock which one is selling will pay a certain dividend is a mere opinion and does not amount to fraud.⁷⁸ It has also been held that an action for a fraudulent representation cannot be maintained against the president and vice-president of a corporation where they represented to a stockholder, who was also secretary and treasurer of the corporation, that the business was going down; that one of them had purchased

Grim v. Byrd, 32 Gratt. (Va.) 293. Upon the question of value the purchaser must rely upon his own judgment. *Patten v. Glatz*, 87 Fed. 283; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166.

⁷⁶ *Saltonstall v. Gordon*, 33 Ala. 149; *Martin v. Wharton*, 38 Ala. 637; *Fitzhugh v. Davis*, 46 Ark. 337; *Choate v. Hyde*, 129 Cal. 580, 62 Pac. 118; *Drake v. Latham*, 50 Ill. 270; *Conwell v. Clifford*, 45 Ind. 392; *Howard v. Witham*, 2 Greenl. (Maine) 390; *Hoyt v. Bradley*, 27 Maine 242; *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115; *Herman v. Hall*, 140 Mo. 270, 41 S. W. 733; *Fellows v. Evans*, 33 Ore. 30, 53 Pac. 491. Thus where the vendor states that his opinion is based upon statements made to him by the former

owner to whom the vendee is referred the vendor is not guilty of fraud. *Hawkins v. Wells*, 17 Tex. Civ. App. 360, 43 S. W. 816.

⁷⁷ *Hennessy v. Damourette*, 15 Colo. App. 354, 62 Pac. 229.

⁷⁸ *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617; *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748. Compare *Strand v. Griffith*, 97 Fed. 854; *Swan v. Mathre*, 103 Iowa 261, 72 N. W. 522; *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279; *Handy v. Waldron*, 18 R. I. 567, 29 Atl. 143, 49 Am. St. 794; *Tacoma v. Tacoma Light & Co.*, 17 Wash. 458, 50 Pac. 55; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560. Complaint in an action for fraudulent representations, see *Spencer v. Johnston*, 58 Nebr. 44, 78 N. W. 482.

sufficient stock to give him a controlling interest in the corporation, and that this was his (the secretary and treasurer's) last chance to get his money out.⁷⁹ In the case above referred to, and the cases cited in connection therewith, the relation, between the parties, approached one of trust and confidence. Likewise, representations as to the quality of articles are ordinarily matters of mere opinion upon which one has no right to rely, where the thing purchased is before the parties and the means of knowledge are equally open to both.⁸⁰

The courts have quite generally applied the term "promissory representations" to predictions and hold that representations looking to the future as to what the vendee can do with the property, how much he can make out of it, or how much he can save by its use, are on a par with affirmations as to the value or quality of the property, and do not usually constitute fraud.⁸¹ Thus the nonfulfilment of roseate views expressed by various speakers at a public sale of lots in a boom town does not entitle the purchasers of such lots to rescind their contract.⁸² However, if the parties sustain a confidential relation one to the other, expressions of opinion or prediction

⁷⁹ *Boulden v. Stilwell*, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258. The court stated that representations concerning the future value or profitability of the business should be excluded from the jury as a basis of recovery, since it is but a prediction of future insolvency, and not a statement of the existence of insolvency. They also held that misrepresentations as to the ownership of the stock did not justify a recovery, and that the one defrauded, since he was secretary and treasurer, had at least equal means of knowledge with the other as to the condition and prospects of the corporation, even though the books had not been brought down to date. See also, in connection with this subject, *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Stark v. Soule*, 27 N. Y. Week. Dig. 80, 9 N. Y. St. 555; *Krumbhaar v. Griffiths*, 151 Pa. St. 223, 25 Atl. 64.

⁸⁰ A statement that certain land is "uncommonly rich water meadow

land," is a mere opinion. *Scott v. Hanson*, 1 Sim. 13; *affd.* 1 Russ. & M. 128; *Ormrod v. Huth*, 14 M. & W. 651; *Pearce v. Carter*, 3 Houst. (Del.) 385; *Wiest v. Garman*, 3 Del. Ch. 422; *Castelberry v. Scandrett*, 20 Ga. 242; *Manes v. Kenyon*, 18 Ga. 291; *Van Velsor v. Seeberger*, 35 Ill. App. 598; *McClanahan v. McKinley*, 52 Iowa 222, 2 N. W. 1101; *Farrell v. Lovett*, 68 Maine 326, 28 Am. Rep. 59; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315; *Taylor v. Fleet*, 4 Barb. (N. Y.) 95; *Fields v. Rouse*, 3 Jones Law (N. Car.) 72.

⁸¹ *Long v. Woodman*, 58 Maine 49; *Gordon v. Parmlee*, 2 Allen (Mass.) 212; *Williamson v. Holt*, 147 N. Car. 515, 61 S. E. 384, 17 L. R. A. (N. S.) 240; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161; *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179; *First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743.

⁸² *Pine Mountain &c. Co. v. Ford*, 21 Ky. L. 142, 50 S. W. 27.

on the part of the dominant party may be ground for avoiding a contract induced thereby.⁸³ Thus representations as to value made by an agent to his principal,⁸⁴ an attorney to his client,⁸⁵ or where trust and confidence is in fact reposed, although there is no special relation of trust and confidence,⁸⁶ are considered as representations of fact and may be relied on.

§ 85. Misrepresentations as to law.—In the absence of a relation of trust and confidence, or some other peculiar fact or circumstance, a misrepresentation of a matter of law is not sufficient to constitute fraud.⁸⁷ A misrepresentation of the legal effect of a written contract is but the expression of an opinion upon a question of law equally open to the observation and in-

⁸³ *Baum v. Holton*, 4 Colo. App. 406, 36 Pac. 154; *Merritt v. Wassenich*, 49 Fed. 785; *Hawk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Hulett v. Kennedy*, 4 Ind. App. 33, 30 N. E. 310; *Barnard v. Coffin*, 138 Mass. 37; *Lofgren v. Peterson*, 54 Minn. 343, 56 N. W. 44; *Smith v. Patterson*, 33 Ohio St. 70; *Fisher v. Budlong*, 10 R. I. 525; *Davenport v. Buckhanan*, 6 S. Dak. 376, 61 N. W. 47; *Boyd v. Jacobs*, 6 Tex. Civ. App. 442, 25 S. W. 681.

⁸⁴ *Cheney v. Gleason*, 125 Mass. 166; *White v. Lowden*, 8 Misc. (N. Y.) 106, 28 N. Y. S. 619, 59 N. Y. St. 509; *Palmer v. Pirson*, 4 Misc. (N. Y.) 455, 24 N. Y. S. 333, 54 N. Y. St. 157. Where plaintiff listed his land with defendant, a real estate agent, for exchange, and, relying on defendant's representation that certain land of his was worth as much as plaintiff's, exchanged his land therefor, his deed to defendant will be canceled where defendant grossly misrepresented the value of his land, since plaintiff has a right to rely on defendant's representations because of the fiduciary relations existing between them. *Shute v. Johnson*, 25 Ore. 59, 34 Pac. 965.

⁸⁵ *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74.

⁸⁶ *Nolte v. Reichelm*, 96 Ill. 425; *Nichols v. Colgan*, 130 Ind. 341, 30 N. E. 301; *Swimm v. Bush*, 23 Mich. 99. See also, *White v. Southerland*, 64 Ill. 181; *Dorr v. Cory*, 108 Iowa

725, 78 N. W. 682; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769.

⁸⁷ *Lewis v. Jones*, 4 B. & C. 506; *Georgian Home Ins. Co. v. Warten*, 113 Ala. 479, 22 So. 288, 59 Am. St. 129; *Rutter & Hendrix v. Hanover Fire Ins. Co.*, 138 Ala. 202, 35 So. 33; *Townsend v. Cowles*, 31 Ala. 428; *Craig v. Blow*, 3 Stew. (Ala.) 448; *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. 126; *Fish v. Cleland*, 33 Ill. 238; *Drake v. Latham*, 50 Ill. 270; *Dillman v. Nadleffer*, 119 Ill. 567, 7 N. E. 88; *Clem v. New Castle & C. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653; *Russell v. Branham*, 8 Blackf. (Ind.) 277; *New Albany & C. R. Co. v. Fields*, 10 Ind. 187; *Fry v. Day*, 97 Ind. 348; *Louchheim v. Gill*, 17 Ind. 139; *Smither v. Calvert*, 44 Ind. 242; *Burt v. Bowles*, 69 Ind. 1; *Platt v. Scott*, 6 Blackf. (Ind.) 389, 39 Am. Dec. 436; *Clodfelter v. Hulett*, 72 Ind. 137; *Abbott v. Treat*, 78 Maine 121, 3 Atl. 44; *Miller v. Brooks*, 109 Mich. 174, 66 N. W. 1092; *Catlin v. Fletcher*, 9 Minn. 85; *Jagger v. Winslow*, 30 Minn. 263, 15 N. W. 242; *American Ins. Co. v. Capps*, 4 Mo. App. 571; *Starr v. Bennett*, 5 Hill. (N. Y.) 303; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Upton v. Tribilcock*, 91 U. S. 45, 50; *Mut. Life Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. 906; *Gormely v. Gymnastic Assn.*, 55 Wis. 350, 13 N. W. 242.

quiries of both parties, and as to which the law presumes the party to whom it was made had knowledge.⁸⁸ However, where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former may be relieved from the terms of a contract so induced. More particularly will this be so if the mistakes are encouraged or induced by misrepresentations of the other party. Thus a settlement of a claim for half the amount a party was entitled to, made in ignorance of the law and upon the fraudulent representations of the other party, who knew of such ignorance and knew the rights of the parties, has been set aside.⁸⁹ It may therefore be deduced as a general rule that if a mistake in law by one party to a contract is known to the other party thereto, and accompanied and induced by the fraud of the latter party, the contract resulting therefrom may be avoided at the option of the defrauded party.⁹⁰

The rule that misrepresentations as to law do not ordinarily constitute fraud, is not applicable where the misrepresentation is in regard to a foreign law or the laws of another state. Misrepresentations as to the laws of a foreign or of a sister state are considered as statements of fact.⁹¹ Representations as to special or private laws may also be fraudulent, such as statements relative to the private character of corporations.⁹²

False representation as to a matter of law may also be fraudulent if the parties sustain a confidential relation toward each other.⁹³ Thus, misrepresentations as to law where the parties

⁸⁸ *Townsend v. Cowles*, 31 Ala. 428; *Beall v. McGehee*, 57 Ala. 438. See also, *Fish v. Cleland*, 33 Ill. 238; *Russell v. Branham*, 8 Blackf. (Ind.) 277; *Wood v. Roeder*, 50 Nebr. 476, 70 N. W. 21; *Upton v. Tribilcock*, 91 U. S. 45.

⁸⁹ *Titus v. Rochester German Ins. Co.*, 97 Ky. 567, 31 S. W. 127, 28 L. R. A. 478, 53 Am. St. 426.

⁹⁰ *Townsend v. Cowles*, 31 Ala. 428; *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123; *Broadwell v. Broadwell*, 1 Gil. (Ill.) 599; *Williams v. Hamilton*, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475; *Berry v. Whitney*, 40 Mich. 65; *Nelson v. Betts*, 21 Mo. App. 219; *Whelen's App.*, 70 Pa. St. 410; *Moreland v. Atchison*, 19 Tex. 303.

⁹¹ *Bethell v. Bethell*, 92 Ind. 318; *Haven v. Foster*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; *Wood v. Roeder*, 50 Nebr. 476, 70 N. W. 21; *King v. Doolittle*, 1 Head (Tenn.) 77. "A misrepresentation which includes the opinion of a law of another state is without the rule, and may be fraudulent; and ignorance may be pleaded by the party to whom the representations were made." *Wood v. Roeder*, 50 Nebr. 476, 70 N. W. 21; *Rosenbaum v. U. S. Credit System*, 64 N. J. L. 34, 44 Atl. 966. *Revd. on other grounds*, 65 N. J. L. 255, 48 Atl. 237, 53 Atl. 449.

⁹² *West London Commercial Bank v. Kitson*, 13 Q. B. Div. 360; *King v. Doolittle*, 1 Head (Tenn.) 77.

⁹³ *Sims v. Ferrill*, 45 Ga. 585; *Sands*

stood in relation of attorney and client,⁹⁴ stepmother and stepson,⁹⁵ executor and heir,⁹⁶ or persons under contract to marry,⁹⁷ have been declared fraudulent. If trust and confidence is actually reposed, even though there is no specific relation between the parties which is considered confidential, a misrepresentation of law may amount to fraud. Thus, where a lessee refused to sign a lease because it failed to provide that if the building burned he would not be liable for the rent, and a lawyer of ability, who was attorney for the lessor, represented that it was unnecessary to place such provision in the lease because there was a statute which would protect him in case the building burned, and thereupon the lessee, relying on this representation, signed the agreement, the court said, "The court will not sanction fraud nor will it enforce a contract obtained thereby. Under the admitted allegations of the answer, the contract as written did not, by reason of the fraud practiced by Headley (the attorney), correctly set out the agreement of the parties. A written contract may always be avoided for fraud, and where actual fraud has been perpetrated the contract thus obtained different from what the parties agreed on, will not be enforced."⁹⁸

§ 86. Materiality.—Another element of fraud or misrepresentation, as shown by the definition, is that of materiality. A representation which is immaterial is not ground for avoiding a contract. As has been stated in a preceding section, a misrepresentation relative to a collateral matter is not, as a general rule, ground for the rescission of a contract, for which it may have been

v. Sands, 112 Ill. 225; Lamb v. Lamb, 130 Ind. 273, 30 N. E. 36, 30 Am. St. 227; Motherway v. Wall, 168 Mass. 333, 47 N. E. 135; Haviland v. Willets, 141 N. Y. 35, 35 N. E. 958; Wheeler v. Smith, 9 How. (U. S.) 55; Hubbard v. McClean, 115 Wis. 9, 90 N. W. 1077.

⁹⁴ Allen v. Frawley, 106 Wis. 638, 82 N. W. 593.

⁹⁵ West v. West, 9 Tex. Civ. App. 475, 29 S. W. 242.

⁹⁶ Schuttler v. Brandfass, 41 W. Va. 201, 23 S. E. 808.

⁹⁷ Lamb v. Lamb, 130 Ind. 273, 30 N. E. 36, 30 Am. St. 227.

⁹⁸ Headley v. Pickering, 23 Ky. L. 905, 64 S. W. 527. Where there is a mistake or misrepresentation relative to the law accompanied by fraud, in any form, such misrepresentation or concealment or taking advantage of one's ignorance of the law may be ground for relief in equity. Schuttler v. Brandfass, 41 W. Va. 201, 23 S. E. 808. See also, Ross v. Drinkard's Admr., 35 Ala. 434; Lehman v. Shackelford, 50 Ala. 437; Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; Moreland v. Atchison, 19 Tex. 303; Snell v. Atlantic Fire & Ins. Co., 98 U. S. 95, 25 L. ed. 52.

one of the inducements.⁹⁹ A representation is material when, but for it, the contract would not have been made,¹ although this test is not conclusive in every case.² In the final analysis, the materiality of a representation will depend on the circumstances of each particular case. Thus a weak-minded or illiterate person would have a right to rely on representations which an educated and sagacious man would have no right to credit.³

§ 87. **Falsity.**—It is obvious that the statement, in order to be fraudulent or amount to a misrepresentation, must be false at the time it is made.⁴ If the statement is substantially true it will not be considered as a false representation.⁵ But a misleading and partial disclosure, even though true as far as it goes, may amount to a false representation if made to deceive and does, in fact, deceive the party to whom it is made.⁶ The mere fact that

⁹⁹ *Gillespie v. Fulton Oil &c. Co.*, 236 Ill. 188, 86 N. E. 219; *Home Gas Co. v. Mannington Co-operative Window Glass Co.*, 63 W. Va. 266, 61 S. E. 329. See ante, § 71, *Fraud or Misrepresentation as to Inducement or Collateral Matter*.

¹ *Thomas v. Grise*, 1 Pen. (Del.) 381, 41 Atl. 883; *McAleer v. Horsey*, 35 Md. 439. A fraudulent misrepresentation does not furnish ground for equitable relief unless it formed a material inducement to the agreement sought to be rescinded. *Powell v. Adams*, 98 Mo. 598, 12 S. W. 295. That which is intended as a part of the contract may be relied on. *Pinney v. Andrus*, 41 Vt. 631.

² *Hall v. Johnson*, 41 Mich. 286, 2 N. W. 55.

³ *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. 995. See also, ante, §§ 72, 73, *Fraud or Misrepresentation as to An Essential Element of Contract; as to Contents or Substance of Contract*.

⁴ *Benton v. Ward*, 59 Fed. 411; *People v. Healy*, 128 Ill. 9, 20 N. E. 692, 15 Am. St. 90; *Austin Mfg. Co. v. Decker*, 109 Iowa 277, 80 N. W. 312; *Southern Express Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. 241; *Potts v. Chapin*, 133 Mass. 276; *Hoelt v. Kock*, 119 Mich. 458, 78 N. W. 556; *Southern Devel-*

opment Co. v. Silva, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. 381. In an action for false representation it is necessary to establish falsity, the intention to deceive, and that the plaintiff relied upon the representation and has suffered damages thereby. *Buchal v. Higgins*, 109 App. Div. (N. Y.) 607, 96 N. Y. S. 241; *Frishmuth v. Barker*, 159 Pa. St. 549, 28 Atl. 368; *Hamberger v. Lusky* (Tenn.), 56 S. W. 24. A contract to buy a lot of B, who represented it to be unencumbered. This statement was true at the time it was made, but in between the time the agreement was made and the giving of the deed, B placed a mortgage on the lot. The court held the "time of the sale was at the deeding of the lot, and at that time the assertion was not true." *Piche v. Robbins*, 24 R. I. 325, 53 Atl. 92.

⁵ *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271; *Benton v. Ward*, 59 Fed. 411; *Austin Mfg. Co. v. Decker*, 109 Iowa 277, 80 N. W. 312; *World Mfg. Co. v. Hamilton-Kenwood Cycle Co.*, 123 Mich. 620, 82 N. W. 528; *Zimmerman v. Hallinger*, 59 N. J. Eq. 644, 44 Atl. 1100.

⁶ See ante, § 80, *Misleading and Partial Disclosures*.

the one making the representation believes it to be untrue does not make it fraudulent, when the statement is in fact true.⁷

§ 88. **Knowledge and intention.**—In an action of fraud, as a general rule, it is necessary to establish the representation, its falsity, the intention to deceive, and that the plaintiff relied upon the representation and has suffered damage thereby.⁸ But such intention to deceive may be implied, and it has been held by the leading case on this question that a false representation becomes fraudulent when made (1) knowingly, (2) without belief in its truth, or (3) recklessly, carelessly, whether it be true or false.⁹ It is the rule in this country and England that if the representation is made without belief in its truth,¹⁰ or made recklessly, without caring whether it be true or false,¹¹ the representation may amount to fraud. Some cases lay down the rule that if the misrepresentation is negligently made it may give rise to an action

⁷ *Austin Mfg. Co. v. Decker*, 109 Iowa 277, 80 N. W. 312.

⁸ *Buchal v. Higgins*, 109 App. Div. (N. Y.) 607, 96 N. Y. S. 241. See also, *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Chisholm v. Gadsden*, 1 Strob. L. (S. Car.) 220, 47 Am. Dec. 550; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. 696.

⁹ *Derry v. Peek*, 14 App. Cas. 337.

¹⁰ *Derry v. Peek*, 14 App. Cas. 337; *Angus v. Clifford*, 2 Ch. (1891) 449; *Eichelberger v. Mills Land & Co.*, 9 Cal. App. 628, 100 Pac. 117; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. In *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. 933, it is said, "Applying these principles to this case, it would seem to follow that when the defendant, with a view to affecting the sale, stated to the plaintiff that the horse was safe and just what he wanted, he thereby affirmed his belief in the truthfulness of his statement, and, it being found that the horse was vicious, and that the defendant suspected that his statement was false, that his want of belief or conscious disregard for the truth or falsity of his statement was established; for a person who suspects that his statement is false does not entertain an

honest belief that it is true, or is consciously and wickedly indifferent to its truth or falsity." *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401; *Kountze v. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. 651.

¹¹ In *Le Lievre v. Gould* (1893), 1 Q. B. 491, 498, it is said, "A man must also be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind," and again on pages 500 and 501, "but his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case, it is the knowledge of the falsehood; in the second, it is the wicked indifference, which constitutes the fraud." *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178; *Watson v. Jones*, 41 Fla. 241, 25 So. 678. In the above case the American decisions are reviewed. *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861; *Kiefer v. Rogers*, 19 Gil. (Minn.) 14. See also, *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. 489; *Vincent v. Corbitt*, 94 Miss. 46, 47 So. 641, 21 L. R. A. 85. But see *Penn*

for fraud or deceit.¹² It may therefore be laid down as a general rule that one is guilty of fraud who without knowledge of the truth or falsity of a material representation, and without any grounds of belief, asserts it as a fact with intent that another shall act thereon as much as if he knew it to be untrue.¹³

Mut. Life Ins. Co. v. Mechanics' Saving & C. Co., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33.

¹²Cunningham v. C. R. Pease House Furnishing Co., 74 N. H. 435, 69 Atl. 120, 124 Am. St. 979. In the above case it is said, "If, therefore, the defendant's false representation that it was safe to use the blacking on a hot stove was the cause of plaintiff's injury, the facts that they thought the statement was true and had no intent to deceive do not necessarily bar her right to a recovery. Proof of those facts would merely require her to prove facts not essential to her case, if the representation was deceitfully made. If the representation was deceitful, she could recover by showing that their fault contributed to cause her injury; but, if it was merely negligent, she must show that it was the sole cause of her injury. The reason for this is that the law makes it the duty of everyone to use ordinary care to avoid being injured by another's negligence; but it imposes on no one the duty to use such care to avoid being injured by another's intentionally wrongful act. In actions for negligence contributory negligence is a defense; in actions for intentional injuries, it is not." It is also said a false statement negligently made may amount to fraud. Madden v. Caldwell Land Co., 16 Idaho 59, 100 Pac. 358, 21 L. R. A. (N. S.) 332. It is difficult to see why the third class of cases above given does not include those negligently made. It would seem that the term "carelessly and recklessly" made would include those negligently made.

¹³Brownlie v. Campbell, 5 App. Cas. 925; Taylor v. Ashton, 11 M. & W. 401; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Munroe v. Prichett, 16 Ala. 785, 50 Am. Dec. 203; Hanger v. Marshall, 58 Ala. 153; Einger v. Evins, 38 Ark. 334; Mayer v. Salazar, 84 Cal. 646, 24 Pac. 597; Schol-

field & C. Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046; Miller v. John, 208 Ill. 173, 70 N. E. 27; Endsley v. Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Ruff v. Jarrett, 94 Ill. 475; Case v. Ayers, 65 Ill. 142; Kirkpatrick v. Reeves, 121 Ind. 280, 22 N. E. 139; Ingalls v. Miller, 121 Ind. 188, 22 N. E. 995; West v. Wright, 98 Ind. 335; Trimbell v. Reid, 97 Ky. 713, 31 S. W. 861; Foard v. McComb, 12 Bush (Ky.) 723; Braley v. Powers, 92 Maine 203, 42 Atl. 362; Brown v. Blunt, 72 Maine 415; McAleer v. Horsey, 35 Md. 439; Savage v. Stevens, 126 Mass. 207; Tucker v. White, 125 Mass. 344; Litchfield v. Hutchinson, 117 Mass. 195; Fisher v. Mellen, 103 Mass. 503; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. 727; Arnold v. Teel, 182 Mass. 1, 64 N. E. 413; Stone v. Denny, 4 Metc. (Mass.) 151; Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Stone v. Covell, 29 Mich. 359; Beebe v. Knapp, 28 Mich. 53; Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. 485, 6 L. R. A. 149; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Carlton v. Hulett, 49 Minn. 308, 51 N. W. 1053; Buserud v. Farrington, 36 Minn. 320, 31 N. W. 360; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Merriam v. Pine City Lumber Co., 23 Minn. 314; Wilder v. DeCou, 18 Minn. 470; Sims v. Eiland, 57 Miss. 607; Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516; Walsh v. Morse, 80 Mo. 568; Caldwell v. Henry, 76 Mo. 254; Gerner v. Yates, 61 Nebr. 100, 84 N. W. 596; Phillips v. Jones, 12 Nebr. 213, 10 N. W. 708; Foulks & C. Motor Co. v. Thies, 26 Nev. 158, 65 Pac. 373, 99 Am. St. 684; Rowell v. Chase, 61 N. H. 135; Bennett v. Judson, 21 N. Y. 238; Indianapolis P. & C. R. Co. v. Tyng, 63 N. Y. 653; Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; L. D. Garrett Co. v. Appleton, 101 App. Div. (N. Y.) 507,

In many cases transactions are declared fraudulent and language used which would indicate that it is immaterial whether the representation was intentional or not, and regardless of the good faith of the one making the statement. For instance, it has been said, "An intentional misrepresentation or concealment in relation to land, either as to the quality or title by which the purchaser is imposed on, is fraudulent, and it is immaterial whether the false representations are intentional or not. If the vendor undertakes to make statements, he is responsible for them."¹⁴ But in this case it appears, first, that the statement was made knowing that it was false; second, that the action was not one of deceit, but for the rescission of a contract,—an action which by the great weight of authority can be maintained regardless of whether the false representation amounts to a fraud or is an innocent misrepresentation.¹⁵ In another case it is said, "If the defendant asserted a fact as true at the time of the sale which was not true,

92 N. Y. Supp. 136; *Oberlander v. Spiess*, 45 N. Y. 175; *Meyer v. Amidon*, 45 N. Y. 169; *Lunn v. Shermer*, 93 N. Car. 164; *Parmelee v. Adolph*, 28 Ohio St. 10; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Cawston v. Sturgis*, 29 Ore. 331, 43 Pac. 656; *Griswold v. Gebbie*, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. 878; *Hexter v. Bast*, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. 874; *Mitchell v. Zimmerman*, 4 Tex. 75, 51 Am. Dec. 717; *Cooper v. Schlesinger*, 111 U. S. 198, 28 L. ed. 382, 4 Sup. Ct. 360; *Lehigh Zinc & Co. v. Bamford*, 150 U. S. 665, 37 L. ed. 1215, 14 Sup. Ct. 219; *Smith v. Columbus Buggy Co.* — Utah —, 123 Pac. 580; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Darling v. Stuart*, 63 Vt. 570, 22 Atl. 634; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. 1016. See also, *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497; *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119. And compare *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833; *Riley v. Bell*, 120 Iowa 618, 95 N. W. 170; *Boddy v. Henry*, 126 Iowa 31, 101 N. W. 447.

¹⁴ *Bailey v. Jordan*, 32 Ala. 50.

¹⁵ *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403. To

same effect, see *Rimer v. Dugan*, 39 Miss. 477, 77 Am. Dec. 687. The case of *Kimball v. Saguin*, 86 Iowa 186, 53 N. W. 116, uses similar language, but it is alleged that the representations were knowingly made. The following cases also use similar language, but in each of them the action was to rescind a contract. *Lanier v. Hill*, 25 Ala. 554; *Lindsey v. Veasey*, 62 Ala. 421. "Such an action (the action of deceit) differs essentially from one brought for rescission of a contract on the ground of misrepresentation. In the latter kind of suit it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentations, however honestly made, it cannot stand. But, when the action is for fraud or deceit, it is not enough to show that the representation was untrue." *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Penn Mut. Life Ins. Co. v. Mechanics' Sav. & Co.*, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33; *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178; *Gardner v. Mann*, 36 Ind. App. 694, 76 N. E. 417; *Adams v. Reed*, 11 Utah 480, 40 Pac. 720; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

the plaintiff was equally deceived, whether the assertion was made in good faith or not. * * * In such cases the assertion is equivalent to the assumption of its truth."¹⁶ In this case it appears that the fraud resulted from the gross negligence of the defendant, and also that the jury might have believed that he had knowledge of the truth or falsity of his statement.¹⁷ Consequently it may be stated as a general rule that one is not guilty of fraud if he has a bona fide belief in the truth of his representation, and has reasonable ground upon which to base such belief.¹⁸

Where a statement is made with knowledge of its falsity, and where the one making the false statement also knows that it will mislead another to his injury, the actual intent of the party guilty

¹⁶ *Piche v. Robbins*, 24 R. I. 325, 53 Atl. 92. See also, *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62. In Michigan it is held, "that if a representation is false in fact, and actually deceives the one to whom it is made, it is actionable fraud, even though made in the best of faith, and even though the one who made it had every reason to believe it to be true." The principle is declared peculiar to Michigan. *Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. 485. See also, *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609.

¹⁷ Many of the cases laying down the broad general doctrine that an action in deceit may be maintained regardless of innocence of the misrepresentation, are explainable on the ground that the misrepresentation was contractual and that the action is really maintainable because of the breach of warranty expressed or implied. The case of *Aldrich v. Scribner* (cited in note 16) might be placed on this ground. An action for deceit is distinct from an action for breach of warranty. *Hitchcock v. Gothenburg Water & C. Co.*, 4 Nebr. 620, 95 N. W. 638.

¹⁸ The basis of the action of deceit is the actual fraud of defendant, his moral delinquency; and therefore his knowledge of the falsity of the representation, or that which in law is equivalent thereto, must be averred and proved. *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178; *Endsley v.*

Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; *Buchal v. Higgins*, 109 App. Div. (N. Y.) 607, 96 N. Y. S. 241; *Erie City Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508. In order to maintain an action for deceit, the statement relied on must be false, and must be made with actual or constructive knowledge of its falsity. *Southern Express Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. 241; *Bank of Atchison v. Byers*, 139 Mo. 627, 41 S. W. 325. See also, *Baldwin v. Marsh*, 6 Ind. App. 533, 33 N. E. 973; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. 727; *Griswold v. Gebbie*, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. 878; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. 1016. See also, *Nash v. Minnesota & C. Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. 489; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. 485; *Kountze v. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. 651. It may be questionable whether or not the belief must have some reasonable ground upon which to rest, but it would seem that it must, for it is difficult to see how one could have a good-faith belief in the truth of his representation if he had no reasonable ground upon which to base it. A statement made without knowledge of its truth could not be a statement honestly believed. See *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Bullitt v.*

of such fraudulent conduct is immaterial since the intent to deceive will be presumed.¹⁹ However, in many instances the intention of the one guilty of a misrepresentation becomes important in order to determine whether his conduct has been fraudulent. Thus, it has been seen in a preceding section that some jurisdictions hold that if a promise to perform some act in the future is made with the design and intention of the promisor to disregard it, and was made to deceive and entrap the other party, then such promise, in case the refusal to perform takes place, will amount to actual fraud.²⁰ Again, if one buys goods without any intention of ever paying for them he is guilty of fraud.²¹ So, also, there is no fraud where the false repre-

Farrar, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. 485; Cooper v. Schlesinger, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. 360. See, however, Penn Mutual Life Ins. Co. v. Mechanics' Saving &c. Co., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33. See also, Vincent v. Corbett, 94 Miss. 46, 47 So. 641, 21 L. R. A. (N. S.) 85, where it is held that one who makes an emphatic assertion of a fact should be required to disprove the presumption of knowledge which is thereby created, and disclose, if he can, what reasonable grounds existed for his belief.

¹⁹ Hine v. Campion, L. R. 7 Ch. Div. 344; Eichelberger v. Mills Land &c. Co., 9 Cal. App. 628, 100 Pac. 117. In the above case it is said, "As the representations were made prior to the transaction, and directly related to it, it must be presumed that they were made for the purpose and with the design of inducing plaintiffs to enter into the contract." Judd v. Weber, 55 Conn. 267, 11 Atl. 40; Endsley v. Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. 727; Hudnut v. Gardner, 59 Mich. 341, 26 N. W. 502; Haven v. Neal, 43 Minn. 315, 45 N. W. 612; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Griswold v. Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. 878; Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N. W. 923, 105 Am. St. 1016.

²⁰ See, ante, § 83, Promise or Representation of Intention as to Future.

²¹ Ferguson v. Carrington, 9 B. & C. 59; Load v. Green, 15 M. & W. 216; White v. Garden, 10 C. P. 919; Clough v. L. & N. W. R. Co., 7 Ex. 26; Ex parte Whittaker, L. R. 10 Ch. App. Cas. 446; Maxwell v. Brown Shoe Company, 114 Ala. 304, 21 So. 1009; Legrand v. Eufaula Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; Wollner v. Lehman, 85 Ala. 274, 4 So. 643; McKenzie v. Rothschild, 119 Ala. 419, 24 So. 716; Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. 283; Bugg v. Wertheimer Shoe Co., 64 Ark. 12, 40 S. W. 134; W. W. Johnson Co. v. Triplett, 66 Ark. 233, 50 S. W. 455; Ayres v. French, 41 Conn. 142; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Brower v. Brower, 29 Fed. 485; Fechheimer v. Baum, 37 Fed. 167, 2 L. R. A. 153; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; Farwell v. Nathanson, 99 Ill. App. 185; O'Donald v. Constant, 82 Ind. 212; Brower v. Goodyer, 88 Ind. 572; Peninsular Stove Co. v. Ellis, 20 Ind. App. 491, 51 N. E. 105; Oswego Starch Factory v. Lendrum, 57 Iowa 573, 42 Am. Rep. 53; Cox Shoe Co. v. Adams, 105 Iowa 402, 75 N. W. 316; Deere v. Morgan, 114 Iowa 287, 86 N. W. 271; Lindauer v. Hay, 61 Iowa 663, 17 N. W. 98; Reager v. Kendall, 19 Ky. L. 27, 39 S. W. 257; Burrill v. Stevens, 73 Maine 395, 40 Am. Rep. 366; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Dow v. Sanborn, 3 Allen (Mass.) 181; Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Watson v. Silsby, 166 Mass. 57, 43 N. E. 1117; Shipman v. Seymour,

sentation is not made directly to the one who acts thereon, unless it appears that the person making such representation intended that it should be conveyed to and acted on by the one who does in fact act thereon.²² Thus, where a fraudulent representation is

- 40 Mich. 274; *Koch v. Lyon*, 82 Mich. 513, 46 N. W. 779; *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. 112; *Slagle v. Goodnow*, 45 Minn. 531, 48 N. W. 402; *Fox v. Webster*, 46 Mo. 181; *McCready v. Phillips*, 56 Nebr. 446, 76 N. W. 885; *Stewart v. Emerson*, 52 N. H. 301; *Johnson v. Monnell*, 41 N. Y. 655, 2 Abb. Dec. (N. Y.) 470; *Hennequin v. Naylor*, 24 N. Y. 139; *Devoe v. Brandt*, 53 N. Y. 462; *Wright v. Brown*, 67 N. Y. 1; *Whitten v. Fitzwater*, 129 N. Y. 626, 29 N. E. 99; *Des Farges v. Pugh*, 93 N. Car. 31, 53 Am. Rep. 446; *Wallace v. Cohen*, 111 N. Car. 103, 15 S. E. 1031; *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501n; *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. 720; *Mulliken v. Millar*, 12 R. I. 296; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. 112, 2 Am. St. 905; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 61 Am. St. 791; *Belding v. Frankland*, 8 Lea (Tenn.) 67; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993; *Lee v. Simmons*, 65 Wis. 523, 27 N. W. 174. In Pennsylvania the purchaser must make some misstatement or practice some trick or artifice in order to render the sale fraudulent. In *re Lewis*, 125 Fed. 143; *Smith v. Smith*, 21 Pa. St. 367; *Bunn v. Ahl*, 29 Pa. St. 387; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Bughman v. Central Bank*, 159 Pa. St. 94, 28 Atl. 209. The mere failure, however, of a purchaser of goods to disclose his insolvency to the vendor is not fraudulent in the absence of an intent not to pay for the goods. Ex parte *Whittaker*, L. R. 10 Ch. App. Cas. 446; *Legrand v. Eufaula Nat. Bank*, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; *Kyle v. Ward*, 81 Ala. 120, 1 So. 468; *Loeb v. Flash*, 65 Ala. 526; *McCormick v. Joseph*, 77 Ala. 236; *Spira v. Hornthall*, 77 Ala. 137; *Hornthall v. Schonfield*, 79 Ala. 107; *Bell v. Ellis*, 33 Cal. 620, overruling *Seligman v. Kalkman*, 8 Cal. 207; *Morrill v. Blackman*, 42 Conn. 324; *Mears v. Waples*, 3 Houst. (Del.) 581; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Kelsey v. Harrison*, 29 Kans. 143; *Cross v. Peters*, 1 Greenl. (Maine) 376, 10 Am. Dec. 78; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Nichols v. Pinner*, 18 N. Y. 295; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Hennequin v. Naylor*, 24 N. Y. 139; *Johnson v. Monell*, 41 N. Y. 655, 2 Abb. App. Dec. (N. Y.) 470; *Mitchell v. Worden*, 20 Barb. (N. Y.) 253; *Fish v. Payne*, 7 Hun (N. Y.) 586; *Morris v. Talcott*, 96 N. Y. 100; *Talcott v. Henderson*, 31 Ohio St. 162; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. 112, 2 Am. St. 905; *Conyers v. Ennis*, 2 Mason (U. S.) 236, Fed. Cas. No. 3149; *Biggs v. Barry*, 2 Curt. (U. S.) 259, Fed. Cas. No. 1402; *Redington & Co. v. Roberts*, 25 Vt. 686; *Garbutt v. Bank of Prairie Du Chien*, 22 Wis. 384. But the intention not to pay for the goods purchased may be evidenced by the circumstances such as insolvency, &c. *Davis v. McWhirter*, 40 U. C. Q. B. 598; *Fechheimer v. Baum*, 37 Fed. 167, 2 L. R. A. 153; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Johnson v. Moneli*, 41 N. Y. 655, 2 Abb. App. Dec. (N. Y.) 470; *Wright v. Brown*, 67 N. Y. 1; *Van Kleek v. Leroy*, 4 Abb. Pr. (N. Y.) 431; *Hall v. Naylor*, 6 Duer (N. Y.) 71; *Talcott v. Henderson*, 31 Ohio St. 162; *Smith v. Smith*, 21 Pa. St. 367, 60 Am. Dec. 51; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Backentoss v. Speicher*, 31 Pa. St. 324; *Mulliken v. Millar*, 12 R. I. 296. The question of intent is for the jury. *Bristol v. Wilshire*, 1 B. & C. 515; *Wabash & C. R. Co. v. Shryock*, 9 Ill. App. 323; *Byrd and Hall v. Hall*, 2 Keyes (N. Y.) 646; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Hennequin v. Naylor*, 24 N. Y. 139; *Buckley v. Archer*, 21 Barb. (N. Y.) 585; *Johnson v. Monell*, 2 Abb. App. Dec. (N. Y.) 470; *Biggs v. Barry*, 2 Curt. C. C. (U. S.) 259, Fed. Cas. No. 1402.
- ²² *Coe v. East & C. R. Co.*, 52 Fed. 531; *Lebanon Steam Laundry Co. v. Dyckman*, 22 Ky. L. 348, 57 S. W.

made to an agent with the intention that it be conveyed to and acted on by the principal, it will be considered as fraud if the representation would have been fraudulent if made directly to the principal.²³ But on the other hand it has been held that the agent himself has no right of action for deceit where the representations were made to the agent with the intention that they be communicated to the principal and not to induce the agent to act thereon.²⁴

The fraudulent representation is not, in every instance, however, so strictly confined in its scope; if general in its nature it may be relied on by any one dealing with the person making the representation. Thus a statement to a commercial agency may be fraudulent.²⁵ It has been held that where the president of a corporation gave a false statement of its financial

227; *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; *Hoelt v. Kock*, 119 Mich. 458, 78 N. W. 556; *Rawlings v. Bean*, 80 Mo. 614; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *McCracken v. West*, 17 Ohio 16; *Butterfield v. Barber*, 20 R. I. 99, 37 Atl. 532; *Gainesville National Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959, 19 Am. St. 738; *Marshall v. Hubbard*, 117 U. S. 415, 29 L. ed. 919, 6 Sup. Ct. 806; *Thorp v. Smith*, 18 Wash. St. 277, 51 Pac. 381; *Tacoma v. Water Co.*, 16 Wash. St. 288, 47 Pac. 738.

²³ *Schoefield & Co. Pulley Co. v. Schoefield*, 71 Conn. 1, 40 Atl. 1046; *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

²⁴ *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436. In the above case it appears that representations were made relative to the soundness of certain sheep. On the strength of these representations the agent's principal bought the sheep. Subsequently the agent purchased the sheep of his principal. They proved to be suffering from a contagious disease. He then brought this action and it was held that he could not recover on the ground that it must appear that the defendant intended that the plaintiff should act on his false and fraudulent statement.

²⁵ *Nicholls v. McShane*, 16 Colo. App. 165, 64 Pac. 375; *Soper Lum-*

ber Co. v. Halstead & Co., 73 Conn. 547, 48 Atl. 425; *Fechheimer v. Baum*, 37 Fed. 167, 2 L. R. A. 153; *In re Epstein*, 109 Fed. 874; *Moyer v. Lederer*, 50 Ill. App. 94; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103; *Cox Shoe Co. v. Adams*, 105 Iowa 402, 75 N. W. 316; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. 112; *Genesee County Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790; *Mooney v. Davis*, 75 Mich. 118, 42 N. W. 802, 13 Am. St. 425; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *Silberman v. Munroe*, 104 Mich. 352, 62 N. W. 555; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790; *Charles P. Kellogg Co. v. Holm*, 82 Minn. 416, 85 N. W. 159; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771, 24 Am. St. 210, 13 L. R. A. 270; *John V. Farwell Co. v. Boyce*, 17 Mont. 83, 42 Pac. 98; *Poska v. Stearns*, 56 Nebr. 541, 76 N. W. 1078, 42 L. R. A. 427, 71 Am. St. 688; *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. 822; *Eaton & Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. 720; *Sharpless v. Gummey*, 166 Pa. St. 199, 30 Atl. 1127; *Avery v. Dickinson* (Tex. Civ. App.), 49 S. W. 662; *Gainesville Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959, 19 Am. St. 738; *Belleville Pump & Works v. Samuelson*, 16 Utah 234, 52 Pac. 282.

standing to the local representative of a commercial agency, one who is not a subscriber to such agency has a right to rely on such report where he obtains it through one who is a subscriber, and if such report is in part false he may rescind the contract and recover money paid for stock.²⁶ In the above case it will be observed that the party defrauded was not a patron of the agency. In that case this fact was held not to defeat recovery. On the other hand it has been held by the Supreme Court of Minnesota that reports to a commercial agency are intended only for its patrons, and being intended for the patrons they are entitled to redress when they rely and act on the statement and representations to their injury, but that the right of redress was confined to the patrons of the agency.²⁷ The two foregoing cases may perhaps be reconciled on the theory that in the first the terms under which the report was furnished to the commercial agency was sufficiently broad to serve as an invitation to all who might obtain possession of such report, while in the latter it was expressly for the patrons of the agency. However, the federal court expressly refused to follow the Minnesota decision.

Likewise, if the statement is made to deceive the public generally it will amount to fraud. Thus it has been held that where "a report in writing was made by the directors of a bank and addressed expressly to the shareholders, but it was left at the bank and copies could be had by shareholders or any person applying for them who was desirous of information in regard to the affairs of the bank with a view to purchase shares, the representations are made to all who might obtain possession of the report, and therefore would be considered as having been made to the plaintiff."²⁸ And so, again, an action was brought against a director of a banking company for falsely, fraudulently and deceitfully publishing and representing to plaintiffs that a dividend was about to be paid out of the profits, and that the shares were a safe investment for money. It appeared that these representations were made in a report by the directors to the shareholders. Copies of this report were left at the bank and were to be had by any

²⁶ *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011.

²⁷ *Irish-American Bank v. Ludlum*, 49 Minn. 344, 51 N. W. 1046.

²⁸ *Scott v. Dixon*, 29 L. J. Exch. (N. S.) 62n, 7 Eng. Rul. Cas. 523.

persons applying for them who were desirous of information in regard to the affairs of the bank and with a view to the purchase of shares. It was held that, since a copy could be procured by any one who desired it, it was a publication directly to each person who obtained a report from the bank, in the same manner as if it had been personally delivered to him by the director, and that the action could be maintained.²⁹ This is true of a statement required to be filed with a state or federal official, if such statement is sufficiently broad to be an invitation to all who may be disposed to deal in the company's shares.³⁰ Consequently, if this statement is furnished a public official and subsequently published in pursuance of a statutory requirement the fraud seems clear. Under such circumstances the statement is sufficiently broad to serve as an invitation to all. It is made with knowledge that it will be published to all who may wish to deal with the company and its stock.³¹ Nor is it necessary that this statement be published under authority of the state. It may be an annual statement published in the newspapers which purports to give the condition of the corporation.³² It has also been held that advertisements published in a daily newspaper by the directors of a bank, in which advertisements they make representations as to its solvency, its capital stock, and other matters, such representations may be relied upon, and that the directors are personally liable for damages sustained by reason of the insolvency of the corporation, where a depositor is induced to place money in the bank solely upon the false representations of solvency made to the general public by the directors.³³

²⁹ *Peek v. Gurney*, L. R. 6 H. L. 377, 7 Eng. Rul. Cas. 527.

³⁰ *Hindman v. First National Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733.

³¹ *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011; *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833; *Prewett v. Trimble*, 92 Ky. 176, 13 Ky. L. 581, 17 S. W. 356, 36 Am. St. 586; *Graves v. Lebanon National Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861;

Gerner v. Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244; *Merchants' Nat. Bank v. Thoms*, 28 Ohio L. J. 164, 11 Ohio Dec. 632; *Gerner v. Yates*, 61 Nebr. 100, 84 N. W. 596. ³² *Hamilton Brown Shoe Co. v. Miliken*, 62 Nebr. 116, 86 N. W. 913. In an action of deceit if the representations are made for the whole or any of the public, if seen, relied and acted upon by any person, and damage results, a right of action arises. *Stuart v. Bank of Staplehurst*, 57 Nebr. 569, 78 N. W. 298.

³³ *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592. See also, to same effect,

§ 89. **Reliance on false statement.**—The representation may be false and it may be material, but unless it is relied on by the party to whom it is made he has no right to relief or redress. This is elementary.³⁴ Thus, if the means of knowledge are open and at hand, and the party who claims to have been defrauded investigated for himself, or if the circumstances were such as he was bound to investigate, and nothing was done to prevent the investigation from being as full as he might choose to make it, he cannot say he relied on the representations of the other.³⁵ Nor is it necessary that the investigation be conducted in person. If

Westervelt v. Damarest, 46 N. J. L. 37, 50 Am. Rep. 400.

³⁴ *Hartford Fire Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651; *Spinks v. Clark*, 147 Cal. 439, 82 Pac. 45; *Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132; *Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *Bennett v. Gibsons*, 55 Conn. 450, 12 Atl. 99; *Supreme Council v. Casualty Co.*, 63 Fed. 48, 11 C. C. A. 96; *Hawkins v. British & C. Mortg. Co.*, 84 Fed. 526, 28 C. C. A. 484; *Huber v. Gugenheim*, 89 Fed. 598; *Hale Elevator Co. v. Hale*, 98 Ill. App. 430; *Crocker v. Manley*, 164 Ill. 282, 45 N. E. 577, 56 Am. St. 196; *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224; *Musick v. Gatzmeyer*, 47 Ill. App. 329; *Gillespie v. Fulton Oil & C. Co.*, 236 Ill. 188, 86 N. E. 219; *Craig v. Hamilton*, 118 Ind. 565, 21 N. E. 315; *Newman v. Sylvester*, 42 Ind. 106; *Kain v. Rinker*, 1 Ind. App. 86, 27 N. E. 328; *Provident Loan Trust Co. v. McIntosh*, 68 Kans. 452, 75 Pac. 498; *Wood v. Staudenmayer*, 56 Kans. 399, 43 Pac. 760; *Harper v. Cincinnati & C. R. Co.*, 15 Ky. L. 223, 22 S. W. 849; *Flanders v. Cobb*, 88 Maine 488, 34 Atl. 277, 51 Am. St. 410; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Spencer v. Johnston*, 58 Nebr. 44, 78 N. W. 482; *Davidson v. Crosby*, 49 Nebr. 60, 68 N. W. 338; *Griswold v. Hazels*, 52 Nebr. 64, 71 N. W. 972; *Murphey v. Illinois Trust & Bank*, 57 Nebr. 519, 77 N. W. 1102; *American Building & C. Assn. v. Bear*, 48 Nebr. 455, 67 N. W. 500; *Pearce v. Buell*, 22 Ore. 29, 29 Pac. 78; *Brown v. Eccles*, 2 Pa. Super. Ct. 192; *Chamberlain v. Fox Coal Co.*, 92 Tenn. 13,

20 S. W. 345; *Schwartz v. Mittenhal* (Tex. Civ. App.), 50 S. W. 182; *Calhoun v. Quinn* (Tex. Civ. App.), 21 S. W. 705; *Smith v. Richards*, 13 Pet. (U. S.) 26; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Bush v. Maxwell*, 79 Wis. 114, 48 N. W. 250. A false representation, to have any effect on a contract, must be shown to have operated on the defrauded person's mind as an influence to enter into the contract, and that but for such influence he would have acted differently. *McNealy v. Bartlett*, 123 Mo. App. 58, 99 S. W. 767. "One rule always adhered to is, that to enable a party to set aside a contract the representations alleged to be false must be relied upon in entering into the contract." In this case it appears that the plaintiff not only distrusted the defendant, but also made an independent investigation through an attorney. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. 170. If one's own testimony shows he did not rely or act on the representations he cannot avoid the contract claimed to have been induced thereby. *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224.

³⁵ *Attwood v. Small*, 1 M. & R. 246; *Jennings v. Broughton*, 17 Beav. 234; *Haywood v. Cope*, 25 Beav. 140; *Curran v. Smith*, 149 Fed. 945, 81 C. C. A. 537, affg. 138 Fed. 150; *Ripy v. Cronan*, 131 Ky. 631, 15 S. W. 791, 21 L. R. A. (N. S.) 305; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. 771; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. 881; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. 164; *Shappirio v.*

the party claiming to have been defrauded, appoints an agent to investigate the matter or submits the contract to an attorney for approval, it is apparent that no reliance was placed in the representation of the other party.³⁶

Since it is obvious that the representation must be relied on, the really important questions to be determined are, what representations may be relied on and who may rely on them? It has already been pointed out that there can be no reliance placed in mere expressions of opinion, such as trade talk, opinions of law, predictions and the like.³⁷ Likewise, if an impossibility is stated as the truth, or if the statement is obviously untrue, the party to whom it is made will not be heard to say that he relied on it.³⁸ Misrepresentations made in a different transac-

Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. 259. In the above case it appeared that the defendant went on the ground and made a personal examination of conditions, and spent a month in so doing. It was held that it could not be said that the defendant relied on the plaintiff's representations where they conducted a personal examination. *Tuck v. Downing*, 76 Ill. 71; *Hall v. Thompson*, 1 Sm. & M. (Miss.) 443; *Long v. Warren*, 68 N. Y. 426; *Williamson v. Holt*, 147 N. Car. 515, 61 S. E. 384, 17 L. R. A. (N. S.) 240; *National Cash Register Co. v. Townsend Grocery Store*, 137 N. Car. 652, 50 S. E. 306, 70 L. R. A. 349; *Mahaffey v. Ferguson*, 156 Pa. St. 156, 27 Atl. 21; *Ludington v. Renick*, 7 W. Va. 273. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another." *Slaughter's Admr. v. Gerson*, 13 Wall. (U. S.) 379, 20 L. ed. 627. But if the nature of the thing investi-

gated is such that the one investigating it cannot understand or appreciate its imperfection he is entitled to rely on the representations of the other party relative thereto. Thus, where the defendant went to see a fence-weaving machine this did not defeat his right to rely on the representation of the inventor when the defendant had no special knowledge of machinery. *Watson v. Brown*, 113 Iowa 308, 85 N. W. 28. See also, *Fargo Gaslight & Co. v. Fargo Gas & Co.*, 4 N. Dak. 219, 59 N. W. 1066, 37 L. R. A. 593.

³⁶ *American Fine Art Co. v. Simon*, 140 Fed. 529, 72 C. C. A. 45; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. 170; *Eppley v. Kennedy*, 198 N. Y. 348, 115 N. Y. Supp. 360.

³⁷ See, ante, § 84, Opinion and Prediction.

³⁸ *Dyer v. Hargrave*, 10 Ves. 505, 8 R. R. 36; *Dillard v. Moore*, 7 Ark. 167; *Stone v. Moore*, 75 Ga. 565; *Van Velson v. Seeberger*, 35 Ill. App. 598; *Woodruff v. Garner*, 27 Ind. 4, 89 Am. Dec. 477n; *Moore v. Turbeville*, 2 Bibb (Ky.) 602, 5 Am. Dec. 642; *Irving v. Thomas*, 18 Maine 418. One may act with his eyes closed if he so desires, but this is no reason why he should later complain of a lack of information which he might readily have obtained if he had kept his eyes open. *Exchange Bank v. Williams*, 120 La. 901, 45 So. 935.

tion and for a different purpose will not entitle one to rescind a contract. A misrepresentation which will entitle the party misled, to a rescission of a contract must have been made as a part of the same transaction.³⁹ Consequently it cannot be said that the defendant was misled by representations made by the plaintiff's agent where it appeared that a contract was drawn up pursuant to such representations and submitted to the plaintiff, who refused to approve it and submitted a new proposition, to which defendant assented. This new agreement was not obtained by false representations, and in effect was a repudiation of those made by the agent.⁴⁰ It is also true that the party to whom the representations are made is usually required to exercise a reasonable degree of diligence under the circumstances to ascertain the truth of the assertion.⁴¹ But where the statement is a positive assertion of a present existing fact, relative to a material element of the contract, the truth or falsity of which is unknown to the one to whom it is made, it may as a general rule be relied on by him.⁴² Especially is this true where there are no means at hand whereby the truth or falsity of the statement may be tested,⁴³ as where the representation relates to property or conditions located at a distance,⁴⁴ or as to the location, boundaries of, or timber on, real

³⁹ *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

⁴⁰ *Simpson v. Crane*, 149 Mich. 352, 110 N. W. 1081.

⁴¹ See, ante, § 77, Negligence.

⁴² *Brown v. Freeman*, 79 Ala. 406; *Baker v. Maxwell*, 99 Ala. 558, 14 So. 468; *Stimson v. Helps*, 9 Colo. 33; *Reid v. Flippen*, 47 Ga. 273; *Kramer v. Williamson*, 135 Ind. 655, 35 N. E. 388; *Jones v. Hathaway*, 77 Ind. 14; *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74; *Westerman v. Corder*, 86 Kans. 239, 119 Pac. 868; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; *Smith v. Werkheiser*, 152 Mich. 177, 115 N. W. 964, 125 Am. St. 406; *Bailey v. Smock*, 61 Mo. 213; *Foley v. Holtry*, 43 Nehr. 133, 61 N. W. 120; *Bacon v. Frisbie*, 15 Hun (N. Y.) 26; *Drake v. Grant*, 36 Hun (N. Y.) 464; *Fargo Gaslight & Co. v. Fargo Gas & Co.*, 4 N. Dak. 219, 59 N. W. 1066, 37 L. R. A. 593; *Protherson v. Reynolds*, 164 Pa. St. 134, 30 Atl. 234; *Moreland v. Atchi-*

son, 19 Tex. 303; *Boyce v. Grunndy*, 6 Pet. (U. S.) 777, 8 L. ed. 579; *Hull v. Field*, 76 Va. 594; *Brown v. Rice's Admr.*, 26 Gratt. (Va.) 467.

⁴³ *Edwards v. M'Leay*, 2 Swanst. 287; *Shorp v. Ponce*, 74 Maine 470; *Merrian v. Pine City Lumber Co.*, 23 Minn. 314; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. 549; *Fishback v. Miller*, 15 Nev. 428; *Tut-hill v. Babcock*, 2 Woodb. & M. (U. S.) 298.

⁴⁴ *In re Smith's Case*, L. R. 2 Ch. App. Cas. 603; *Sellar v. Clelland*, 2 Colo. 532; *Henderson v. Henshall*, 54 Fed. 320, 4 C. C. A. 357; *Bartlett v. Smith*, 17 Fed. 668; *Bryan v. Suggs*, 56 Ga. 679; *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. 456; *Borders v. Kattleman*, 142 Ill. 96, 31 N. E. 19; *Ladd v. Piggott*, 114 Ill. 647, 2 N. E. 503; *Armstrong v. White*, 9 Ind. App. 588, 37 N. E. 28; *Wolfe v. Pugh*, 101 Ind. 293; *Ross v. Hobson*, 131 Ind. 166, 26 N. E. 775; *Stevens v. Allen*, 51 Kans. 144, 32 Pac. 620; *Matlack v. Shaffer*,

estate.⁴⁵ One may also rely on representations of fact materially affecting the contract, peculiarly within the knowledge of the other party, and in respect to what one, in the exercise of rea-

51 Kans. 208, 32 Pac. 890; Hanks v. McKee, 2 Litt. (Ky.) 227, 13 Am. Dec. 265; Bean v. Herrick, 12 Maine 262, 28 Am. Dec. 176; Savage v. Stevens, 126 Mass. 207; Deming v. Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; Griffin v. Farrier, 32 Minn. 474, 21 N. W. 553; Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125; Linhart v. Foreman's Admr., 77 Va. 540; Miner v. Medbury, 6 Wis. 295. But see Williams v. McFladden, 23 Fla. 143, 11 Am. St. 345. "The matters directly before the party which may be observed he must be presumed to see. But does the reason of the justice of the rule apply where the subject-matter is not present, but distant from the contracting parties? In such case, where the party making the representation has had means and opportunities to know the facts concerning the subject-matter of the contract which the other party has not had, and cannot have without going to the expense and delay of an investigation of matters at a distance, we see no reason why he may not rely upon such representations of fact." Hingston v. L. P. & J. A. Smith Co., 114 Fed. 294, 52 C. C. A. 206. Where the work to be done is located at a distance one may rely on the statements of the other party relative to the conditions under which the work is to be done. Hingston v. L. P. & J. A. Smith Co., 114 Fed. 294, 52 C. C. A. 206. In the above case the thickness of rock to be dredged was misrepresented. See also, § 71. Fraud as to Essential Element of Contract, *supra*.

⁴⁵Sherwood v. Salmon, 5 Day (Conn.) 439, 5 Am. Dec. 167; Stevens v. Giddings, 45 Conn. 512; Lynch v. Mercantile Trust Co., 18 Fed. 486; Cooke v. Jersey County School Comrs., 6 Ill. 537; Weatherford v. Fishback, 4 Ill. 170; Brooks v. Riding, 46 Ind. 15; Cowger v. Gordon, 4 Blackf. (Ind.) 110; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. 787; Hervey v. Parry, 82 Ind. 263; Campbell v. Frankem, 65 Ind. 591; McGibbons v. Wilder, 78 Iowa 531, 43 N. W. 520;

Carmichael v. Vandebur, 50 Iowa 651; Upshaw v. Debow, 7 Bush (Ky.) 447; Pringle v. Samuel, 1 Litt. (Ky.) 43, 13 Am. Dec. 214; Roberts v. Plaisted, 63 Maine 335; Roberts v. French, 153 Mass. 60, 26 N. E. 416, 10 L. R. A. 656, 25 Am. St. 611; Starkweather v. Benjamin, 32 Mich. 305; Chase v. Boughton, 93 Mich. 285, 54 N. W. 44; Porter v. Fletcher, 25 Minn. 493; Brooks v. Hamilton, 15 Minn. 26; Olson v. Orton, 28 Minn. 36, 8 N. W. 878; Hall v. Thompson, 1 Sm. & M. (Miss.) 443; Hitchcock v. Baughan, 44 Mo. App. 42; Couse v. Boyles, 4 N. J. Eq. 212, 38 Am. Dec. 514; Clarke v. Baird, 7 Barb. (N. Y.) 64; Schwenk v. Naylor, 102 N. Y. 683; Whitton v. Goddard, 36 Vt. 730; Gunther v. Ulrich, 82 Wis. 222, 52 N. W. 88, 33 Am. St. 37; McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. 178. In the above case the wrong tract of land was pointed out. For cases holding that misrepresentations as to number of acres and a tract of land is actionable, see Eichelberger v. Mills Land & C. Co., 9 Cal. App. 628, 100 Pac. 117; Coon v. Atwell, 46 N. H. 510; Whitney v. Allaire, 1 N. Y. 305; Beardsley v. Duntley, 69 N. Y. 577; Hill v. Brower, 76 N. Car. 124; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Bedford v. Hickman, 5 Call (Va.) 236, 2 Am. Dec. 590. But see Mabardy v. McHugh, 202 Mass. 148, 88 N. E. 894, 132 Am. St. 484. Where it is held that mere misrepresentation as to the area of a tract of land, not so extensive but that its area may be inspected and estimated, unmixed with any other fraud, cannot maintain an action of deceit. See, however, Roberts v. French, 153 Mass. 60, 26 N. E. 416, 19 L. R. A. 656, 25 Am. St. 611. The circumstance may be such that no reliance can be placed in such statements, as where it is the mere expression of an opinion (Hill v. Bush, 19 Ark. 522), or both parties have equal means of knowledge and the facts are apparent. Hill v. Bush, 19 Ark. 522. If the purchaser accepts

reasonable diligence, has not opportunity to ascertain their truth or falsity.⁴⁶

§ 90. **Must mislead.**—No reliance can be placed in statements known to be false. The one to whom such statements are made cannot be considered as having been misled thereby.⁴⁷ Before a false representation will be ground for the avoidance of a

with the knowledge that the property conveyed does not contain the number of acres it is represented as containing he may be estopped to claim a rescission. *McMichael v. Webster*, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. 630. But the party defrauded is not estopped because he suspected fraud at the time the property was delivered, but did not know just what it was, or the extent thereof, at the time. *Griffith v. Bergeson*, 115 Iowa 279, 88 N. W. 451.

⁴⁶ *McGar v. Williams*, 26 Ala. 469, 62 Am. Dec. 739; *Leicester Piano Co. v. Front & Co. Imp. Co.*, 55 Fed. 190, 5 C. C. A. 60. The purchaser of stock has a right to rely on the statement of another, relative to the indebtedness of the corporation, when the vendor alleges there are no account books showing the corporate indebtedness. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Thomas v. Grise*, 1 Penn. (Del.) 381, 41 Atl. 883; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; *Louisville & C. Co. v. Bodenschatz-Bedford Stone Co.*, 141 Ind. 251, 39 N. E. 703; *Bloomer v. Gray*, 10 Ind. App. 326, 37 N. E. 819; *Lee v. Lemert*, 26 Kans. 111; *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. 285. By some authorities it is held that such representation may be relied on, though the means of ascertaining its falsity are fully open to him. *Gammill's Heirs v. Johnson*, 47 Ark. 335, 1 S. W. 610. See also, *Beckwith v. Ryan*, 66 Conn. 589, 34 Atl. 488.

⁴⁷ *Nelson v. Stocker*, 4 DeG. & J. 458, 28 L. J. Ch. 760, 5 Jur. (N. S.) 751; *Jennings v. Broughton*, 17 Beav. 234, 22 L. J. Ch. (N. S.) 584, 17 Jur. 905, affd. 5 DeG. M. & G. 126, 23 L. J. Ch. (N. S.) 999; *Vigers v. Pike*, 8 Clark & F. 562; *Cowen v. Simpson*, 1

Esp. 290; *Lord Brooke v. Rounthwaite*, 5 Hare 298, 15 L. J. Ch. (N. S.) 332, 10 Jur. 656; *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 101, 18 L. T. (N. S.) 305, 20 L. T. (N. S.) 89, 17 Week. 211, L. R. 5 Eq. 485; *Stiewel v. American Surety Co.*, 70 Ark. 512, 68 S. W. 1021; *McDaniel v. Strohecker*, 19 Ga. 432; *Bowman v. Carithers*, 40 Ind. 90; *Hess v. Young*, 59 Ind. 379; *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74; *Continental Ins. Co. v. Pierce*, 39 Kans. 396, 18 Pac. 291, 7 Am. St. 557; *Standard Horseshoe Co. v. O'Brien*, 91 Md. 751, 46 Atl. 346; *Whiting v. Hill*, 23 Mich. 399; *Morse v. Rathburn*, 49 Mo. 91; *Williamson v. Holt*, 147 N. Car. 515, 61 S. E. 384, 17 L. R. A. (N. S.) 240; *Dunning v. Cresson*, 6 Ore. 241; *Cox v. Highley*, 100 Pa. St. 249; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. 696; *Trammel v. Ashworth*, 99 Va. 646, 39 S. E. 593. "A representation must be of a material existing fact, present or past, and actually relied on by the other party, who must have been misled." *Home Gas Co. v. Mannington Co-operative Window Glass Co.*, 63 W. Va. 266, 61 S. E. 329. Where a party is actually deceived by the representation the defrauded party may set up fraud in his defense to an action on the contract. *Turner v. Ware*, 2 Ga. App. 57, 58 S. E. 310; *Epps v. Warring*, 93 Ga. 765, 20 S. E. 645. If the party who claims to have been deceived is well aware of the truth or falsity of the representation he is not misled thereby. Thus where one railroad represents to another that it intended to build its line to N., and the railroad to which these representations were made knew the other road did not have the means to build this extension, there was no reliance placed in such representations. *Harper v.*

contract it must be reasonably relied upon by the party to whom it is made.⁴⁸

§ 91. **Must result in damage or injury.**—The remaining essential element of fraud is damage. Before fraud will give rise to an action for deceit, or for rescission, or before a sufficient defense can be predicated thereon in an action on the contract, the fraud practiced must result in injury. The principle of *damnum absque injuria* applies.⁴⁹ Thus, where a debtor was by a false representation induced to sign a note for the full amount of his debt, when the creditor had agreed to accept fifty per cent. as payment in full consideration of the debtor not going through bankruptcy, it was held that while the debtor was under no obligation to execute the note he was under a duty to pay the debt, and

Cincinnati &c. R. Co., 15 Ky. L. 223, 22 S. W. 849. Where the defendant represented to plaintiff that certain stock was at par, and yet traded shares of it to the plaintiff for a farm, taking his farm at four or five times the value, defendant must have known that such stock was far below its par value. *Younger v. Hoge*, 211 Mo. 444, 111 S. W. 20, 18 L. R. A. (N. S.) 94. An answer which does not allege that the defendant was deceived by the false representations is demurrable. *Fuy v. Haughton*, 83 N. Car. 467.

⁴⁸*Dillman v. Nadleffer*, 119 Ill. 567, 7 N. E. 88; *Moore v. Recek*, 163 Ill. 17, 44 N. E. 868; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. 170; *King v. Williams*, 71 Iowa 74, 32 N. W. 178; *Clark v. Tanner*, 100 Ky. 275, 38 S. W. 11; *Brown v. Leach*, 107 Mass. 364; *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. 262; *Lewis v. Brookdale Land Co.*, 124 Mo. 672, 28 S. W. 324; *Long v. Warren*, 68 N. Y. 426; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Kane v. Chester Traction Co.*, 186 Pa. St. 145, 40 Atl. 320, 65 Am. St. 846; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Prince v. Overholser*, 75 Wis. 646, 44 N. W. 775; *Kaiser v. Nummendor*, 120 Wis. 234, 97 N. W. 932. Where a complainant alleged that he had found out B had made misrepresentations that his statements were contradictory and that he was distrustful

of him, but alleged that the distrust went only to suspecting that in a doubtful case, where B's own interest could be served by misrepresentation, &c., he would resort thereto, but at the time of the sale he was not convinced that he would perpetrate a deliberate, positive and malicious fraud, it was held that the sale was not made in reliance on the representations of B, and that, in view of the knowledge complainant had, a reasonable person would not have relied upon them. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. 170. But the mere fact that there were suspicious circumstances which calculated to arouse suspicion will not necessarily cause a court of equity to deny relief to parties ignorant of the true conditions, and who rely on the false representations made as to material facts. *Eichelberger v. Mills Land &c. Co.*, 9 Cal. App. 628, 100 Pac. 117.

⁴⁹*Merryman v. David*, 31 Ill. 404; *Buford v. Guthrie*, 14 Bush (Ky.) 690; *Power v. Turner*, 37 Mont. 521, 97 Pac. 950; *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301; *Stetson v. Riggs*, 37 Nebr. 797, 56 N. W. 628; *Runge v. Brown*, 23 Nebr. 817, 37 N. W. 660; *McNeny v. Campbell*, 81 Nebr. 754, 116 N. W. 671, 81 Nebr. 761, 117 N. W. 885; *Taylor v. Guest*, 58 N. Y. 262; *Sonnesyn v. Akin*, 14 N. Dak. 248, 104 N. W. 1026; *Withers v. Atkinson*, 1 Watts (Pa.) 236.

that he could not be injured by merely promising to pay his debt.⁵⁰ However, when suit to rescind is brought by the party defrauded or fraud is set up as a defense to an action for specific performance it would seem that the word damage should not be restricted in its meaning to financial loss, but that where the party to whom the misrepresentation is made has, as a result, acquired either some legal right or incurred a liability, different from that represented or contracted for, he has a right to avoid the agreement regardless of pecuniary loss.⁵¹

§ 92. **Parties in pari delicto.**—Where two persons guilty of participation in an unlawful transaction are in *pari delicto*, neither a court of law nor a court of equity will aid either to recover or reinvest himself with any title or interest which he, in consideration of such unlawful contract, has vested in the other, but will leave them in the same condition as to vested interests as they, by their own acts, have placed themselves. If such a participator cannot recover in a suit at law, on account of the principle embodied in the maxim, “*in pari delicto, melior est conditio possidentis*,” he can have no relief in equity; because a court of equity will not relieve him from the operation of such principle any more than will a court of law, but merely lends its aid in the case of executory contracts, when the circumstances are such that the defensive remedy at law is not as equally certain, complete and adequate as it may be made in equity.⁵² Thus, for example, a court of equity will not order that notes given as

⁵⁰ *Bowen v. Waxelbaum*, 2 Ga. App. 521, 58 S. E. 784.

⁵¹ “If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon the discovery of the fraud, and the party in the wrong will not be heard to say that no real injury can result from the fact misrepresented.” *MacLaren v. Cockran*, 44 Minn. 255, 46 N. W. 408. Thus, where the wrong but an equally valuable piece of land was pointed out as one being sold, the purchaser is entitled to rescind for mistake. *Clapp v. Greenlee*, 100 Iowa 586, 69 N. W. 1049; *Harlow v. La Brum*, 151 N. Y.

278, 45 N. E. 859. As to necessity of placing defendant in *statu quo* before rescinding contract for fraud, see *Bayse v. Paola Refining Co.*, 79 Kans. 755, 101 Pac. 658, 25 L. R. A. (N. S.) 1302, 131 Am. St. 746. See also, *Baker v. Maxwell*, 99 Ala. 558, 14 So. 468; *Williams v. Kerr*, 152 Pa. St. 560, 25 Atl. 618.

⁵² *Jackson v. Dwight*, 78 Fed. 896, 24 C. C. A. 380; *Beer v. Landman* (Texas), 30 S. W. 64, *revd.* in 88 Tex. 450, 31 S. W. 805, on the ground that where the parties are in *pari delicto* equity will not order that a note given in settlement of a gambling transaction be canceled and delivered up.

collateral to a note given in consideration of a gambling debt be delivered up.⁵³ Where an owner, during the pendency of a suit

⁵³ *Beer v. Landman*, 88 Texas 450, 31 S. W. 805, per Denman, J.: "Thus, Parke, B., in *Scarfe v. Morgan*, (1838), 4 M. & W. 280, where a mare was delivered by plaintiff to defendant as security for a debt unlawfully contracted on Sunday, said: 'This is not the case of an executory contract; both parties were in *pari delicto*—it is one which has been executed, and the consideration given; and although in the former case the law would not assist one to recover against the other, yet if the contract is executed, and the property, either special or general, has passed thereby, the property must remain' * * * and refuse to allow plaintiff to recover. In the leading case of *Taylor v. Chester* (1869), L. R. 4 Q. B. 313, it was held, that the plaintiff, having deposited with the defendant the half of a fifty-pound bank note as a pledge to secure the payment for wine, etc., supplied to plaintiff by defendant in a brothel kept by her, to be there consumed in a debauch, could not recover such half note, the court saying: 'Plaintiff's argument was based upon the hypothesis that in spite of the finding of the jury, the plaintiff was entitled to recover by virtue of his property in the half note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim. This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to him, by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defense arising from the plea, which set up an existing pledge of the half note, the plaintiff had recourse to the special replication, in which he was obliged to

set forth the immoral and illegal character of the contract upon which the half note had been deposited. It was therefore impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. And under such circumstances, the maxim, "*in pari delicto, potior est conditio possidentis*", clearly applies, and is decisive of the case.' In the case of *King v. Green* (1863), 6 Allen (Mass.) 139, where plaintiff had pledged his watch to secure an unlawful livery bill, the court refused to allow him to recover the same, saying: 'It is true that the law would not enable the defendant to recover such a debt (*Way v. Foster*, 1 Allen, 408); but neither will it enable the plaintiff to recover back his property given in pledge for the debt, any more than to recover back the money after paying it. In such cases the maxim, "*potior est conditio possidentis*," is applicable. The plaintiff has at least as little claim to the aid of the law as the defendant.' In *Harris v. Woodruff* (1878), 124 Mass. 205, where plaintiff had delivered a mare to defendant for the purpose of training her for races, the court, after holding that defendant had an implied lien on the mare for such training, on the question of illegal consideration, Gray, C. J., said: 'It is quite clear that, even if the parties were in *pari delicto*, "*potior est conditio possidentis*," and the law will not assist the plaintiff to obtain possession of the mare, without paying the defendant for his services under the executed contract, by which the general owner had voluntarily transferred to the defendant a special property in the mare.' The principles applicable to cases of this character will also be found ably discussed by Judge Gray, in *Hall v. Corcoran* (1871), 107 Mass. 251, and *Cranson v. Goss* (1871), 107 Mass. 440, 9 Am. Rep. 45. In *Frost v. Plumb* (1873), 40 Conn. 112, 16 Am. Rep. 18, discussing the principle under consideration, and following in the line of the English and Massa-

against him, and in view of a possible judgment being rendered therein adversely to him, conveys his property to another, with intent to defeat the satisfaction of such judgment as may be recovered against him in the suit, he cannot, after judgment in such suit in his favor, have the aid of a court of equity to compel the grantee to reconvey to him the property.⁵⁴ While in such a case the fraudulent grantee, from a sense of his moral duty, ought to give back the property to him from whom he received it, yet the law, to discourage frauds, will not compel him to restore

chusetts cases above cited, the court say: 'We understand the rule to be this: The plaintiff cannot recover when it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transactions; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover.'

"Price v. Andrew, 51 Ohio St. 405, 38 N. E. 84, per Dickman, C. J.: "In Fletcher v. Fletcher, 2 MacArthur 38, an action of slander had been commenced against the grantor and his wife, and the conveyance was executed to the defendant to protect the real estate therein described from the result of the action at law, upon an agreement with the defendant that, as soon as the action was dismissed, or decided in favor of the grantor and his wife, he would reconvey the property to the grantor, his heirs or assigns. It was held that such an averment was fatal to the bill of complaint, and that a court of equity would not interpose to set the conveyance aside, but would leave the parties to the consequences of their own act. It was conceded, however, that a court of equity might assist the grantor where circumstances were shown to exist which recognized its interposition on other grounds of settled equity jurisdiction, 'such as fraud in procuring the deed, imposi-

tion by the grantee, a violation of some fiduciary relation, an abuse of confidence, delusion or the like on the part of the grantor at the time of executing the deed.' See also, Pinckston v. Brown, 3 Jones Eq. (N. Car.) 496; Boyd v. De La Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Free-love v. Cole, 41 Barb. (N. Y.) 318; Ford v. Harrington, 16 N. Y. 285; Holliway v. Holliway, 77 Mo. 396; Nichols v. McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; Barnes v. Brown, 32 Mich. 146. In commenting upon the foregoing and other cases of like tenor, Mr. Wait, in his work on Fraudulent Conveyances (§ 401), very forcibly says: 'While it is possible to deduce from them a general principle that degrees of guilt will be recognized in such transactions, and that grantors may, in certain cases, reclaim the property fraudulently alienated where the transaction was superinduced by the unfair action of a vendee who occupied some relation of confidence which enabled him to unduly influence the vendor, yet a very clear case, with well-defined reasons for excepting it from the general rule, must be presented. Debtors contemplating fraudulent alienations should draw little encouragement from these exceptional cases, as for a general rule, after passing through the troubled waters of insolvency, they will find themselves stripped of the power to reach or recover the secret property in the hands of their fraudulent grantees. The ancient rule, "In pari delicto melior est conditio possidentis," is not to be easily uprooted, and must not be considered as overthrown or abrogated by these cases.'

it to the fraudulent grantor.⁵⁵ Nevertheless, it has been held proper to give relief if the nature of the case is such that public policy demands that it be granted one who has been defrauded, even though the one defrauded had intended and expected to defraud others and share in the profits derived thereby.⁵⁶ In the foregoing case the party defrauded knew that the race on which he was betting was a "fake" race, but supposed he knew the way it was to go. Another line of cases holds that where the one betting does not know that the race or other chance on which he placed his money is false or pretended he may recover on the ground that the transaction does not amount to a wager, but is only a pretended wager.

⁵⁵ Swift v. Holdridge, 10 Ohio 230, 36 Am. Dec. 85.

⁵⁶ Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. 709 and note. To same effect, Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499. Contra, Abbe v. Marr, 14 Cal. 210. In the above case the facts are similar to those in the Hobbs case. See also, Bohemian Oats Swindle Cases, Shipley v. Rea-

soner, 80 Iowa 548, 45 N. W. 1077; Shirey v. Ulsh, 2 Ohio C. C. 401, 1 Cir. D. 554; Carter v. Lillie, 3 Ohio C. C. 364. Fake foot-race, Lockman v. Cobb, 77 Ark. 279, 91 S. W. 546. Shell game, Webb v. Fulchire, 25 N. Car. (3 Ired. L.) 485, 40 Am. Dec. 419. Card game, Preston v. Hutchinson, 29 Vt. 144. Contra, Babcock v. Thompson, 3 Pick. (Mass.) 446, 15 Am. Dec. 235.

CHAPTER V.

MISTAKE.

§ 100. Generally—Materiality.

101. As to the nature of transactions.
102. As to parties.
103. Mistake as to subject-matter.
104. Mistake as to existence of subject matter.
105. As to identity of subject matter.
106. As to nature or quality of subject-matter.

§ 106a. Mistake as to quantity.

107. As to price.
108. As to value.
109. In execution of writing.
110. Negligence.
111. Ratification—Laches.
112. Mutuality of mistake.
113. Mistake as to the law.
114. Mistake of fact as to interest induced by mistake of law.

§ 100. **Generally—Materiality.**—Contracts entered into through mistake bear in many respects a close similarity to those induced by fraud or misrepresentation. In both cases one or both of the parties enter into the agreement in ignorance of the true conditions; the distinction being that in the case of mistake the ignorance of one party is not caused or fostered by the other, while in the case of misrepresentation it is caused or fostered by the other party, and when this is done with wrongful intent such conduct becomes fraudulent. The reason contracts are avoided or reformed because of mistake is the same that underlies the avoidance of contracts for fraud—there is no real assent. In reality it is not the mistake that avoids the agreement but the want of assent to its terms.¹ As with fraud or misrepresentation, in order to entitle a party to relief from a mistake, it must be material to the transaction and affect its substance, and not merely its incidents.² Some of the cases cited hold that the

¹ *Curtis v. Albee*, 167 N. Y. 360, 60 N. E. 660; *Miles v. Stevens*, 3 Pa. St. 21, 45 Am. Dec. 621n. See also, *Knight v. Lanfear*, 7 Rob. (La.) 172.

² *Carpmael v. Powis*, 10 Beav. 36; *Stone v. Godfrey*, 5 De G. M. & G. 76; *Okill v. Whittaker*, 1 De G. & Sm. 83; *Trigge v. Lavalley*, 15 Moore P. C. 270; *Segur v. Tingley*,

11 Conn. 134; *Wilson v. Queen Ins. Co.*, 5 Fed. 674; *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114n, 117 Am. St. 224n; *Harrod v. Cowan*, Hard. (Ky.) 542; *Mayor v. Blache*, 3 Mill. (La.) 618; *Stewart v. Ticonic Nat. Bank*, 104 Maine 578, 72 Atl. 741; *Henderson v. Dickey*, 35

mistake must have determined the conduct of him by whom it was made, but as has been pointed out courts cannot "be expected to enter upon an inquiry as to how the parties would have traded if each had known the same facts as to the state of the crops, the conditions of trade, a declaration of war, the signing of a treaty of peace, or any speculative matter or extrinsic fact of general or special knowledge."³

§ 101. **As to the nature of transaction.**—Mistakes may be divided into two general groups. Those of the first class are fundamental in character and relate to an essential element of the contract. This prevents the minds of the parties from meeting and consequently no agreement is in fact made.* These fundamental errors have to do with the existence and identity of the subject-matter, errors as to price, quantity and the like being merely subdivisions under these two general heads. In the other class of mistakes an actual, good-faith understanding is reached but through some error in expression the actual agreement is not reduced to writing. This is not a fundamental error and may be corrected. Cases illustrating these two kinds of mistakes will not

Mo. 120; *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 566; *Dambmann v. Schulting*, 75 N. Y. 55; *Stettheimer v. Killip*, 75 N. Y. 282; *Trigg v. Read*, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447n; *Darnell v. Dolan*, — Tex. Civ. App. —, 132 S. W. 857; *Ketchum v. Catlin*, 21 Vt. 191; *Simmons v. Palmer*, 93 Va. 389, 25 S. E. 6; *Weaver v. Carter*, 10 Leigh (Va.) 37. "A mistake as to a matter of fact to warrant relief in equity must be material; and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be released." *Lamoreaux v. Phelan*, 89 Nebr. 47, 130 N. W. 988, quoting from *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *M'Ferran v. Taylor*, 3 Cranch (U. S.) 270, 2 L. ed. 577. Before a mistake will be relieved against it must be an unconscious error, not

due to negligence, relative to an intrinsic fact, past or present, not understood to be conjectural. *Kowalke v. Milwaukee Elec. & Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. 877.

³ *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232. Compare with *Stahl v. Schwartz*, — Wash. —, 120 Pac. 856. It would perhaps be more accurate to say that the mistake must be one which entered into the contemplation of both parties as a condition of the assent. *Gibson v. Union Rolling Mill Co.*, 3 Watts (Pa.) 32. See also, *Wilson v. Wyoming Cattle and Investment Co.*, 129 Iowa 16, 105 N. W. 338. See post, § 112, *Mutuality of Mistake*.

* Mutual assent is requisite to the creation of a contract and if there is a mistake of fact by one of the parties going to the essence of the contract, no agreement is, in fact, made. *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114n, 117 Am. St. 224n; *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135; *Briggs v. Watkins*, 112 Va. 14, 70 S. E. 551.

be carefully grouped together but the distinction is here pointed out as it will aid greatly in understanding the subject.⁵ The principle on which contracts are avoided for mistake is the same as that which governs the law of offer and acceptance, the only difference in the two cases being that in the latter the parties must assent to the same thing. There must be no variance between the offer and its acceptance. The question as to what the parties may have meant does not arise because they have not said the same thing. In the former there is apparent agreement and the contract concluded, but a common intention on the part of the parties is wanting and their minds never in reality met on some essential element of the agreement. It follows, therefore, that if the parties do not actually understand each other, one meaning to give his assent to one thing and the other to another there is no contract. This happens when there is a mistake as to the nature of the transactions. This principle finds its application in those cases where one, through no fault or negligence of his own, signs an agreement under the supposition that it is an instrument of another and different character. In the majority of cases the signature may have been induced by fraud but it is no less mistake because of this. It should be borne in mind, however, that where the signature is procured by fraud it may be voidable merely, but when signed by mistake it is no agreement at all.⁶ In contemplation of law the one whose name is appended to the contract never signed it.⁷ If not guilty of negligence,⁸ the one so signing may

⁵ *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. 577.

⁶ *Eldorado Jewelry Co. v. Darnell*, 135 Iowa 555, 113 N. W. 344, 124 Am. St. 309. See also, *Bates v. Harte*, 124 Ala. 427, 26 So. 898, 82 Am. St. 186; *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Rockford & Co. v. Schunick*, 65 Ill. 223; *Schaper v. Schaper*, 84 Ill. 603; *Pioneer Cooperage Co. v. Romanowicz*, 186 Ill. 9, 57 N. E. 864; *Esterly v. Eppeleheimer*, 73 Iowa 260, 34 N. W. 846; *Warden v. Reser*, 38 Kans. 86, 16 Pac. 60; *Sibley v. Holcomb*, 104 Ky. 670, 47 S. W. 765; *Freedley v. French*, 154 Mass. 339, 28 N. E. 272; *Bliss v. New York Cent. & C. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. 504; *Trambly v. Ricard*, 130 Mass.

259; *Shurte v. Fletcher*, 111 Mich. 84, 69 N. W. 233; *Aultman v. Olson*, 34 Minn. 450, 26 N. W. 451; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606n; *Wright v. McPike*, 70 Mo. 175; *Cole v. Williams*, 12 Nebr. 440, 11 N. W. 875; *Alexander v. Brogley*, 63 N. J. L. 307, 43 Atl. 888; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258, 30 Am. St. 617n; *Schuyllkill v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441; *Cameron v. Estabrooks*, 73 Vt. 73, 50 Atl. 638; *Lord v. American Mut. & C. Assn.*, 89 Wis. 19, 61 N. W. 293, 46 Am. St. 815, 26 L. R. A. 741.

⁷ *Foster v. MacKinnon*, L. R. 4 C. P. 704, reported in a note to *Douglas v. Matting*, 4 Am. Rep. 238.

⁸ *Bedell v. Herring*, 77 Cal. 572, 20

avoid the instrument even when it is in the hands of an innocent purchaser.⁹

In one of the oldest and at the same time leading cases on this subject it appears that an illiterate man signed a deed which was explained to him by a third person as merely a release for arrears of rent but which was in fact a general release of all claims, it was held that the instrument so signed was not the plaintiff's deed.¹⁰ Likewise where one signed a bill of exchange on the representation that he was signing a guaranty it was held that the signature was not binding.¹¹ Likewise where an illiterate man signed a paper which was falsely represented to him as a petition but it was in reality a bond, it was held that he was not liable thereon, the plea of non est factum being good even though the obligee was not aware of the fraud at the time the bond was accepted.¹²

Mistakes of this character are confined almost entirely to written agreements wherein one of the parties is led to sign the agreement believing it to be of a different import. Consequently where one through no negligence of his own signs an agreement different from the contract proposed orally the person so signing is not bound.¹³ This class of cases must be dis-

Pac. 129, 11 Am. St. 307n. See *Swannell v. Watson*, 71 Ill. 456; *Fisher v. Von Behren*, 70 Ind. 19, 36 Am. Rep. 162; *Ruddell v. Dillman*, 73 Ind. 518, 38 Am. Rep. 152; *Williams v. Stoll*, 79 Ind. 80, 41 Am. Rep. 604n; *Fayette County Sav. Bank v. Steffes*, 54 Iowa 214, 6 N. W. 267; *Dinsmore v. Stimbert*, 12 Neb. 433, 11 N. W. 872; *Mackey v. Peterson*, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211; *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409n, 33 Am. St. 731; *Albrecht v. Milwaukee &c. R. Co.*, 87 Wis. 105, 58 N. W. 72, 41 Am. St. 30.

⁹*Vanbrunt v. Singley*, 85 Ill. 281; *Richardson v. Schirtz*, 59 Ill. 313; *Webb v. Corbin*, 78 Ind. 403; *Baldwin v. Bricker*, 86 Ind. 221; *Green v. Wilkie*, 98 Iowa 74, 66 N. W. 1046, 36 L. R. A. 434n, 60 Am. St. 184; *Willard v. Nelson*, 35 Nebr. 651, 53 N. W. 572, 37 Am. St. 455n; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477;

Millard v. Barton, 13 R. I. 601, 43 Am. Rep. 51; *Walker v. Ebert*, 29 Wis. 194, 9 Am. Rep. 548; *Keller v. Ruppold*, 115 Wis. 636, 92 N. W. 364, 95 Am. St. 974; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. 710.

¹⁰*In re Thoroughgood's Case*, 1 Coke, Part II 9 (b).

¹¹*Foster v. Mackinnon*, L. R. 4 C. P. 704. See also, *Nance v. Lary*, 5 Ala. 370; *Wilson v. Miller*, 72 Ill. 616; *First Nat. Bank v. Zeims*, 93 Iowa 140, 61 N. W. 483; *Caulkins v. Whisler*, 29 Iowa 495, 4 Am. Rep. 236.

¹²*Schuylkill v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441.

¹³*In re Thoroughgood's Case*, 1 Coke, Part II, 9 (b); *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Bates v. Harte*, 124 Ala. 427, 26 So. 898, 82 Am. St. 186; *Puffer v. Smith*, 57 Ill. 527; *Baldwin v. Bricker*, 86 Ind. 221; *Esterly v. Eppelsheimer*, 73 Iowa 260, 34 N. W. 846; *Kagel v. Totten*, 59 Md. 447; *Trambly v. Ricard*, 130

tinguished from those wherein the party signing understands the character of the instrument executed but is led to believe that it is a mere form or does not understand the precise effect of the agreement or conveyance executed.¹⁴ It is well settled that the person entering into an agreement under a mistake as to the nature of the transaction must be reasonably free from negligence under the circumstances. If he is guilty of negligence he will not be relieved from mistake. This phase of the subject will be discussed later.¹⁵

§ 102. As to parties.—When the identity of one of the parties is a material element of the contract a mistake in respect thereto invalidates the agreement.¹⁶ Mistakes as to the identity of the person with whom the contract is made arise where A contracts with X believing him to be M; that is, where the offerer has in contemplation a definite person with whom he intends to contract.¹⁷ One has the right to select the person with whom he wishes to contract, especially where the nature of the transaction is such that it is important that performance be had by a particular individual, as agreements with a painter, writer, or which call for the performance of any act requiring skill such as the one sought to be contracted with is supposed to possess. In such cases one may contract with whomever he may choose and the sufficiency of his reasons for so doing is immaterial.¹⁸ Thus, where one sends an order for goods or other proposal to another, a third person cannot without the knowledge of the one sending the

Mass. 259; *Soper v. Peck*, 51 Mich. 563, 17 N. W. 57; *Wright v. McPike*, 70 Mo. 175; *First Nat. Bank v. Lierman*, 5 Nebr. 247; *Jackson v. Hayner*, 12 Johns. (N. Y.) 469; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477; *Leonard v. Southern Power Co.*, 155 N. Car. 10, 70 S. E. 1061; *Schuylkill v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441; *De Prez v. Everett*, 73 Tex. 431, 11 S. W. 388; *Walker v. Ebert*, 29 Wis. 194, 9 Am. Rep. 548; *Benjamin on Cont.*, 180; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. 710. And see, *Hewitt v. Jones*, 72 Ill. 218; *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675; *DeCamp v. Hamma*, 29 Ohio St. 467.

¹⁴ *Hunter v. Walters* (1871), L. R.

7 Ch. App. 75; *Terry v. Tuttle*, 24 Mich. 206. In the above case it is said, "If a person signs and acknowledges a deed, supposing it to be a lease without reading the same and thereby enables his grantee to sell to an innocent purchaser for value he cannot as against the latter deny the validity of the deed."

¹⁵ See post, § 110, Negligence.

¹⁶ *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439.

¹⁷ *Anson on Contracts* (8 ed.), p. 163; *Fifer v. Clearfield & Co. Coke Co.*, 103 Md. 1, 62 Atl. 1122.

¹⁸ *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9. See also, *Humble v. Hunter*, 12 Q. B. 310; *Arkansas Valley Smelting Co. v.*

order or making the proposal become a party to the agreement by accepting such proposal.¹⁹ Likewise, where one enters into an apparent agreement with another by correspondence or other means of communication, without coming in personal contact with him, believing him to be another person, there is in general no binding agreement.²⁰ Again, where one represents himself as the agent or member of a reputable firm, there is no intention on the part of the seller to deal with or convey title to the one making such representation nor is there any intention on the part of the principal, the imposter purported to represent, to accept title, consequently there is no contract and the title to the goods remains in the seller.²¹ However, the mere fact that the seller believes the buyer is acting as agent for a certain third person and because of such belief makes the sale does not avoid it where

Belden Min. Co., 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. 1308; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Gregory v. Wendell, 40 Mich. 432; King v. Batterson, 13 R. I. 117, 43 Am. Rep. 13.

¹⁹ Boulton v. Jones, 2 H. & N. 564. In the above case goods were ordered of A and supplied by C without the one giving the order being informed of the change. The goods were accepted and later an invoice was received from C in his own name whereupon the one giving the order and who had accepted the goods said they knew nothing of him, that is C. The court held there was no contract and that C could not recover the price of the goods. Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Randolph Iron Co. v. Elliott, 34 N. J. L. 184. But if the person has notice that the goods are being furnished by another and accepts them notwithstanding this fact he thereby assents to and ratifies the filling of the order and such ratification relates back and gives the order the same effect as if it had been given directly to the person who filled it. Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367. See also, Fox v. Tabel, 66 Conn. 397, 34 Atl. 101; Roof v. Morrisson, 37 Ill. App. 37; Barker v. Keown, 67 Ill. App. 433; Haines v. Starkey, 82 Minn. 230, 84 N. W. 910; Newberry v. Norfolk

&c. R. Co., 133 N. Car. 45, 45 S. E. 356; Belfield v. National Supply Co., 189 Pa. St. 189, 42 Atl. 131, 69 Am. St. 799.

²⁰ Cundy v. Lindsay, 3 App. Cas. 459; Barnett, Ex parte (1876) 3 Ch. Div. 123.

²¹ Hardman v. Booth, 1 H. & C. 803; Kingsford v. Merry, 1 H. & N. 503; Cundy v. Lindsay, 3 App. Cas. 459; La Salle &c. Brick Co. v. Coe, 65 Ill. App. 619; Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; Peters Box &c. Co. v. Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. 367; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; Edmunds v. Merchants' &c. Transp. Co., 135 Mass. 283; Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; Collins v. Ralli, 20 Hun (N. Y.) 246, 85 N. Y. 637; Hensz v. Miller, 94 N. Y. 64; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. 843; Dean v. Yates, 22 Ohio St. 388; Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519; Decan v. Shipper, 35 Pa. St. 239, 78 Am. Dec. 334; Barker v. Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; McCrillis v. Allen, 57 Vt. 505; Mayhew v. Mather, 82 Wis. 355, 52 N. W. 436. See also, Higgins v. Burton, 26 L. J. Ex. 342; Kingsford v. Merry, 26 L. J. Ex. 83; Hardman v. Booth, 1 H. & C. 803; Edmunds v. Merchants Despatch Transportation

there was no misrepresentation made or fraud practiced.²² It has also been held where one was led to suppose he was dealing with a corporation with a paid-up capital and a legal status, he did not intend to contract with an individual and when misled in so doing there was no valid agreement between the parties and a suit for damages could not be maintained for its breach.²³ However, if the identity of the other party to the contract is immaterial it would seem that no mistake as to the identity of the parties, such as would avoid the agreement, could be made.²⁴

§ 103. Mistake as to subject-matter.—Not only must there be no mistake as to the nature of the transaction but it is essential that the subject-matter of the contract be identified. Mistake as to the subject-matter usually arises when some material phase of the contract has no obvious meaning, or is reasonably capable of a diverse interpretation and was in fact differently understood by the parties.²⁵ This involves a mistake relative to the existence, identity, nature or quality of the subject-matter and will be discussed in the order named in the following sections.

§ 104. As to existence of subject-matter.—It is obvious that practically every contract is entered into under the assumption that certain things are true. One of the things which the parties assume in the absence of absolute knowledge, is that the subject-matter actually exists. Consequently when the contract is, in effect, conditioned on the existence of the subject-matter its non-existence invalidates any agreement made in reference thereto.²⁶ Where certain facts assumed by both parties are the

Co., 135 Mass. 283; Consumers' Ice Co. v. E. Webster, Son & Co., 32 App. Div. (N. Y.) 592, 53 N. Y. S. 56. See however, Hawkins v. Davis, 8 Baxt. (Tenn.) 506.

²² Stoddard v. Ham, 129 Mass. 383, 37 Am. Rep. 369.

²³ Fifer v. Clearfield & Co. Coke Co., 103 Md. 1, 62 Atl. 1122. But see, Weber & Co. v. Hearn, 49 App. Div. (N. Y.) 213, 63 N. Y. S. 41, where it is held that in the absence of any actual misrepresentation, the fact that the defendant thought he was dealing with a partnership does not affect the right of the plaintiff to

recover for work actually done.

²⁴ Smith v. Wheatcroft (1878) 9 Ch. Div. 223.

²⁵ Wheaton Bldg. & Co. v. Boston, 204 Mass. 218, 90 N. E. 598. See also, Crislip v. Cain, 19 W. Va. 438.

²⁶ Couturier v. Hastie, 5 H. L. Cas. 673. A sale of a cargo of a vessel at sea has been held void where it subsequently appears that the cargo was lost before the sale was made. Hastie v. Couturier, 9 Exch. 102; Schmidt v. Tiden, L. R. 9 Q. B. 446; Koenig v. Haddix, 21 Ill. App. 53; Blakemore v. Blakemore, 19 Ky. L. 1619, 44 S. W. 96; Neal v. Coburn,

basis of a contract and it subsequently appears that such facts do not exist the apparent agreement is inoperative.²⁷ Thus where both parties assumed that a certain flouring mill produced a specified grade of flour and attempted to form a contract on that basis and later discovered that the mill in question did not produce that grade of flour the contract was held impossible of fulfilment and unenforceable.²⁸ And where the defendant sold water rights to the plaintiff and it was afterward discovered that the defendant had no such rights to convey, it was held that the agreement was inoperative and void.²⁹ Likewise, where the plaintiff and defendant were under the impression that there was rock in a certain quarry more than sufficient to fulfil the contract between them, which belief was erroneous, it was held that the contract was unenforceable since based on assumed facts which did not exist.³⁰ However, when the parties treat upon the basis that the fact which is the subject of the agreement is doubtful and the consequent risk each is to encounter is taken into consideration in the stipulations

92 Maine 139, 42 Atl. 348, 69 Am. St. 495; Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. 501; Gauntlett v. Sea Ins. Co., 127 Mich. 504, 86 N. W. 1047; Allen v. Hammond, 11 Pet. (U. S.) 63, 9 L. Ed. 633. An agreement based on a supposed judgment which has no existence in fact is no agreement because of the want of a subject matter. Gibson v. Pelkie, 37 Mich. 380; Beland v. Anheuser-Busch Brew. Assn., 157 Mo. 593, 58 S. W. 1; Fisher v. Durning, 53 Mo. App. 548; Duncan v. New York Mut. Ins. Co., 138 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386; Fink v. Smith, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750; Riegel v. American Life Ins. Co., 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166. Same case, 140 Pa. St. 193, 21 Atl. 392, 11 L. R. A. 857, 23 Am. St. 225; Bedell v. Wilder, 65 Vt. 406, 26 Atl. 589, 36 Am. St. 871; Darnell v. Dolan, — Tex. Civ. App. —, 132 S. W. 857. See also, Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094.

²⁷ Fink v. Smith, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750; Horbach v. Gray, 8 Watts (Pa.) 492; Willing v. Peters, 7 Pa. St. 287; Frevall v.

Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; St. Louis & C. R. Co. v. Johnston, — Tex. Civ. App. —, 125 S. W. 61.

²⁸ Nordyke & Marmon Co. v. Kehlror, 155 Mo. 643, 56 S. W. 287, 78 Am. St. 600.

²⁹ Bedell v. Wilder, 65 Vt. 406, 26 Atl. 589, 36 Am. St. 871.

³⁰ St. Louis & C. R. Co. v. Johnston (Tex. Civ. App.), 125 S. W. 61. To same effect, Edwards v. Trinity & C. R. Co. (Tex. Civ. App.), 118 S. W. 572. In the above case it was assumed that there was sufficient gravel in a certain pit to fulfil the contract between the parties. See however, Du Bois Borough v. Du Bois City Waterworks Co., 176 Pa. St. 430, 35 Atl. 248, 53 Am. St. 678, 34 L. R. A. 92, where the court refused to rescind a contract merely because the parties thereto had mistaken the amount of water that could be obtained from certain springs. The court further stated that the contract might be reformed. For further illustrations, see Cooper v. Hayward, 71 Minn. 374, 74 N. W. 152, 70 Am. St. 330; State Sav. Bank v. Buhl, 129 Mich. 193, 88 N. W. 471, 56 L. R. A. 944.

assented to, the contract is valid, notwithstanding it may develop that one or both of the parties held a mistaken opinion relative to the doubtful subject-matter of the agreement, provided there be no concealment or unfair dealing by the opposite party that would affect any other contract. This principle applies to insurance contracts and every compromise of a doubtful right.³¹

§ 105. As to identity of subject-matter.—Error as to the identity of the subject-matter is an error relative to the specific thing. If one agrees to buy and the other to sell a tract of land, the cargo of a particular ship, a horse or other chattel, reference being had by them to different objects or animals, no contract is concluded.³² Thus it has been held that where the defendant ordered a cargo of cotton, “to arrive Ex. ‘Peerless’ from Bombay” and there were two ships of that name which sailed from Bombay, it was held that “the defendant only bought that cotton which was to arrive by a particular ship” and not by any ship bearing the name “Peerless,” and that the defendant meant one ship and the plaintiff another.³³ So in an action for the purchase price of land where it appeared that the contract was to buy a lot on Prospect street and there were two Prospect streets in the town and the buyer meant a lot on one of them and the seller a lot on the other, it was held that their minds did not agree on the subject-matter of the sale and there was no contract whereby the purchaser could be bound.³⁴ However, where the terms of the agreement were unambiguous the contract will not be declared void on the ground of mistake when the misconception of one of the parties relative to the identity of the subject-matter is wholly un-

³¹ *Ancient Order of United Workmen v. Mooney*, 230 Pa. 16, 79 Atl. 233; *Perkins v. Gay*, 3 Serg. & R. (Pa.) 327, 8 Am. Dec. 653. See also, *John Soley & Sons v. Jones*, 208 Mass. 561, 95 N. E. 94.

³² *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433. See also, *Hazard v. New England Marine Ins. Co.*, 1 Summ. (U. S.) 218; *Harvey v. Harris*, 112 Mass. 32; *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152n; *Cutts v. Guild*, 57 N. Y. 229; *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. 209; *Reilly v. Gaut-*

sch, 174 Pa. St. 80, 34 Atl. 576; *Sheldon v. Capron*, 3 R. I. 171.

³³ *Raffles v. Wichelhaus*, 2 H. & C. 906.

³⁴ *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560. To same effect, *Stong v. Lane*, 66 Minn. 94, 68 N. W. 765; *Briggs v. Watkins*, 112 Va. 14, 70 S. E. 551 (mistake as to the location of timber land). See also, *Harris v. Pepperell*, L. R. 5 Eq. 1. Where one purchases a lot at public sale understanding the auctioneer to offer lot 25 when in fact he offered lot 24, no valid contract was made;

authorized by the language used in the terms of the agreement.³⁵ If two parties bargaining do actually misunderstand each other, if their language is equivocal, and one is meaning to speak of one subject and the other of another, it is clear there is no contract; for there is no *aggregatio mentium* necessary to make one. If the words are clear and unequivocal neither party can say that he understood them in a different sense from what they plainly bear; and if either party knows that the other understands him as speaking of one subject, or with one meaning, he will not be allowed to say that he had in mind another or intended a different meaning.³⁶

§ 106. **As to nature or quality of subject-matter.**—It may be stated as a general rule that a mistake merely as to the quality of the subject-matter unmixed with any other element is not sufficient to afford ground for the rescission of a contract or for the reformation of its terms. Such mistakes are ordinarily deemed collateral in their nature and the error is one for which no relief is afforded either in law,³⁷ or

Sheldon v. Capron, 3 R. I. 171. Mistakes as to the tract of land agreed upon (*Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152n), or location of the boundary line thereto (*Bigham v. Madison*, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267) may prevent the formation of any contract.³⁵ *Teachout v. Clough*, 143 Mo. App. 474, 127 S. W. 672. In the above case the alleged ambiguity arose over the meaning of the words "saw timber" as used in an agreement exchanging real estate.

³⁶ *Oldham v. Kerchner*, 79 N. Car. 106, 28 Am. Rep. 302n.

³⁷ *Citizens' Bank v. James*, 26 La. Ann. 264. To same effect, see *Cleveland v. Richardson*, 132 U. S. 318, 33 L. ed. 384, 10 Sup. Ct. 100; *Schurtz v. Romer*, 82 Cal. 474, 23 Pac. 118; *Dewey v. Whitney*, 93 Fed. 533, 35 C. C. A. 414, affd. 85 Fed. 325; *Grannis v. Quintard*, 69 Fed. 206; *Barker v. Northern Pac. R. Co.*, 65 Fed. 460; *Hamblin v. Bishop*, 41 Fed. 74; *Williams v. Thwing Electric Co.*, 160 Ill. 526, 43 N. E. 595; *McDonald v. Minnick*, 147 Ill. 651, 35 N. E. 367; *Post v. First Nat.*

Bank, 38 Ill. App. 259; *City R. Co. v. Citizens' St. R. Co. (Ind.)* 52 N. E. 157; *Smith v. Tewalt*, 9 Ind. App. 646, 37 N. E. 294; *German Sav. Bank v. Geneser*, 116 Iowa 119, 89 N. W. 201; *Kiburz v. Jacobs*, 104 Iowa 580, 73 N. W. 1069; *Bigelow v. Wilson*, 99 Iowa 456, 68 N. W. 798; *Wood v. Stedwell*, 91 Iowa 224, 59 N. W. 28; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. 708; *Bridge-water Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433; *Miller v. Brooks*, 109 Mich. 174, 66 N. W. 1092; *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114; *Grinnell v. Wisconsin Cent. Co.*, 47 Minn. 569, 50 N. W. 891; *Schildts v. Hickey*, 26 Mo. App. 194; *Brong v. Spence*, 56 Nebr. 638, 77 N. W. 54; *Moore v. Scott*, 47 Nebr. 346, 66 N. W. 441; *Stettheimer v. Killip*, 75 N. Y. 282; *White v. Richmond & C. R. Co.*, 110 N. Car. 456, 15 S. E. 197; *Goldsmith v. Cincinnati*, 14 Ohio C. C. 342; *Seeley v. Citizens' Traction Co.*, 179 Pa. St. 334, 36 Atl. 229; *Gormly v. Gormly*, 130 Pa. St. 467, 18 Atl. 727; *Pickett v. Fidelity & Casualty Co.*, 60 S. Car. 477, 38 S. E. 160, 629; *Ruohs v. Third Nat.*

equity.³⁸ Thus, where the defendant bought a horse under a mistake of fact as to the actual condition of the horse such error was held to be a mistake which in no manner effected the validity of the contract. The court said, "In a case where there is a mutual mistake of the parties as to the subject-matter of the contract, or the price or terms, going to show the want of a consensus ad idem, without which no contract can arise, such a defense may be made. But here the mistake of the defendants was in relation to a fact wholly collateral, and not affecting the essence of the contract itself. The vendee cannot escape from the obligation of their contract because they have been mistaken or disappointed in the quality of the article purchased. In the absence of a warranty the principle of caveat emptor applies, and the buyer takes the risk of quality upon himself."³⁹

The mere fact that one signs a release in full of all damages which have accrued or which may accrue for personal injuries received in an accident, under a misapprehension as to the nature and extent of his injuries, does not in the absence of fraud or misrepresentation constitute such mistake as will avoid the release.⁴⁰ Mistakes as to quality of land,⁴¹ usefulness of a machine,⁴² or validity of municipal bonds purchased⁴³ have been held insufficient to affect the validity of the contract. And where a diamond worth seven hundred dollars was sold for one dollar, both parties to the sale having no knowledge as to the value of the stone and thought it to be a topaz, it has been held that the one selling the stone could not recover its possession and rescind the

Bank, 94 Tenn. 57, 28 S. W. 303, *Gholson v. Finney* (Tenn. Ch. App.), 46 S. W. 345; *Houston & Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. 854, revg. 21 Tex. Civ. App. 568, 54 S. W. 421; *Coughran v. Alderete* (Tex. Civ. App.), 26 S. W. 109; *Adams v. Pardue* (Tex. Civ. App.), 36 S. W. 1015; *Kowalke v. Milwaukee Elec. & Light Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. 877; *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610n.
³⁸ *Moore v. Scott*, 47 Nebr. 446, 66 N. W. 441.

³⁹ *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28.

⁴⁰ *Houston & Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. 854; *Kane v. Chester Traction Co.*, 186 Pa. St. 145, 40 Atl. 320, 65 Am. St. 846; 67 Central Law Journal.

⁴¹ *Citizens' Bank v. James*, 26 La. Ann. 264; *Moore v. Scott*, 47 Nebr. 346, 66 N. W. 441; *Crist v. Dice*, 18 Ohio St. 536.

⁴² *Chanter v. Hopkins*, 4 M. & W. 399.

⁴³ *Ruohs v. Third Nat. Bank*, 94 Tenn. 57, 28 S. W. 303.

sale.⁴⁴ It will be observed that in this case there could be no question as to the identity of the thing sold. The question as to the nature of the thing sold does not appear to have been raised or if raised was not decided and herein lies a distinction which in some cases may be drawn. Thus, where the contract for the sale of a cow was entered into, both parties believing her to be barren, which supposition proved to be untrue, it was held that the mistake was not as to the mere quality of the animal sold, but went to the very nature of the thing and that the vendor had a right to rescind the agreement.⁴⁵

§ 106a. Mistake as to quantity.—A mistake as to the quantity of something which is contracted for by generic description

⁴⁴ *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610n. An eminent writer on this subject has formulated four general rules which govern mistakes as to quality. They are first, on the sale of a specified article, unless there be a warranty, the purchaser is bound to take the article bought, even though it does not possess the quality he presumed it to possess. Each takes the consequences. The purchaser may get a better thing than the vendor intended to sell, but he may get a worse thing than he intended to buy. In neither case is the validity of the contract affected. *Smith v. Hughes*, L. R. 6 Q. B. 597. Second, should the seller have knowledge that the purchaser believes that the article possesses a quality which it does not possess, the contract is binding so long as the seller does nothing to deceive the purchaser. In the absence of a confidential relation the seller is under no obligation to correct the erroneous impression of the purchaser. *Smith v. Hughes*, L. R. 6 Q. B. 597. Third, in case the purchaser overestimates the quality of the article sold and believes the seller intends to sell an article of the quality the purchaser desires to buy, the contract is binding, the mere apprehension of the purchaser of the extent of the seller's promise unknown to the seller does not defeat the validity of the agreement. The purchaser might have protected himself by inserting the terms which he wished to form a part of the

contract. *Smith v. Hughes*, L. R. 6 Q. B. 597; *Scott v. Littledale*, 8 E. & B. 815. Fourth, where the buyer believes the article possesses a certain quality and thinks the seller intends to sell an article of that quality, and the seller knows that the purchaser is mistaken not only as to the quality of the goods but also the extent of the promise and allows this mistake to continue, the contract is void. In this instance the error is not one of judgment but is an error in regard to the intention of the seller. It is the knowledge that the vendee has mistaken the quality promised that vitiates the sale. *Anson on Contracts* (4th ed.) 132; *Smith v. Hughes*, L. R. 6 Q. B. 597; *Hammond on Contracts*, 113.

⁴⁵ *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. 531. See also, *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135, in which it is held that a grantor was ignorant of the right of title that he had in the property, he could not be held to have intended it as a gift where he conveyed it without consideration. In this case, however, it appeared that a confidential relation existed between father and son and that it was the duty of the son under the circumstances to disclose every essential fact relative to the agreement. Also *Tolley v. Poote*, 62 W. Va. 231, 57 S. E. 811, where it is held that if an election is made in ignorance or under a mistake as to the real nature of their proper-

(whether alone or in connection with an individual characterization) may avoid the agreement for the reason that there never was any real consent because the minds of the parties never met.⁴⁶ If the parties to a contract for the sale of land estimate the quantity at so much and the amount of land has a direct influence on the price to be paid or was a controlling motive in entering into the contract, equity will grant relief in case there is a material excess or deficiency, by compelling a reconveyance of the excess,⁴⁷ or fixing an equitable compensation,⁴⁸ or rescinding the agreement.⁴⁹ Specific performance has been refused in several instances where the mistake was not mutual but was caused by the act of the other party.⁵⁰ So, on the other hand, where the purchaser knew that the vendor was making a mistake as to the size of the lot to be conveyed,⁵¹ or where it would be inequitable to enforce the agreement.⁵² However, where a tract of land is sold as a whole the

ties or as to the nature of the elector's rights, such mistake will be regarded as one of fact rather than of law and the election held not binding, a court of equity will permit it to be revoked, unless the rights of third parties have intervened which would be interfered with by the revocation. In this case one of the parties was overreached and taken advantage of by the other.

⁴⁶ *Henkel v. Pape*, L. R. 6 Ex. 7. In the above case the defendant ordered three rifles. The telegraph agent, through mistake, transmitted the order for fifty rifles. The purchaser accepted three of the fifty and refused to receive the others. It was held that the telegrapher was the purchaser's agent only to transmit the message as delivered to him. *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S. E. 755. In the above case owing to an ambiguity in the offer quoted the purchaser thought he was buying five carloads of matches while the seller understood he was selling one carload. *Devine v. Edwards*, 101 Ill. 138. Mutual mistake as to the capacity of a milk can.

⁴⁷ *Shipp v. Swann*, 2 Bibb. (Ky.) 82; *Miller v. Craig*, 83 Ky. 623, 4 Am. St. 179; *Gilmore v. Morgan*, 2 J. J. Marsh. (Ky.) 65.

⁴⁸ *Winston v. Browning*, 61 Ala. 80;

Folsom v. Howell, 94 Ga. 112, 21 S. E. 136; *McCormick v. Jones* (Ky.), 22 S. W. 881; *Weart v. Rose*, 16 N. J. Eq. 290; *Marvin v. Bennett*, 8 Paige (N. Y.) 312; *Hull v. Cunningham*, 1 Mumf. (Va.) 330. The measure of damages is the difference between the estimated and actual quantity. *Hays v. Hays*, 126 Ind. 92, 25 N. E. 600, 11 L. R. A. 376n.

⁴⁹ *Harris v. Pepperell*, L. R. 5 Eq. 1; *Trout v. Goodman*, 7 Ga. 383. *Contra*, *Iverson v. Wilburn*, 65 Ga. 103; *Baird v. Beall* (Ky.), 21 S. W. 236, 14 Ky. L. 653; *Megie v. Bennett*, 51 N. J. Eq. 281, 27 Atl. 917; *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. 209; *Ladd v. Pleasants*, 39 Tex. 415; *Yost v. Mallicote*, 77 Va. 610; *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210.

⁵⁰ *Coles v. Bowne*, 10 Paige (N. Y.) 526. Mistake caused by manner in which auctioneer made the sale.

⁵¹ *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550.

⁵² In the following cases property not intended to be conveyed was, through a mistake in the description, included in the contract. *Neap v. Abbott*, C. P. Cooper 333; *Richards v. North London R. Co.*, 20 Week. Rep. 194; *Mansfield v. Sherman*, 81 Maine 365, 17 Atl. 300.

amount may be immaterial even though greater than the vendor supposed, and the contract be valid and enforceable.⁵³

§ 107. **As to price.**—Mistakes as to price are closely allied to those relating to quantity. If the mistake as to price is such that it prevents the minds of the parties from meeting there is no contract even though each party believes that the contract as interpreted by him is concluded, when it is repudiated or rescinded on the discovery of the mistake prior to the delivery and acceptance of the property.⁵⁴ This rule has been held applicable to a price quoted by an agent through mistake, as where the wrong freight rate was given a shipper. It was held that the railroad could recover the difference between the price actually paid and the charge that should have been made.⁵⁵ And when no contract is formed because of the failure of the minds of the parties to meet, the written agreement cannot be reformed to express the understanding of either of the parties,⁵⁶ and is subject to cancellation or rescission only.⁵⁷ Rescission is usually the only remedy in those cases where the parties can be placed in statu quo, in case there has been performance in whole or in part.⁵⁸ If the parties

⁵³ Davis v. Parker, 14 Allen (Mass.) 94.

⁵⁴ Phillips v. Bistolli, 2 Barn. & C. 511, 3 Dowl. & R. 822, 26 Rev. Rep. 433; Wilkinson v. Williamson, 76 Ala. 163; Rovegno v. Defferari, 40 Cal. 459. Offer to sell for \$850 understood as an offer to sell for \$750. Werner v. Rawson, 89 Ga. 619, 15 S. E. 813. In the above case the vendor understood that he offered the lots at \$1,200 for each, while the vendee understood that \$2,500 covered the cost of both lots. Rupley v. Daggett, 74 Ill. 351. Offer understood to be \$65 when in fact it was \$165. Mummenhoff v. Randall, 19 Ind. App. 44, 49 N. E. 40. In this case the defendant intended to offer the plaintiff potatoes at 55 cents per bushel; through mistake the offer was transmitted 35 cents per bushel. The defendant accepted. The potatoes were shipped. After receipt of a part of the potatoes, the mistake was discovered. In a suit brought to recover the difference between 35 and 55 cents per bushel, it was held that

the minds of the parties never met and that no contract was formed since each party was in reality agreeing to something different notwithstanding the apparent mutual assent. Estey Organ Co. v. Lehman, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254, 122 Am. St. 951. (Sale of organ, mistake as to price.) See also, Everson v. International Granite Co., 65 Vt. 658, 27 Atl. 320. Compare the foregoing with S. F. Bowser & Co. v. Marks, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429.

⁵⁵ Rowland v. New York & C. R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. 175. To same effect, Gulf & C. R. Co. v. Dawson (Tex. Civ. App.), 24 S. W. 566; Hartford & C. R. Co. v. Jackson, 24 Conn. 514, 63 Am. Dec. 177.

⁵⁶ Bancharel v. Patterson, 64 Minn. 454, 67 N. W. 356.

⁵⁷ Werner v. Rawson, 89 Ga. 619, 15 S. E. 813; Bancharel v. Patterson, 64 Minn. 454, 67 N. W. 356.

⁵⁸ Norton v. Bohart, 105 Mo. 615, 16 S. W. 598.

cannot be placed in statu quo the reasonable value of the goods furnished or services rendered may be recovered.⁵⁹ It has been held, however, that where the goods are received and retained after the mistake in price has been discovered, and notice given thereof the purchaser will be deemed to have accepted at the price at which the goods were billed and not at the price originally quoted.⁶⁰ In the foregoing cases the mistake was either obvious or the circumstances were such that the mistake was or should have been known by the purchaser. The cases were in fact decided on the theory that a person cannot snap up an offer which he must have known to be a mistake.⁶¹ Consequently if the error in computing the price is known,⁶² or the circumstances are such that the purchaser should have known it,⁶³ or if the mistake is excusable,⁶⁴ or if no completed contract

⁵⁹ *West v. De Wezele*, 4 Fost. & F. 596; *Peerless Glass Co. v. Pacific Crockery & Tinware Co.*, 121 Cal. 641, 54 Pac. 101; *Rowland v. New York & C. R. Co.*, 61 Conn. 103, 23 Atl. 755, 29 Am. St. 175; *Butler v. Moses*, 43 Ohio St. 166, 1 N. E. 316; *Gulf & C. R. Co. v. Dawson* (Tex. Civ. App.), 24 S. W. 566. Recovery is not had on the contract. It is invalid. Recovery is for the quantum meruit of the services. *Vickery v. Ritchie*, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810.

⁶⁰ *Cunningham Mfg. Co. v. Rotograph Co.*, 30 App. D. C. 524, 15 L. R. A. (N. S.) 368n; *Mummenhoff v. Randall*, 19 Ind. App. 44, 49 N. E. 40; *Fear v. Jones*, 6 Iowa 169; *Fullerton v. Dalton*, 58 Barb. (N. Y.) 236; *Estey Organ Co. v. Lehman*, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254n, 122 Am. St. 951. See, however, *Webster v. Cecil*, 30 Beav. 62; *Shelton v. Ellis*, 70 Ga. 297; *Griffin v. O'Neil*, 48 Kans. 117, 29 Pac. 143, revg. 47 Kans. 116, 27 Pac. 826; *Edwards & C. Lumber Co. v. Baker*, 2 N. Dak. 289, 50 N. W. 718; *Harran v. Foley*, 62 Wis. 584, 22 N. W. 837.

⁶¹ *Webster v. Cecil*, 30 Beav. 62. See also, Plaintiff agreed to cut certain timber for the defendant and by mistake the price to be paid for such services was written as \$10 for a 1,000 feet instead of \$1, per 1,000 feet.

The court stated that if the plaintiff was ignorant of the mistake, he could recover, but the evidence was held to show that plaintiff had knowledge of the mistake and could not recover. It was also held that as the plaintiff had knowledge of the mistake it was unnecessary for the defendant to inform him of the error as the law never imposes a needless obligation. *Mercer v. Hickman-Ebbert Co.*, 32 Ky. L. 230, 105 S. W. 441. See cases cited ante, note 60.

⁶² *Shelton v. Ellis*, 70 Ga. 297; *Everson v. International Granite Co.*, 65 Vt. 658, 27 Atl. 320.

⁶³ *Cunningham Mfg. Co. v. Rotograph Co.*, 30 App. D. C. 524, 15 L. R. A. (N. S.) 368, 11 Am. & Eng. Ann. Cas. 1147; *Buckberg v. Washburn-Crosby Co.*, 115 Mo. App. 701, 92 S. W. 733; *Butler v. Moses*, 43 Ohio St. 166, 1 N. E. 316. See also ante, note 61.

⁶⁴ *School Com'rs v. Bender*, 36 Ind. App. 164, 72 N. E. 154. Where a party contracts to do certain work based on estimates prepared by the adversary party's engineer, he may, in the absence of negligence on his part, have it canceled because of mutual mistake when induced by erroneous estimates by the adversary party's engineer of the amount of work to be done. *Long v. Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96.

has in fact been made,⁶⁵ relief will usually be granted the one making the error. Thus, it has also been held that a purchaser cannot defeat an action brought to recover the purchase price of goods sold and delivered where it appears that, at the time the contract was entered into, the seller made a mistake in computing the total cost, and the buyer was experienced in the business and might easily have ascertained for himself the total amount.⁶⁶

On the other hand, where the mistake is not obvious and the purchaser is not informed of the error before receiving or accepting the goods and the contract is made and the goods accepted by the purchaser in entire ignorance of the mistake and he in no way contributes thereto, the contract will not be avoided because of the vendor's error.⁶⁷ Thus where a mistake was made in adding a column of figures the court said, "a mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject-matter of the contract, its location, identity or amount, and there was neither belief in the existence of a fact which did not exist nor ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the

⁶⁵ Neill v. Midland R. Co., 20 L. T. (N. S.) 864, 17 Week. Rep. 871; Moffett & Co. v. Rochester, 178 U. S. 373, 20 Sup. Ct. 957, affd. 82 Fed. 255, revg. 91 Fed. 28.

⁶⁶ Dalhoff Const. Co. v. Block, 157 Fed. 227, 85 C. C. A. 25, 17 L. R. A. (N. S.) 419.

⁶⁷ Tatum v. Coast Lumber Co., 16 Idaho 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109n. In this case the defendant furnished plaintiff's agent with a list of machinery desired by him and asked for the company's price. This price was furnished by the agent, the gross amount being

given and no itemized statement furnished, the agent made a mistake of over \$1,000. It was held that this error did not affect the contract, did not go to its substance and afforded no grounds for its rescission or avoidance. Adkins & Co. v. Campbell, 6 Pen. (Del.) 96, 64 Atl. 628. See also, Griffin v. O'Neil, 48 Kans. 117, 29 Pac. 143, revg. 47 Kans. 116, 27 Pac. 826. Here it is held there can be no recovery by the vendor unless the mistake is mutual or the vendee knowingly took advantage of the vendor's error.

lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake, there would be no stability in contracts."⁶⁸

§ 108. **As to value.**—The mere fact that parties to a contract of sale may be mistaken as to the value of the thing sold does not defeat the validity of the sale so long as the defendant stands on equal footing and the mistake arises from a misconception of the intrinsic worth of the articles sold.⁶⁹ However, where the value of the thing sold depends upon some extrinsic fact or upon the nature of the thing sold, both parties being ignorant as to such facts or the nature of the thing sold and neither party had means of discovering the truth, equity may grant relief.⁷⁰ But if the information is equally open to both parties and might have been obtained by the exercise of ordinary diligence, neither can plead ignorance or mistake and thus attempt to avoid the agreement.⁷¹ A mistake as to the value of services to be rendered is not necessarily ground for the avoidance of the agreement. On the contrary where the facts are equally open to the observation of both

⁶⁸ *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564, 117 Am. St. 224n, 10 L. R. A. (N. S.) 114n. To the same effect, *Crilly v. Board of Education*, 54 Ill. App. 371; *Douglas v. Grant*, 12 Ill. App. 273; *Boeckler Lumber Co. v. Cherokee Realty Co.*, 135 Mo. App. 708, 116 S. W. 452; *Chaplain Realty & Co. v. Philip Gruner & Co.*, 137 Mo. App. 451, 118 S. W. 665; *Brown v. Levy*, 29 Tex. Civ. App. 389, 69 S. W. 255.

⁶⁹ *Smith v. Hughs*, L. R. 6 Q. B. 597; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Smith v. Tewalt*, 9 Ind. App. 646, 37 N. E. 294; *Citizens' Bank v. James*, 26 La. Ann. 264; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. 708; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441; *Hunter v. Goudy*, 1 Ohio 449; *Adams v. Pardue* (Tex. Civ. App.), 36 S. W. 1015; *Warner v. Daniels*, 1 Woodb. & M. (U. S.) 90; *Ferson v. Sanger*, 1 Woodb. & M. (U. S.) 138; *Hough v. Richardson*, 3 Story (U. S.) 659; *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610n. One partner sold his interest to another for a

specified sum. Later it was discovered that the bookkeeper had embezzled \$4,500 of the firm's funds. This sum was recovered by the purchasing partner from the bondsmen of the bookkeeper. The retired partner then brought suit for one-half the amount recovered. Neither partner knew of the mistake at the time the sale was made. Held there was no mutual mistake that would entitle plaintiff to recover. *Cohen v. Haberman*, 126 App. Div. (N. Y.) 710, 111 N. Y. S. 67.

⁷⁰ *Hore v. Becker*, 12 Sim. 465; *Bogardus v. Grace*, 78 Fed. 856; *Fritzler v. Robinson*, 70 Iowa 500, 31 N. W. 61; *Montgomery Co. v. American Emigrant Co.*, 47 Iowa 91; *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. 531; *Mays v. Dwight*, 82 Pa. St. 462; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493. See ante, §§ 103 et seq., Nature or quality of the subject-matter.

⁷¹ *Dortic v. Dugas*, 55 Ga. 484; *Griffin v. O'Neil*, 48 Kans. 117, 29 Pac. 143; *Ludington v. Ford*, 33 Mich. 123; *Hecht v. Batcheller*, 147 Mass.

parties and no advantage whatever is taken by the party agreeing to perform the services, the contract will not be set aside merely because the one agreeing to perform made a mistake as to the value of the services to be rendered.⁷²

§ 109. In execution of writing.—Quite frequently parties to an agreement have reached an oral understanding and then attempt to reduce it to writing. In so doing through some mistake on the part of the scrivener or on the part of the parties in the selection of words used, the writing fails to give expression to the contract it was intended to evidence. Such an error does not render the contract void because the minds of the parties never met, for their minds did in fact meet, but the agreement as written merely fails to give expression to the real agreement. Against errors of this nature equity will grant relief in a proper case by permitting them to be set up as a defense, or by canceling or reforming the written contract so as to make it conform to the real intention of the parties.⁷³ It is apparent, however, that the writing will not be reformed unless there was a prior agreement, so

335, 17 N. E. 651, 9 Am. St. 708; *Sample v. Bridgforth*, 72 Miss. 293, 16 So. 876; *Stettheimer v. Killip*, 75 N. Y. 282; *Sankey v. First Nat. Bank*, 78 Pa. St. 48; *Ruohs v. Third Nat. Bank*, 94 Tenn. 57, 28 S. W. 303. See ante, § 107, *Price—Mistakes in computation*.

⁷² *The Stanley v. Miner*, 172 Fed. 486. In this case the above named vessel had been wrecked and was lying on her side in the shoals. The owner and the one who subsequently agreed to raise her hired a diver and attempted to ascertain the extent of her injuries but owing to her position and the condition of the water were unable to gain the desired information. The parties subsequently entered into an agreement whereby the owner agreed to pay \$2,750 for having the vessel raised and conveyed to either New York or Philadelphia. This the libellant undertook to do and in a short time discovered that the injuries were much more extensive than supposed and gave notice that he would continue with the work but that he would look to the owner for extra compensation. The vessel was raised

and conveyed to the dock designated. The owners refused to pay more than the contract price. The court held that they would not be bound to pay a greater amount than the agreed price notwithstanding the libellant expended \$13,800.22 in raising the vessel and conveying her to dock. An engineer's estimate of the value of certain work may be corrected when it clearly appears that the engineer made a mistake. *Cleveland v. Griffin*, 27 Ohio C. C. 167.

⁷³ Against the mistake of both parties, by which, in the effort to reduce the agreement which they have made to writing, they mistake its terms so that the writing does not represent the real contract, equity will grant relief. *Canedy v. Marcy*, 13 Gray (Mass.) 373; *McGraw v. Muma*, 164 Mich. 117, 129 N. W. 20, 17 Detroit Leg. N. 1037; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Kilmer v. Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311; *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106; *Menomonee Locomotive Mfg. Co. v. Langworthy*, 18 Wis. 444. The real contract may be alleged

certain and definite in its terms that a court might enforce it.⁷⁴ Any other holding would result in making a contract for the parties which they themselves did not make.⁷⁵ Before the contract as written can be reformed there must be an agreement to which it should conform.⁷⁶ It must not only be shown that the writing does not give expression to the real contract but the actual contract must also be shown.⁷⁷ If the prior agreement would be unenforceable because of some legal disability on the part of one of the parties,⁷⁸ or be void because of some statute or positive rule of law,⁷⁹ the agreement will not be enforced. However, the statute of frauds does not defeat the reformation of a contract merely because the prior agreement was not in writing. The statute is intended to prevent, not to promote, fraud and must be so construed. Consequently it has been held that deeds of conveyance of land may be reformed notwithstanding the fact that the contract of sale was oral.⁸⁰

and proved. *Germer v. Gambill*, 140 Ky. 469, 131 S. W. 268. Equity interferes to correct an instrument only as between the original parties, or those claiming under them in privity. *Adams v. Baker*, 24 Nev. 162, 51 Pac. 252, 77 Am. St. 799n; *Blackie v. Clark*, 15 Beav. 595. See post, § 112.

⁷⁴ *Thompson v. Phoenix Ins. Co.*, 25 Fed. 296.

⁷⁵ *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264.

⁷⁶ *Robertson v. Walker*, 51 Ala. 484. A contract will not be reformed if such reformation would have the effect of supplying the contract with a material and essential element rather than that of correcting a mistake that has been made in the contract itself. *Allen v. Kitchen*, 16 Idaho 133, 100 Pac. 1052; *Nelson v. Davis*, 40 Ind. 366; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *St. Anthony Falls Water Power Co. v. Merriman*, 35 Minn. 42, 27 N. W. 199; *Ellison v. Fox*, 38 Minn. 454, 38 N. W. 358; *Clark v. Blumenthal*, 53 N. Y. Super. Ct. 211; *Ray v. Durham County*, 110 N. Car. 169, 14 S. E. 646; *Mitchell v. Holman*, 30 Ore. 280, 47 Pac. 616; *Mills v. Evansville Seminary*, 47 Wis. 354, 2 N. W. 550.

⁷⁷ *Guilmartin v. Urquhart*, 82 Ala. 570, 1 So. 897; *Slobodisky v. Phoenix*

Ins. Co., 52 Nebr. 395, 72 N. W. 483; *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264.

⁷⁸ *Holland v. Moon*, 39 Ark. 120; *Leonis v. Lazzarovich*, 55 Cal. 52; *Heaton v. Fryberger*, 38 Iowa 185; *Gebb v. Rose*, 40 Md. 387; *Montana Nat. Bank v. Schmidt*, 6 Mont. 609, 13 Pac. 382; *Cannon v. Beatty*, 19 R. I. 524, 34 Atl. 1111; *Williams v. Cudd*, 26 S. Car. 213, 2 S. E. 14, 4 Am. St. 714.

⁷⁹ *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; *Andrews Bros. Co. v. Youngstown Coke Co.*, 39 Fed. 353; *Williamson v. Hitner*, 79 Ind. 233.

⁸⁰ *Wall v. Arrington*, 13 Ga. 88; *Hunter v. Bilyeu*, 30 Ill. 228; *Jones v. Sweet*, 77 Ind. 187; *Morris v. Stern*, 80 Ind. 227; *Louisville & C. R. Co. v. Power*, 119 Ind. 269, 21 N. E. 751; *Gelpcke & Co. v. Blake*, 15 Iowa 387, 83 Am. Dec. 418; *Conaway v. Gore*, 24 Kans. 389; *Noel v. Gill*, 84 Ky. 241, 1 S. W. 428; *Turpin v. Marksberry*, 3 J. J. Marsh. (Ky.) 622; *Levy v. Ward*, 33 La. Ann. 1033; *Bond v. Dorsey*, 65 Md. 310, 4 Atl. 279; *Popp-lein v. Foley*, 61 Md. 381; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Bellows v. Stone*, 14 N. H. 175; *Prior v. Williams*, 3 Abb. App. Dec. (N. Y.) 624; *Gillespie v.*

To justify the reformation of a contract for mistake in its execution the mistake must be mutual. For, as has been seen, the writing will not be reformed unless there is a valid prior agreement. Consequently if the mistake is not mutual there could be no prior agreement to which the instrument could be made to conform.⁸¹ It is not every mistake, error, or misconception that will justify the reformation of a contract. The mistake must be about or material to the agreement.⁸² But the rule that the mistake must be mutual in order to entitle one or both the parties to the contract to set up mistake as a defense, or as ground for cancellation or reformation of the contract does not apply where one of the parties was mistaken and the other guilty of fraud or inequitable conduct.⁸³

Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559n; Stites v. Wiedner, 35 Ohio St. 555; Smith v. Butler, 11 Ore. 46, 4 Pac. 517; Schettiger v. Hopple, 3 Grant Cas. (Pa.) 54; Bartle v. Vossbury, 3 Grant Cas. (Pa.) 277; Huss v. Morris, 63 Pa. St. 367; Bumpas v. Zachary (Tex. Civ. App.), 34 S. W. 672; Goodell v. Field, 15 Vt. 448; Petesch v. Hambach, 48 Wis. 443, 4 N. W. 565. On this subject see Allen v. Kitchen, 16 Idaho 133, 100 Pac. 1052.

⁸¹ Douglas v. Grant, 12 Ill. App. 273; Dulany v. Rogers, 50 Md. 524; Diman v. Providence &c. R. Co., 5 R. I. 130. See ante note 76 infra. See also, Kempter v. Force, 86 Ind. 81.

⁸² Moffett Co. v. Rochester, 82 Fed. 255; New York Life Ins. Co. v. McMaster, 87 Fed. 63; Ruffner v. McConnell, 17 Ill. 212, 63 Am. Dec. 362; Whitesides v. Taylor, 105 Ill. 496; Douglas v. Grant, 12 Ill. App. 273; Purvines v. Harrison, 151 Ill. 219, 37 N. E. 705; Carskaddon v. South Bend, 141 Ind. 596, 39 N. E. 667, 41 N. E. 1; Marshall v. Westrope, 98 Iowa 324, 67 N. W. 257; Bigelow v. Wilson, 99 Iowa 456, 68 N. W. 798; Reeder v. Gorsuch, 55 Kans. 553, 40 Pac. 897; Andrews v. Andrews, 81 Maine 337, 17 Atl. 166; Dulany v. Rogers, 50 Md. 524; Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45; Clark v. Higgins, 132 Mass. 586; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; White v. Port Huron &c. R. Co., 13 Mich. 356;

Burns v. Caskey, 100 Mich. 94, 58 N. W. 642; Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. 816; Martini v. Christenson, 60 Minn. 491, 62 N. W. 1127; Bartlett v. Brown, 121 Mo. 353, 25 S. W. 1108; Home Fire Ins. Co. v. Wood, 50 Nebr. 381, 69 N. W. 941; Welles v. Yates, 44 N. Y. 525; Ranney v. McMullen, 5 Abb. N. Cas. (N. Y.) 246; Eames Vacuum Brake Co. v. Prosser, 88 Hun (N. Y.) 343, 34 N. Y. S. 398; Smith v. Mackin, 4 Lans. (N. Y.) 41; Ramsey v. Smith, 32 N. J. Eq. 28; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. 577; Fehlberg v. Cosine, 16 R. I. 162; Norman v. Norman, 26 S. Car. 41, 11 S. E. 1096; Webster v. Stark, 10 Lea (Tenn.) 406; Lott v. Kaiser, 61 Tex. 665; Farley v. Deslonde, 69 Tex. 458, 6 S. W. 786; Harvey's Case, 13 Ct. Cl. (U. S.) 322; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856; Coates v. Buck, 93 Wis. 128, 67 N. W. 23; St. Clara Female Academy v. Rockford Ins. Co., 93 Wis. 57, 66 N. W. 1140.

⁸³ Higgins v. Parsons, 65 Cal. 280, 3 Pac. 881; Wilson v. Moriarty, 88 Cal. 207, 26 Pac. 85; Essex v. Day, 52 Conn. 483; Wyche v. Greene, 26 Ga. 415; Bergen v. Ebey, 88 Ill. 269; Roszell v. Roszell, 109 Ind. 354, 10 N. E. 114; Williams v. Hamilton, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475n; Manatt v. Starr, 72 Iowa 677, 34 N. W. 784; Germer v. Gambill, 140 Ky. 469, 131 S. W. 268; Kilmer v.

Equity will also relieve against mistakes made by the scrivener where he fails to draw up the agreement in accordance with instructions, the mistake being deemed the mistake of both.⁸⁴ Thus where the parties to a deed intended that a fee simple should be conveyed, but the word "heirs" was omitted, so that only a life estate was conveyed, a reformation of the deed will be decreed, although the omission arose from a mistake of law made by the scrivener.⁸⁵ The omission of the scrivener from a lease executed by an illiterate man, who could not speak English, of a material portion of the consideration, which the lessor believed to be inserted therein, is ground for reforming the lease.⁸⁶ So, also, it has been decided in Ken-

Smith, 77 N. Y. 226, 33 Am. Rep. 613; *Leonard v. Southern Power Co.* (N. Car.), 78 S. E. 1061; *McCormick Harvesting Mach. Co. v. Woulph*, 11 S. Dak. 252, 76 N. W. 939. One of limited intelligence and inability to read English, who, in the absence of fraud practiced upon him, executes an instrument, comes within the rule that mere ignorance of the contents of an instrument which a party voluntarily executes is not sufficient ground for setting it aside if ultimately the paper is found to be different from what he supposed it to be. *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952.

⁸⁴ *Hartford &c. Ore Co. v. Miller*, 41 Conn. 102; *Wooden v. Haviland*, 18 Conn. 101; *Stedwell v. Anderson*, 21 Conn. 139; *Rogers v. Atkinson*, 1 Ga. 12; *Nowlin v. Pyne*, 47 Iowa 293. An allegation to the effect that certain timber was bought, and that by mutual mistake of the parties and the scrivener, the agreement specified only a part of the timber, sufficiently shows the mistakes existed at the time the agreement was made. *Doell v. Schrier*, 36 Ind. App. 253, 75 N. E. 600; *Rice v. Hall* (Ky.), 19 Ky. L. 814, 42 S. W. 99; *Germer v. Gambill*, 140 Ky. 469, 131 S. W. 268; *Canedy v. Marcy*, 13 Gray (Mass.) 373; *Stines v. Hays*, 36 N. J. Eq. 364; *Hebler v. Brown*, 18 Misc. (N. Y.) 395; *Linton v. Unexcelled Fireworks Co.*, 128 N. Y. 672, 28 N. E. 580; *Born v. Schrenkeisen*, 110 N. Y. 55,

17 N. E. 339; *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106.

⁸⁵ *Brock v. O'Dell*, 44 S. Car. 22, 21 S. E. 976.

⁸⁶ *Neuenberger v. Neuenberger*, 16 Ky. L. 710, 29 S. W. 617. "It is claimed in this answer that furnishing the vegetables was only a part consideration for the lease, and the proof, as already stated, shows such to have been the case. The father was advanced in years, is an ignorant and illiterate German, cannot speak the English language so as to be understood, and when signing the lease believed that all the stipulations of the agreement had been inserted by the draftsman, who seems to have concluded that the essential part of the lease was a mere private agreement between the parties, and, therefore, not necessary to be reduced to writing. We are of the opinion, however, that the lease ought not to be canceled, but the stipulations should be inserted as herein indicated, reforming its terms so as to express the true intent and meaning of the parties—that, in consideration of the lease the lessee binds himself to furnish the table of his father and mother with food, such as is suited to their condition during their lives, including not only vegetables, but their meat, bread and groceries; also fuel for their room. If the appellee is not willing to accept the terms indicated, the chancellor will cancel the lease, and in doing so will charge the

tucky that where several successive renewal notes stated that the place of payment was the "German National Bank" and it was shown that the parties intended to make all renewal notes payable at that place, a mistake in drafting a subsequent renewal note, making it payable at "said bank," the note containing no more definite designation of the place of payment may, in a suit between the original parties, be corrected by inserting the omitted words "German National."⁸⁷ This decision is in accordance with the general rule that wherever an instrument which is intended to carry into execution an agreement previously made, but which, by mistake of the draftsman either as to law or fact, does not fulfil that intention, or violates it, equity will correct the mistake, and compel the parties to comply with the agreement according to its terms.⁸⁸

§ 110. **Negligence.**—As has been seen, equity will grant relief against a mistake of fact; but this general statement must usually be qualified by adding, when the error is of such a nature that it could not, by reasonable diligence, have been avoided at the time. Equity will not relieve against mistakes occasioned by inexcusable negligence.⁸⁹ Ordinary diligence and prudence must be exercised.⁹⁰ Consequently when a person able to read executes a contract without reading the same or is otherwise guilty of negligence, he cannot avoid liability on the ground that he was mistaken as to its contents, no fraud or misrepresentation having been practiced on him.⁹¹ If one negligently signs a deed

appellee with no rent nor the appellant with any improvements. An amended petition should be filed by the appellant to meet the proof offered."

⁸⁷ *German Nat. Bank v. Louisville &c. Tallow Co.*, 97 Ky. 34, 16 Ky. L. 881, 29 S. W. 882.

⁸⁸ *Story on Equity Jurisprudence*, § 5. *Scales v. Ashbrook*, 1 Metc. (Ky.) 358. Citing *Inskoe v. Proctor*, 6 T. B. Mon. (Ky.) 311; *McCurdy v. Breathitt*, 5 T. B. Mon. (Ky.) 234; *Hunt v. Rhodes*, 1 Pet. (U. S.) 1, 7 L. ed. 27. To the same effect see *Parcels v. Gohegan*, 2 J. J. Marsh (Ky.) 133.

⁸⁹ *Woodside v. Lippold*, 113 Ga. 877,

39 S. E. 400, 84 Am. St. 267. Especially where the other party will obtain no unconscionable advantage. *Bibber v. Carville*, 101 Maine 59, 63 Atl. 303, 115 Am. St. 303.

⁹⁰ *Williamson v. Hitner*, 79 Ind. 233. This rule prevails not only when the rights of third parties have intervened but between the original parties. *Robinson v. Glass*, 94 Ind. 211.

⁹¹ *Bates v. Harte*, 124 Ala. 427, 26 So. 898, 82 Am. St. 186; *Dunham Lumber Co. v. Holt*, 123 Ala. 336, 26 So. 663; *Martin v. Smith*, 116 Ala. 639, 22 So. 917; *Terry v. Mutual Life Ins. Co.*, 116 Ala. 242, 22 So. 532; *Bank of Guntersville v. Webb*, 108

supposing it to be a lease he is bound by such deed as against an

- Ala. 132, 19 So. 14; Beck &c. Lithographing Co. v. Houppert, 104 Ala. 503, 16 So. 522, 53 Am. St. 77; Jones v. Cincinnati &c. R. Co., 89 Ala. 376, 8 So. 61; Campbell v. Larmore, 84 Ala. 499, 4 So. 593; Pacific Guano Co. v. Anglin, 82 Ala. 492, 1 So. 852; Foster v. Johnson, 70 Ala. 249; Goetter, Weil & Co. v. Pickett, 61 Ala. 387; Blum v. Mitchell, 59 Ala. 535; Birmingham &c. Power Co. v. Jordan, 170 Ala. 530, 54 So. 280; Lester v. Walker, — Ala. —, 55 So. 619; Alosi v. Birmingham Waterworks Co., — Ala. —, 55 So. 1029; Placer County Bank v. Freeman, 126 Cal. 90, 58 Pac. 388; Metropolitan Loan Assn. v. Esche, 75 Cal. 513, 17 Pac. 675; Barker v. N. P. R. Co., 65 Fed. 460; Harrison & Garrett v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730; Georgia Medicine Co. v. Hyman, 117 Ga. 851, 45 S. E. 238; Walton Guano Co. v. Copelan, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268; Jossey v. Georgia &c. R. Co., 109 Ga. 439, 34 S. E. 664; Chicago Bldg. & Mfg. Co. v. Summerour, 101 Ga. 820, 29 S. E. 291; Boynton v. McDaniel, 97 Ga. 400, 23 S. E. 824; Fuller v. Buice, 80 Ga. 395, 6 S. E. 17; MacPherson v. Morrill, 190 Ill. 194, 60 N. E. 86; Stewart v. Chicago &c. R. Co., 141 Ind. 55, 40 N. E. 67; Miller v. Powers, 119 Ind. 79, 21 N. E. 455, 4 L. R. A. 483; Wood v. Wack, 31 Ind. App. 252, 67 N. E. 562; Beist v. Sipe, 16 Ind. App. 4, 44 N. E. 762; Norris v. Scott, 6 Ind. App. 18, 32 N. E. 103; Chicago Cottage Organ Co. v. Caldwell, 94 Iowa 584, 63 N. W. 336; Chicago &c. Trust Co. v. Smyth, 94 Iowa 401, 62 N. W. 792; Jenkins v. Clyde Coal Co., 82 Iowa 618, 48 N. W. 970; Minneapolis &c. R. Co. v. Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. 216; Wallace v. Chicago &c. R. Co., 67 Iowa 547, 25 N. W. 772; Garden Grove Bank v. Humeston &c. R. Co., 67 Iowa 526, 25 N. W. 761; Hewett v. Chicago &c. R. Co., 63 Iowa 611, 19 N. W. 790; Robinson v. Transportation Co., 45 Iowa 470; Mulligan v. I. C. R. Co., 36 Iowa 181, 14 Am. Rep. 514; McGregor v. Metropolitan Life Ins. Co., 143 Ky. 488, 136 S. W. 889; Case Mill Mfg. Co. v. Vickers, 147 Ky. 396, 144 S. W. 76; Eldridge v. Dexter &c. R. Co., 88 Maine 191, 33 Atl. 974; Condon v. Rice, 88 Md. 720, 44 Atl. 169; Condon v. Mutual &c. Life Assn., 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. 169; Spitze v. Baltimore &c. R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. 378; Bakhaus v. Caledonian Ins. Co., 112 Md. 676, 77 Atl. 310; Clark v. City of Boston, 179 Mass. 409, 60 N. E. 793; Fonseca v. Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660; Rahilly v. St. Paul &c. R. Co., 66 Minn. 153, 68 N. W. 853; Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155; Alabama &c. R. Co. v. Jones, 73 Miss. 110, 19 So. 105, 55 Am. St. 488; Benn v. Pritchett, 163 Mo. 560, 63 S. W. 1103; International Text-Book Co. v. Lewis, 130 Mo. App. 158, 108 S. W. 1118; Crim v. Crim, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502; Och v. Missouri &c. R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Campbell v. Van Houten, 44 Mo. App. 231; Mateer v. Missouri Pac. R. Co., 105 Mo. 320, 16 S. W. 839; Goldstein v. Curtis, 63 N. J. Eq. 454, 52 Atl. 218; Atkinson v. Farrington Co. (N. J. Eq.), 28 Atl. 315; Gage v. Phillips, 21 Nev. 150, 26 Pac. 60, 37 Am. St. 494; Little v. Little, 2 N. Dak. 175, 49 N. W. 736; Fivey v. Pennsylvania R. Co., 67 N. J. L. 627, 52 Atl. 472, 91 Am. St. 445; Howell v. Bloom, 117 N. Y. S. 893; Rubinstein v. Radt, 133 App. D. (N. Y.) 57, 117 N. Y. S. 893, 119 N. Y. S. 1143; Ross v. Doland, 29 Ohio S. 473; Winchell v. Crider, 29 Ohio S. 480; McNuich v. Northwest Thresher Co., 23 Okla. 386, 100 Pac. 524, 138 Am. St. 803; In re Weller's Appeal, 103 Pa. St. 594; Pennsylvania R. Co. v. Shay, 82 Pa. St. 198; Wylie v. Commercial &c. Bank, 63 S. Car. 406, 41 S. E. 504; Sloan v. Courtenay, 54 S. Car. 314, 32 S. E. 431; Robertson v. Smith, 11 Tex. 211, 60 Am. Dec. 234; Kansas City Packing Box Co. v. Spies (Tex. Civ. App.), 109 S. W. 433; Ellicott Machine Co. v. United States, 43 Ct. Cl. (U. S.) 469; Boylar v. Hot Springs R. Co., 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. 50; Larsen v. Oregon Short Line R. Co. (Utah), 110 Pac. 983;

innocent purchaser for value.⁹² And where one signed an agreement hastily in order to accommodate the other party but was fully cognizant of its terms, one clause being omitted because of haste, with the understanding that the feature omitted should be considered as covered by another clause, it was held that the contract must be enforced as written and that its terms could not be changed or varied because of the alleged mistake or understanding.⁹³ Nor will the court reform a contract because of mistake, by striking out the words: "This machine is not guaranteed against slugs, spurious coins, or weather," where the one seeking such reformation signed without reading the order, no fraud or artifice being practiced to obtain his signature.⁹⁴ Nor can one defeat an action to recover on a stock subscription where he signed the subscription without reading it or having it read to him but supposed that he was merely expressing a willingness to subscribe for stock and not actually subscribing therefor.⁹⁵ Nor will a contract be reformed where through negligence on the part of the plaintiff he agreed to do the marble work on six stories of a building when he intended to do such work only on five stories.⁹⁶ A material man has also been held liable on his contract to furnish the marble and tile work for a building when he called at the office of the party having the plans and specifications in his pos-

Pederson v. Seattle Consolidated R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246; *Albrecht v. Milwaukee Co.*, 87 Wis. 105, 58 N. W. 72, 41 Am. St. 30; *Weltner v. Thurmond*, 17 Wyo. 268, 98 Pac. 590, 129 Am. St. 1113. See also, *Blake v. Black Bear Coal Co.*, 145 Ky. 788, 141 S. W. 403. One cannot set up his own negligence and call it a mutual mistake. *Ellicott Mach. Co. v. United States*, 44 Ct. Cl. (U. S.) 127. He may show that his signature was obtained by artifice or fraud. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235.

⁹² *Gavagan v. Bryant*, 83 Ill. 376.

⁹³ *Kansas City Packing Box Co. v. Spies* (Tex. Civ. App.), 109 S. W. 432. To the same effect, *J. I. Case*

Threshing Mach. v. Mattingly, 142 Ky. 581, 134 S. W. 1131. (In the above case the signor said he was in a hurry and refused to wait to have the contract read to him.) *Zeller v. Ransom*, 140 Mo. App. 220, 123 S. W. 1016. In the above case an order for jewelry was given with the alleged understanding that it was subject to countermand and must be assented to by the other member of the firm before it would be binding. The contract contained a warning in bold type, that it should not be signed without reading and also provided that its terms could not be changed by the agent.

⁹⁴ *Mitchell Manufacturing Co. v. Ike Kempner*, 84 Ark. 349, 105 S. W. 880.

⁹⁵ *Mower, Harwood & Co. v. Hill*, 135 Iowa 600, 113 N. W. 466.

⁹⁶ *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264.

session but was unable to read them accurately by reason of his having left his glasses at home and was misinformed by a clerk in the office as to the scale upon which the plans were drawn.⁹⁷ Where one signs a release for personal injuries and before the signature is attached every effort is made to explain its meaning to him and he apparently comprehends, the one so signing cannot avoid the release even though he fails to understand when the other party did not know of such misunderstanding and was guilty of no fault, fraud or collusion.⁹⁸ Nor will one be relieved from the terms of a contract on the ground of mistake when it was within his power to have a stipulation inserted in the agreement which would have fully protected him. He is bound to assume any risk he might have provided against in the contract.⁹⁹

It may therefore be stated as a rule generally applicable that where there is no excuse to justify the failure to read or understand the terms of a contract before one affixes his signature thereto, and no fraud is practiced on him by the other party the one so signing is estopped by his own signature from questioning the validity of the agreement.¹ However it is not every instance of negligence that will defeat a right to relief. In case no prejudice will result to the other party relief may be granted even though negligence is established.² Thus, where the owner of a

⁹⁷ *C. H. Young Co. v. Springer*, 113 Minn. 382, 129 N. W. 773.

⁹⁸ *Blossi v. Chicago & C. R. Co.*, 144 Iowa 697, 123 N. W. 360, 26 L. R. A. (N. S.) 255. When the execution of a release for personal injuries is shown the burden is on the party giving the release to show that it was obtained by misrepresentation. *Birmingham & C. Power Co. v. Jordan*, 170 Ala. 530, 54 So. 280. See also, *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952 (as to the signature of a contract by one incapable of understanding the language).

⁹⁹ *Potts v. Riddle*, 5 Ga. App. 378, 63 S. E. 253; *Soley v. Jones*, 208 Mass. 561, 95 N. E. 94. When the contract as written expresses the actual agreement it cannot be reformed. *Curtis v. Albee*, 167 N. Y. 360, 60 N. E. 660.

¹ *Reed v. Coughran*, 21 S. Dak. 257, 111 N. W. 559. If the one signing

cannot read he should have the contract read to him. *Hawkins v. Hawkins*, 50 Cal. 558; *Chicago St. P. M. & O. R. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *Mulderrig v. Burke*, 24 Misc. (N. Y.) 716, 53 N. Y. S. 1004; *Appeal of Weller*, 103 Pa. St. 594; *Hurt v. Wallace*, (Tex. Civ. App.), 49 S. W. 675. He is presumed to understand the contents of the agreement he signs. *Haag v. Burns*, 22 S. Dak. 51, 115 N. W. 104. See, however, *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Green v. Maloney*, 7 Houst. (Del.) 22, 30 Atl. 672; *Muller v. Kelley*, 125 Fed. 212, revg. 116 Fed. 545, 60 C. C. A. 170; *Melle v. Candelora*, 88 N. Y. S. 385. An illiterate person is not bound if the instrument is incorrectly read to him. *Suffern v. Butler*, 18 N. J. Eq. 220.

² *Leuty v. Hillas*, 2 De G. & J. 110; *Beaufort v. Neeld*, 12 Cl. & Fin. 248;

lot paid an assessment for street improvement on an adjoining lot, under the mistaken supposition that he was paying the assessment on his own lot equity will assist him to recover it even though he was negligent in making the payment.³

§ 111. **Ratification—Laches.**—Courts generally term those contracts entered into under mistake as to the essential element, i. e. mistakes as to the nature of the transaction, person of the other party, or the subject-matter of the agreement, void. This being true it would seem that they could not be ratified. However, where the vendee bought a lot different from that he intended to purchase by reason of the vendor through mistake pointing out the wrong lot, it was held that the vendee ratified the sale by holding the lot after the mistake was discovered and making no attempt to rescind until the lot had greatly depreciated in value.⁴ A mistake which does not avoid the agreement but which merely furnishes ground for reformation may be ratified. If this is done the parties in effect substitute the agreement as written for their original contract.⁵

No definite specified act is necessary to amount to a ratification. One may be held to have ratified the agreement through his own laches. The application for relief upon the ground of mistake must be made with due diligence on discovery of the mistake,⁶ and what

Wild v. Hillas, 28 L. J. Ch. 170; Beasley v. Beasley, L. R. 9 Ch. D. 103, 1 Atk. 97; Snyder v. Ives, 42 Iowa 157; Wood v. Patterson, 4 Md. Ch. 335; Western R. R. Corporation v. Babcock, 6 Metc. (Mass.) 346; Dillett v. Kemble, 25 N. J. Eq. 66; Voorhis v. Murphy, 26 N. J. Eq. 434; Mayer v. New York, 63 N. Y. 455; Capehart v. Mhoon, 5 Jones' Eq. (N. Car.) 179; Lewis v. Lewis, 5 Ore. 169; Diman v. Providence &c. R. Co., 5 R. I. 130; Ferson v. Sanger, 1 Wood. & M. (U. S.) 138; United States Bank v. Bank of Georgia, 10 Wheat. (U. S.) 333.

³ Mayer v. New York, 63 N. Y. 455. To same effect, Union Nat. Bank v. Sixth Nat. Bank, 43 N. Y. 452, 3 Am. Rep. 718; Duncan v. Berlin, 46 N. Y. 685; Lawrence v. American Nat. Bank, 54 N. Y. 432; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; National Bank of Commerce v. Na-

tional Mec. Bank Assn., 55 N. Y. 211, 14 Am. Rep. 232.

⁴ Simmons v. Palmer, 93 Va. 389, 25 S. E. 6. In this case it also appears that the vendee was familiar with the property and its location and might by the exercise of reasonable diligence have known of the mistake. It also appears that the lot was bought for speculative purposes and that the location was not so material as to have influenced the conduct of the parties. See also, Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n.

⁵ See New York Life Ins. Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532; Dotterer v. Freeman, 88 Ga. 479, 14 S. E. 863.

⁶ Sweeny v. Water Supply Co., 121 Ala. 454, 25 So. 575; Werner v. Rawson, 89 Ga. 619, 15 S. E. 813.

amounts to due diligence is (in the absence of a statute of limitations applicable to the case) determined by reference to the facts attending the particular case.⁷ If the party seeking relief is guilty of unreasonable delay,⁸ and the other party has altered his position so that it is impossible to place him in statu quo,⁹ relief will be denied.¹⁰ But before a change in position will be permitted to defeat a rescission of the contract it must be such a change as affects the substantial rights of the parties.¹¹ In case one of the parties to an agreement makes a mistake which is known to and taken advantage of by the other party, the one making the mistake may rescind, when it is such a mistake as

⁷ *Simmons v. Palmer*, 93 Va. 389, 25 S. E. 6; *Welles v. Yates*, 44 N. Y. 525; *De Forest v. Walters*, 153 N. Y. 229, 47 N. E. 294; *Harris v. Ivey*, 114 Ala. 363, 21 So. 422; *Providence Steam-Engine Co. v. Hathaway Mfg. Co.*, 79 Fed. 512; *Citizen's National Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263, note to *Gillespie v. Moon*, 2 John's Ch. (N. Y.) 585, 7 Am. Dec. 559; *Day v. Day*, 84 N. Car. 408; *Metropolitan Lumber Co. v. Lake Superior &c. Canal Co.*, 101 Mich. 577, 60 N. W. 278; *Schautz v. Keener*, 87 Ind. 258; *Wilson v. Wilson*, 23 Nev. 267; *Hill v. Kuhlman*, 87 Fed. 498, 31 C. C. A. 87; *Thompson v. Marshall*, 36 Ala. 504, 76 Am. Dec. 328; *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381; *Merrifield v. Ingersoll*, 61 Mich. 4, 27 N. W. 714; *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334; *Stevens v. Hertzler*, 114 Ala. 563, 22 So. 121.

⁸ *Van Vleet v. Van Vleet*, 45 Fed. 743; *Murphy v. Bank*, 95 Iowa 325, 63 N. W. 702.

⁹ *Conn. Ins. Co. v. Stewart*, 95 Ind. 588; *Truesdale v. Sidle*, 65 Minn. 315, 67 N. W. 1004.

¹⁰ *Crymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958, per *Finch, J.*: "If he intended not to be bound it was his duty to speak, and he had full opportunity to do so. Silence misled to their harm both the administrators and the supposed legatees. The former paid and the latter accepted the money as rightfully payable and due, and the

one incurred risk and the other may have spent the money or changed modes of life in consequence, and certainly thereby incurred an unknown and unsuspected obligation, if required to return the fund. Under such circumstances the plaintiff is estopped from a recovery. The moment he learned his real rights it was his duty to speak. He had full opportunity to speak, and he knew that his silence would necessarily mislead the other parties to their harm. *Erie County Bank v. Roop*, 48 N. Y. 298; *Blair v. Wait*, 69 N. Y. 113; *Viele v. Judson*, 82 N. Y. 32; *Queen v. Lords of the Treasury*, 16 Q. B. 357; *Brisbane v. Dacres*, 5 Taunt. 144. Indeed, if the case should be reduced down to its simplest elements, and treated from the moment in which Barclay knew his rights on the basis of a mere gift which he had authorized the representatives of the estate to make out of his own share, he could not recover back from the donees the gift so far as executed. It cannot be that a gift voluntarily made, without mistake or fraud, can be at will recovered back; and, from the day when Barclay knew that the lapsed share was his every payment made to Samuel's daughters was his payment because made by his direction and authority, with full knowledge of both law and facts, and by the assent of his silence during more than three years."

¹¹ *Culbertson v. Blanchard*, 79 Tex. 486, 15 S. W. 700.

will entitle him to a rescission notwithstanding the other party cannot be placed in statu quo.¹² A person cannot be said to have ratified a contract unless it appears that he knew and understood the terms of the agreement at the time the alleged ratification is made. Ratification involves knowledge of the facts on the part of the person ratifying.¹³

§ 112. Mutuality of mistake.—As is demonstrated by many of the cases cited in the preceding section of this chapter either a mutual or a unilateral mistake may be ground for the rescission of a contract, if the error is of such character as to prevent the minds of the parties from meeting. However, there is a well-marked distinction between mutual and unilateral mistakes. A mistake on one side (i. e. unilateral mistake) may be ground for rescinding but not reforming a contract.¹⁴ A contract may also be set aside for the mistake of one of the parties without the contract being induced by and the mistake arising from the fraud of the other party.¹⁵ A court will not, however, cancel a contract because of a unilateral mistake induced by no fraud, falsehood, misrepresentation or concealment on the part of the other party where ordinary diligence would have revealed the error. Especially is this true where no unconscionable advantage will be obtained by the party not guilty of error.¹⁶ A contract will not be

¹² Phetteplace v. Bucklin, 18 R. I. 297, 27 Atl. 211.

¹³ Dolvin v. American Harrow Co., 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.) 785; Williams v. Hamilton, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475n. See also, Alabama &c. R. Co. v. Jones, 73 Miss. 110, 19 So. 105, 55 Am. St. 488; Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892.

¹⁴ Douglas v. Grant, 12 Ill. App. 273; Dulaney v. Rogers, 50 Md. 524; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. 577; Wirsching v. Grand Lodge &c., 67 N. J. Eq. 711, 56 Atl. 713, 63 Atl. 1119, 3 Am. & Eng. Ann. Cas. 442; Fehlberg v. Cosine, 16 R. I. 162, 13 Atl. 110; Dietrich v. Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. 698; Hearne v. New Eng. Mut. Marine Ins. Co., 20 Wall. (U. S.) 488, 22 L. ed. 395; Moffett, Hodgkins & Clarke Co. v. Rochester, 178

U. S. 373, 20 Sup. Ct. 957, 44 L. ed. 1108.

¹⁵ Moore v. Copp, 119 Cal. 429, 51 Pac. 630. See also, Singer v. Grand Rapids Match Co., 117 Ga. 86, 43 S. E. 755.

¹⁶ Bibber v. Carville, 101 Maine 59, 63 Atl. 303, 115 Am. St. 303. "The power of a court of equity to relieve parties from their contracts, upon the ground of mutual mistake of fact, or mutual mistake of mixed law and fact, is well settled. * * * To authorize the relief, however, the mistake must be clearly shown to be mutual to both parties, for equity will rarely relieve from the mistake of one of the parties, except in those instances where the mistake was in a measure induced or brought about by the inequitable conduct of, or when known to and wrongfully acted upon or taken advantage of by, the other

reformed unless the mistake is mutual,¹⁷ or the adverse party is guilty of fraud, or other reprehensible or inequitable con-

tracting party. Mutual mistake consists in a clear showing of a misunderstanding, reciprocal and common to both parties, in respect to the terms and subject-matter of the contract, or some substantial part thereof." *C. H. Young Co. v. Springer*, 113 Minn. 382, 129 N. W. 773. Where parties in entering into a contract stand upon an equality with respect to each other and with regard to the subject-matter of the contract, courts ought not to interfere merely because one party or the other must assume or discharge a burden not anticipated when the contract was entered into, provided such burden comes within its terms. *White v. Snell*, 35 Utah 434, 100 Pac. 927. One party may know that the other is mistaken but unless there is a duty to disclose, this fact alone does not constitute sufficient grounds for the cancellation of the agreement. *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135. "No court, however, so far as we are advised, has ever held a contract void or invalid on account of a unilateral mistake of which the other party was not aware, and which did not go to the subject-matter of the contract itself." *Tatum v. Coast Lumber Co.*, 16 Idaho 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109n. See also, *Wilson v. Wyoming Cattle & Investment Co.*, 129 Iowa 16, 105 N. W. 338; *Monks & Sons v. West Street Imp. Co.*, 134 N. Y. S. 39.

¹⁷*Clark v. Hart*, 57 Ala. 390; *Lof-tus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; *New York Life Ins. Co. v. Mc-Master*, 87 Fed. 63, 30 C. C. A. 532; *Iverson v. Wilburn*, 65 Ga. 103; *Com-er v. Granniss*, 75 Ga. 277; *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135; *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430; *Douglas v. Grant*, 12 Ill. App. 273; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Marshall v. Westrope*, 98 Iowa 324, 67 N. W. 257; *Wilson v. Wyoming Cattle & Investment Co.*, 129 Iowa 16, 105 N. W. 338; *Prescott v. Cooper*, 37 La. Ann. 553; *Dulany v. Rogers*, 50 Md. 524; *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550; *Loud v. Barnes*, 154 Mass. 344, 28

N. E. 271; *Martine v. Christensen*, 60 Minn. 491, 62 N. W. 1127; *Ban-charel v. Patterson*, 64 Minn. 454, 67 N. W. 356; *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Raymond v. Cox*, 44 N. J. Eq. 415, 15 Atl. 593; *Pasman v. Montague*, 30 N. J. Eq. 385; *Morris v. Penrose*, 38 N. J. Eq. 629; *Eames Vacuum Brake Co. v. Prosser*, 88 Hun (N. Y.) 343, 34 N. Y. S. 398, 68 N. Y. St. 388; *Ranney v. McMullen*, 5 Abb. N. C. (N. Y.) 246; *Floors v. Ætna L. Ins. Co.*, 144 N. Car. 232, 56 S. E. 915, 11 L. R. A. (N. S.) 357n; *Archer v. California Lumber Co.*, 24 Ore. 341, 33 Pac. 526; *Hollenback's Appeal*, 121 Pa. St. 322, 15 Atl. 616; *Breneiser v. Davis*, 141 Pa. St. 85, 21 Atl. 508; *Fehlberg v. Cosine*, 16 R. I. 162; *Norman v. Nor-man*, 26 S. Car. 41, 11 S. E. 1096; *Monks v. McGrady*, 71 Tex. 134, 8 S. W. 617; *Lott v. Kaiser*, 61 Tex. 665; *Rushton v. Hallett*, 8 Utah 277, 30 Pac. 1014; *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839; *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264; *Harvey's Case*, 3 Ct. of Cl. (U. S.) 38.

¹⁸*New York Life Ins. Co. v. Mc-Master*, 87 Fed. 63, 30 C. C. A. 532; *Prater v. Bennett*, 98 Ga. 413, 25 S. E. 510; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Winans v. Huyck*, 71 Iowa 459, 32 N. W. 422; *Marshall v. Westrope*, 98 Iowa 324, 67 N. W. 257; *Bush v. Merri-man*, 87 Mich. 260, 49 N. W. 567; *Bancharel v. Patterson*, 64 Minn. 454, 67 N. W. 356; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607; *Archer v. California Lumber Co.*, 24 Ore. 341, 33 Pac. 526. The doctrine of reformation for mistake applies when a fire insurance agent knowingly locates the property insured in the wrong building. *Ætna Ins. Co. v. Brannon*, 99 Tex. 391n, 89 S. W. 1057, 2 L. R. A. (N. S.) 548; *Lott v. Kais-er*, 61 Tex. 665; *Trustees v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140. In the following cases the one whose duty it was to reduce the contract to writing prepared an agreement materially different from that orally agreed upon. *McDonald v. Yung-*

duct.¹⁸ The reason for this rule has been pointed out.^{18a}

§ 113. **Mistake as to the law.**—A mistake of law is in strictness, an erroneous conclusion as to the legal effect of known facts.¹⁹ As a general rule a mistake of this nature, unmixed with matters of fact or any other reason for equitable relief, affords no ground for the rescission or reformation of the contract induced thereby.²⁰ Other circumstances must combine with the

bluth, 46 Fed. 836; *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Bergen v. Ebey*, 88 Ill. 269; *Williams v. Hamilton*, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607. The theory upon which these cases were decided is that the fraud practiced by one party prevents the real contract from being reduced to writing and since the other party by mistake receives such writing as the real contract equity will lend its aid to the party thus defrauded and reform the written agreement. *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264; *James v. Cutler*, 54 Wis. 172, 10 N. W. 147.

^{18a} See ante, § 109, *Mistake in Execution of Writing*.

¹⁹ *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah 43, 53 Pac. 215.

²⁰ *Midland G. W. R. Co. v. Johnson*, 6 H. L. Cas. 798; *Bilbie v. Lumley*, 2 East 469; *Cockerell v. Cholmeley*, 1 Russ. & M. 419; *Stewart v. Kennedy*, L. R. 15 App. Cas. 108; *Haden v. Ware*, 15 Ala. 149; *Clark v. Hart*, 57 Ala. 390; *Steinfeld v. Zeckendorf*, 10 Ariz. 221, 86 Pac. 7; *Taylor v. Holmes*, 14 Fed. 498, affd. 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; *Allen v. Galloway*, 30 Fed. 466; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Bonney v. Stoughten*, 122 Ill. 536, 13 N. E. 833; *Oswald v. Sproehnle*, 16 Ill. App. 368; *Goltra v. Sana-sack*, 53 Ill. 456; *Ruffner v. McConnel*, 17 Ill. 212, 63 Am. Dec. 362; *Shaffer v. Davis*, 13 Ill. 395; *Oiler v. Gard*, 23 Ind. 212; *Allen v. Anderson*, 44 Ind. 395; *Pierson v. Armstrong*, 1 Iowa 282, 63 Am. Dec. 440; *Casady v. Woodbury County*, 13

Iowa 113; *Stewart v. Ticonic Nat. Bank*, 104 Maine 578, 72 Atl. 741; *Stover v. Poole*, 67 Maine 217; *Carpenter v. Jones*, 44 Md. 625; *Gist v. Drakely*, 2 Gill (Md.) 330, 41 Am. Dec. 426; *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109, 76 N. W. 395; *McGraw v. Munia*, 164 Mich. 117, 129 N. W. 20, 17 Detroit Leg. N. 1037; *Sparks v. Pittman*, 51 Miss. 511; *Price v. Estill*, 87 Mo. 378; *St. Louis v. Priest*, 88 Mo. 612; *Kleimann v. Gieselmann*, 114 Mo. 437, 21 S. W. 796, 35 Am. St. 761; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Champlin v. Laytin*, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; *Terry v. Moore*, 12 Misc. (N. Y.) 641, 67 N. Y. St. 499, 33 N. Y. S. 846; *Kent v. Manchester*, 29 Barb. (N. Y.) 595; *Dupre v. Thompson*, 4 Barb. (N. Y.) 279; *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 51; *Morehead Bkg. Co. v. Morehead*, 124 N. Car. 622, 32 S. E. 967; *Gross v. Leber*, 47 Pa. 520; *In re Dunham*, 9 Phila. (Pa.) 471, Fed. Cas. No. 4146; *Good v. Herr*, 7 Watts & S. (Pa.) 253, 42 Am. Dec. 236; *Norman v. Norman*, 26 S. Car. 41, 11 S. E. 1096; *Talley v. Courtney*, 1 Heisk. (Tenn.) 715; *Farnsworth v. Dinsmore*, 2 Swan (Tenn.) 38; *Lott v. Kaiser*, 61 Tex. 655; *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534; *Scott v. Slaughter*, 35 Tex. Civ. App. 524, 80 S. W. 643; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah 43, 53 Pac. 215; *Proctor v. Thrall*, 22 Vt. 262; *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406; *Mellish v. Robertson*, 25 Vt. 603; *Brown v. Armistead*, 6 Rand. (Va.) 594; *Mackintosh v. Renton*, 3 Wash. Terr. 431, 19 Pac. 144; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219;

mistake of law before it will be relieved against.²¹ However, it is possible to divide such mistakes into two more or less well-defined classes; first a mistake in law as to the legal effect of the contract actually made by the parties, and second, a mistake of law in reducing the contract to writing whereby it does not carry out or effectuate the intention of the parties.²²

In the first instance the contract actually entered into will seldom, if ever, be relieved against, unless there are other equitable features calling for the interposition of the court. Here the instrument is just as the parties design it to be.²³ When the language used or the form adopted has been deliberately and voluntarily chosen by the parties to express their meaning, the parties must be bound thereby, and equity will not, as a general rule, afford them relief merely because they have mistaken the legal effect of the language used.²⁴ It has been held, however,

Harner v. Price, 17 W. Va. 523; *Rochester v. Alfred Bank*, 13 Wis. 432, 80 Am. Dec. 746; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32, 9 L. ed. 989; *Sims v. Lyle*, 4 Wash. C. C. 301, Fed. Cas. No. 12891; *Sims v. Lyle*, 4 Wash. C. C. 320, Fed. Cas. No. 12892.

²¹ *Stephenson v. Atlas Coal Co.*, 147 Ala. 432, 41 So. 301; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Sparks v. White*, 7 Humph. (Tenn.) 86; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah 43, 53 Pac. 215; *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85, 25 L. ed. 52; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. 972; *Hunt v. Rhodes*, 1 Pet. (U. S.) 1, 7 L. ed. 27.

²² *Richmond v. Ogden Street R. Co.*, 44 Ore. 48, 74 Pac. 333.

²³ *Langley v. Brown*, 2 Atk. 195, 1 M. & P. 583; *Robertson v. Walker*, 51 Ala. 484; *Kelly v. Turner*, 74 Ala. 513; *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354; *Hackmack v. Wiebrock*, 172 Ill. 98, 49 N. E. 984; *Nelson v. Davis*, 40 Ind. 366; *Armstrong v. Short*, 95 Ind. 326; *Showman v. Miller*, 6 Md. 479; *McElderry v. Shipley*, 2 Md. 25, 56 Am. Dec. 703; *Sanford v. Nyman*, 23 Mich. 326; *Bradford v. Bradford*, 54 N. H. 463; *Beers v. Hendrickson*, 6 Robt. (29 N. Y. Super. Ct.) 53; *Mills v. Kampfe*, 135 App. Div. (N. Y.) 748,

119 N. Y. Supp. 903; *Fehlberg v. Cosine*, 16 R. I. 162, 13 Atl. 110; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98.

²⁴ *Hunt v. Rousmainer's Admr's.*, 8 Wheat. (U. S.) 174, 5 L. ed. 589. In the above case a borrower of money proposed to secure the lender by either of three modes—a mortgage on his vessel, a bill of sale of the vessel, or an irrevocable power to sell. The lender selected the latter, and, although there was no doubt of the intention of both parties to have the loan adequately secured, yet the court declined to give relief when the security proved unavailing by reason of the death of the borrower before the maturity of the debt, which, as matter of law, operated as a revocation of the power of sale, although it was contended that the lender acted under a mistaken belief that the power of sale was irrevocable, and that he should be relieved from the consequences of such mistake. In that case it was undoubtedly the intention of the parties, the one to give, and the other to obtain, adequate security for the repayment of the money loaned; yet, as the mistake was due to an erroneous construction of the legal effect of the instrument, which was adopted to carry out the intention, relief was denied, although the lender acted under the advice of

that a lease of premises might be rescinded by the lessee when both lessor and lessee had no knowledge of the fact that an ordinance had been recently passed which placed the property in the district within which the erection of wooden buildings was prohibited, inability to erect a wooden building rendering the lease valueless.²⁵

In the second class the mistake is not in the contract, but terms are used or omitted which gives the instrument a legal effect not intended by the parties and different from the contract actually made. Consequently there is a large and growing class of cases which hold when the terms of an agreement, employed by the parties, result in a contract different from the one really entered into by reason of omission, ignorance or misapprehension of their legal effect, a court of equity will in its discretion reform the instrument so as to effectuate the intention of the parties.²⁶ Especially where failure to do so would give an unconscionable advantage to one and operate as a gross injustice to the other.²⁷ Under this principle of law mistakes made in drawing up deeds,²⁸ negotiable instruments,²⁹ and insurance policies,³⁰ have been re-

counsel, which proved to be erroneous, that the power to sell was irrevocable." *William Cramp & Sons & Co. v. Sloan*, 21 Fed. 561; *Douglas v. Grant*, 12 Ill. App. 273; *Showman v. Miller*, 6 Md. 479; *Rogers v. Smith* (Tenn.), 48 S. W. 700; *DelaWare Ins. Co. v. Hill* (Tex. Civ. App.), 127 S. W. 283; *Moore v. Studebaker Bros. Mfg. Co.* (Tex. Civ. App.), 136 S. W. 570; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. ed. 120. No relief will be granted where the terms are such as the parties intended to use. *Andrus v. Blazard*, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354. See also, *Wheaton Building & Co. v. City of Boston*, 204 Mass. 218, 90 N. E. 598.

²⁵ *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094.

²⁶ *Clark v. Hart*, 57 Ala. 390; *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Marshall v. Westrope*, 98 Iowa 324, 67 N. W. 253; *Reed v. Root*, 59 Iowa 359, 13 N. W. 323; *Trusdell v. Lehman*, 47 N. J. Eq. 218; *Evants v. Strode's Admr.*, 11 Ohio 480, 38 Am. Dec. 744; *Ryder v. Ryder*, 19 R. I.

188, 32 Atl. 919; *Brock v. O'Dell*, 44 S. Car. 22; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; *Bailey v. American Central Ins. Co.*, 4 McCrary (U. S.) 221.

²⁷ *Dolvin v. American Harrow Co.*, 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.) 785; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. 63.

²⁸ *Spaulding Mfg. Co. v. Godbold*, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168; *Allis v. Hall*, 76 Conn. 322, 56 Atl. 637; *Sampson v. Mudge*, 13 Fed. 260; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. 63; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Cooke v. Husbands*, 11 Md. 492; *Corrigan v. Tiernay*, 100 Mo. 276, 13 S. W. 401; *McMillan v. Fish*, 29 N. J. Eq. 610; *Condor v. Secrest*, 149 N. Car. 201, 62 S. E. 921; *Brock v. O'Dell*, 44 S. Car. 22, 21 S. E. 976.

²⁹ *Clayton v. Bussey*, 30 Ga. 946, 76 Am. Dec. 680; *Hausbrandt v. Hoffer*, 117 Iowa 103, 90 N. W. 494, 94 Am. St. 289. As to evidence necessary, see, *Van Vleet v. Sledge*, 45 Fed. 743.

³⁰ *Woodbury Saving & Co. Assn. v.*

formed. However, before equity will reform an instrument entered into through mistake of law, in the absence of fraud or misrepresentation the mistake must have been mutual.³¹

It has been held that a contract entered into under a mistake of law which is of such a nature as to prevent the minds of the parties from meeting is void and neither party is bound as a matter of law.³² It is also well settled that where there is a mistake of law on one side and either positive fraud, inequitable, unfair, and deceptive conduct on the part of the party, which tends to confirm the mistake and conceal the truth, equity will award relief. Thus, a mistake of law accompanied and induced by fraud of the

Charter Oak &c. Ins. Co., 31 Conn. 517; Sias v. Roger Williams Ins. Co., 8 Fed. 183; Lansing v. Commercial Union Assur. Co., 4 Nebr. Unof. 140, 93 N. W. 756; Eastman v. Provident Mutual Relief Assn., 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. 29; Maher v. Hibernia Ins. Co., 67 N. Y. 283.

³¹ Mortimer v. Shortall, 2 Drury & War. 363; Parker v. Carter, 91 Ark. 162, 120 S. W. 836, 134 Am. St. 60; New York L. Ins. Co. v. McMaster, 30 C. C. A. 532, 87 Fed. 63; Spare v. Home Mutual Ins. Co., 19 Fed. 14; Houser v. Austin, 2 Idaho (Hasb.) 204, 10 Pac. 37; Sutherland v. Sutherland, 69 Ill. 481; Douglas v. Grant, 12 Ill. App. 273; Phenix Ins. Co. v. Rogers, 11 Ind. App. 72, 38 N. E. 865; Schoonover v. Dougherty, 65 Ind. 463; Baldwin v. Kerlin, 46 Ind. 426; Wachendorf v. Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533; Williams v. Hamilton, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475n; Conaway v. Gore, 24 Kans. 389; Stockhoff v. Brannin, 14 Ky. L. 717; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; Burns v. Caskey, 100 Mich. 94, 58 N. W. 642; Steinberg v. Phenix Ins. Co., 49 Mo. App. 255; Adkins v. Tomlinson, 121 Mo. 487, 26 S. W. 573; Bartlett v. Brown, 121 Mo. 353, 25 S. W. 1108; Meek v. Hurst, 223 Mo. 688, 122 S. W. 1022, 135 Am. St. 531; Henderson v. Beasley, 137 Mo. 199, 38 S. W. 950; Ramsey v. Smith, 32 N. J. Eq. 28; Green v. Stone, 54 N. J. Eq. 387, 34 Atl.

1099, 55 Am. St. 577; Lesser v. Demarest (N. J. Eq.), 72 Atl. 14; Lanier v. Wyman, 5 Robt. (28 N. Y. Super. Ct.) 147; Devereux v. Sun Fire Office, 51 Hun (N. Y.) 147, 4 N. Y. Supp. 655, 20 N. Y. St. 584; Allison Bros. Co. v. Allison, 144 N. Y. 21, 38 N. E. 956; Berringer v. Schaefer, 52 How. Pr. (N. Y.) 69; Mills v. Kampfe, 135 App. Div. (N. Y.) 748, 119 N. Y. S. 903; Kent v. Manchester, 29 Barb. (N. Y.) 595; Nevius v. Dunlap, 33 N. Y. 676; Whittemore v. Farrington, 76 N. Y. 452; Brioso v. Pacific Mut. Ins. Co., 4 Daly (N. Y.) 246; Coles v. Bowne, 10 Paige (N. Y.) 526; Evarts v. Steger, 5 Ore. 147; Thornton v. Krimbel, 28 Ore. 271, 42 Pac. 995; Mitchell v. Holman, 30 Ore. 280, 47 Pac. 616; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. 798; Biggs v. Bailey, 49 W. Va. 188, 38 S. E. 499; Grant Marble Co. v. Abbot, 142 Wis. 279, 124 N. W. 264; De Voin v. De Voin, 76 Wis. 66, 44 N. W. 839; Moehlenpah v. Mayhew, 138 Wis. 561, 119 N. W. 826; Harvey v. United States, 13 Ct. Cl. (U. S.) 322; Durham v. Fire & M. Ins. Co., 10 Sawy. (U. S.) 526, 22 Fed. 468.

³² Silander v. Gronna, 15 N. Dak. 552, 108 N. W. 544, 125 Am. St. 616. See also, Wirsching v. Grand Lodge &c., 67 N. J. Eq. 711, 56 Atl. 713, 63 Atl. 1119, 3 Am. & Eng. Ann. Cas. 442; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. 577; Dietrich v. Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. 698.

other party may authorize a reformation or rescission of the agreement.³³

It is not necessary that the conduct of one of the parties to a contract be actually fraudulent in order to entitle the other party to have it rescinded or reformed when he entered into it under a mistake of law. Inequitable conduct on the part of the other may be sufficient to give the one so mistaken relief.³⁴ Thus, where plaintiff, who was an old man, through a mistake of law supposed that, on the lapse of a legacy caused by the death of a legatee, it went to the deceased legatee's children, although in fact the plaintiff was entitled to it as the testator's brother and heir, executed to the executor a release of all claims against the estate, it was held that the release was voidable because of the executor's concealment from plaintiff of his legal rights as heir.³⁵

A mistake relative to the laws of another state or a foreign country is considered as a mistake of fact against which relief will be granted.³⁶ Private and special acts³⁷ are also considered as

³³ *Cooper v. Joel*, 1 DeG. F. & J. 240; *Townsend v. Cowles*, 31 Ala. 428; *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123; *Broadwell v. Broadwell*, 6 Ill. 599; *Williams v. Hamilton*, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475n; *Berry v. Whitney*, 40 Mich. 65; *Nelson v. Betts*, 21 Mo. App. 219; *Drew v. Clark*, *Cooke* (Tenn.) 373, 5 Am. Dec. 698; *Gorman v. McCabe*, 24 R. I. 245, 52 Atl. 989; *Moreland v. Atchison*, 19 Tex. 303; *Tolley v. Pooteet*, 62 W. Va. 231, 57 S. E. 811; *Grant Marble v. Abbott*, 142 Wis. 279, 124 N. W. 264. See ante, *Fraud Misrepresentations as to law*.

³⁴ *Evans v. Llewellyn*, 2 Bro. Ch. 150; *A'Dair v. McDonald*, 42 Ga. 506; *Bales v. Hunt*, 77 Ind. 355; *Jordan v. Stevens*, 51 Maine 78, 81 Am. Dec. 556; *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150; *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958; *Nelson v. Betts*, 21 Mo. App. 219; *Champlin v. Laytin*, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382; *Heert v. Cruger*, 14 Misc. (N. Y.) 508, 35 N. Y. S. 1063, 70 Y. St. 688; *Garnar v. Bird*, 57 Barb. (N. Y.) 277; *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534; *Moreland v. Atchison*, 19 Tex. 303; *West v. West*, 9 Texas App. 475, 29 S. W.

242. "Whatever may be the effect of a mistake of law pure and simple, there is no doubt that equitable relief will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied, by inequitable conduct of the other parties." *Weeke v. Wortmann*, 84 Nebr. 217, 120 N. W. 933.

³⁵ *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958.

³⁶ *McCormick v. Garnett*, 5 DeG. M. & G. 278; *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218; *Sampson v. Mudge*, 13 Fed. 260; *Norton v. Marden*, 15 Maine 45, 32 Am. Dec. 132; *Raynhan v. Canton*, 3 Pick. (Mass.) 293; *Haven v. Foster*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; *Rosenbaum v. United States Credit System Co.*, 64 N. J. L. 34, 44 Atl. 966, 65 N. J. L. 255, 48 Atl. 237; *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385; *Chillicothe Bank v. Dodge*, 8 Barb. (N. Y.) 233; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

³⁷ *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Beauchamp v. Winn*, L. R. 6 H.

matters of fact.³⁸ Courts do not take judicial notice of the laws of other jurisdictions; consequently, the laws of a foreign jurisdiction are provable as facts.³⁹

§ 114. **Mistake of fact as to interest induced by mistake of law.**—"Private right of ownership is a matter of fact."⁴⁰ Consequently, if one or both of the parties should enter into a contract under a mistake and misapprehension as to their existing private legal rights or interest in the thing conveyed or contracted about, the mistake may be treated as a mistake of fact against which equity will grant relief, defensive or affirmative.⁴¹ A mistake thus made is, in a certain sense, one of law, but in its most important features it is one of private right of ownership. It is, therefore, considered as one of fact although it may result from ignorance or mistake as to the law.⁴² This mistake must not, however, be confused with mistake as to the legal scope and operation of the contract actually formed. A mistake by a party as to his antecedent existing legal rights is distinct from a mistake as to the legal import of the act done. The former fur-

L. 223, 22 W. R. 193; *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303.

³⁸ A mistake relative to a court order would seem to be a mistake of fact. *Allen v. Galloway*, 30 Fed. 466; *Gardiner v. Schermerhorn*, *Clarke* (N. Y.) 101; *Gaul v. Miller*, 3 Paige (N. Y.) 192.

³⁹ *Holmes v. Broughton*, 10 Wend. (N. Y.) 75, 25 Am. Dec. 538.

⁴⁰ *Cooper v. Phibbs*, L. R. 2 H. L. 149, 22 Eng. Rul. Cas. 870; *Marshall v. Lane*, 27 App. D. C. 276.

⁴¹ *Bingham v. Bingham*, 1 Ves. Sr. 126; *Marshall v. Lane*, 27 App. D. C. 276; *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Blakeman v. Blakeman*, 39 Conn. 320; *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833; *Morgan v. Owen*, 228 Ill. 598, 81 N. E. 1135; *Baker v. Massey*, 50 Iowa 399; *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150; *Galard v. Winans*, 111 Md. 434, 74 Atl. 626; *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. 400; *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 32 Am. St. 458; *Hamilton v. Park*, 125 Mich. 72, 83 N. W. 1018; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91;

Hoy v. Hoy, 93 Miss. 732, 48 So. 903, 25 L. R. A. (N. S.) 182; *Alabama &c. R. Co. v. Jones*, 73 Miss. 110, 19 So. 105, 55 Am. St. 488; *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476; *Martin v. McCormick*, 8 N. Y. 331; *Champlin v. Laytin*, 6 Paige (N. Y.) 189; *Baldock v. Johnson*, 14 Ore. 542, 13 Pac. 434; *In re Whelen's Appeal*, 70 Pa. St. 410; *Fink v. Smith*, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750; *Wilson v. Ott*, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. 767; *Griffing v. Gislason*, 21 S. Dak. 56, 109 N. W. 646; *Cook v. Summer Spinning &c. Co.*, 1 Sneed (Tenn.) 698; *Toland v. Corey*, 6 Utah 392, 24 Pac. 190; *Varnum v. Highgate*, 65 Vt. 416, 26 Atl. 628; *Waggoner v. Waggoner*, 111 Va. 325, 68 S. E. 990, 30 L. R. A. (N. S.) 644n; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. One cannot release a claim of which he has no knowledge. *Cooper v. Hayward*, 71 Minn. 374, 74 N. W. 152, 70 Am. St. 330. See also, *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094.

⁴² *Galard v. Winans*, 111 Md. 434, 74 Atl. 626.

nishes a ground for equitable relief in cases in which the mistake can be rectified without injury to the rights of others,⁴³ while the latter does not.⁴⁴

⁴³ In re McFarlin, — Del. —, 75 Atl. 281; Wyche v. Greene, 16 Ga. 47; Renard v. Clink, 91 Mich. 1, 51 N. W. 692, 30 Am. St. 458. Thus A may give a deed for a certain land; the effect of this deed is understood perfectly, but A may give it under a mistake as to his legal interest or right in the property, in which case, as is above pointed out, it may be avoided. See 2 Pom. Equity 841, 856.

⁴⁴ It has been held that a misrepresentation to the effect that the plaintiff was not bound by the assignment to a bank because it had not formally accepted the instrument was not a mistake of law, but of fact. Montgomery Door &c. Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 N. E. 71. See ante, § 113, Mistake as to Law.

CHAPTER VI.

FAILURE TO DISCLOSE MATERIAL FACTS.

- | | |
|---|---|
| § 120. Nondisclosure as to essential elements. | § 125. Failure to disclose changes in fact. |
| 121. Failure to disclose matter of inducement. | 126. Insurance cases. |
| 122. Fact peculiarly within the knowledge of one party. | 127. Suretyship. |
| 123. Silence where there is a duty to speak. | 128. Sales. |
| 124. Relations of trust and confidence. | 129. Warranties. |
| | 130. Leases. |
| | 131. Commercial paper. |
| | 132. Stock subscriptions and sales. |
| | 133. Compromise. |

§ 120. **Nondisclosure as to essential elements.**—In certain instances mistake and nondisclosure overlap each other. As a result of this it is sometimes said that the nondisclosure of an essential element of a contract prevents the formation of any contract at all. It will be found upon investigation that in those cases in which this principle is announced one of the parties was mistaken as to an essential element of the contract, and that the other party knew of this mistake but did not correct it. The mistake was such that it prevented the minds of the parties from meeting, and thus prevented the formation of any contract at all. One is not permitted to snap up or take advantage of the offer of another when he knows, or ought to know, that a mistake has been made.¹ Likewise, when one pays money without knowledge of circumstances, with which the receiver is acquainted but does not make known, which if made known would have avoided the payment, the receiver acts fraudulently and

¹ Cunningham Manufacturing Co. v. Rotograph Co., 30 App. D. C. 524, 15 L. R. A. (N. S.) 368; Germain Fruit Co. v. Western Union Tel. Co., 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; Singer v. Grand Rapids Match Co., 117 Ga. 86, 43 S. E. 755; Mummenhoff v. Randall, 19 Ind. App. 44, 49

N. E. 40; Smith v. Mackin, 4 Lans. (N. Y.) 41; Butler v. Moses, 43 Ohio St. 166, 1 N. E. 316; Moffett & Co. v. Rochester, 178 U. S. 373, 44 L. ed. 1108, 20 Sup. Ct. 957, revg. 91 Fed. 28, 33 C. C. A. 319, which reversed 82 Fed. 255. See also, ch. 5, Mistake.

the money may be recovered.² But in this instance it is the fraud which in reality avoids the agreement, and not the nondisclosure. To say that nondisclosure of an essential element prevents the formation of a contract leads to confusion. It would be better if the preceding cases and cases similar thereto were classified under the respective heads of Fraud and Mistake.

§ 121. Failure to disclose matter of inducement.—The mere failure of one party to disclose facts extrinsic or intrinsic to the contract, known to him and not to the adversary party, does not, in the absence of special circumstances or relations, amount to fraud or affect the validity of the contract.³ Nondisclosure must be distinguished from active concealment. The one guilty of nondisclosure must say or do nothing to mislead the other, or induce him not to investigate or otherwise prevent him from ascertaining the truth, for a very little is sufficient to affect the application of the principle that nondisclosure does not avoid a contract, and it is said that "if a word, if a single word be dropped, which tends to mislead the other, that principle will not be allowed to operate."⁴ The above principles as to mere nondis-

² *Carson v. Berson*, 86 Cal. 433, 25 Pac. 7; *Chickasaw County &c. Fire Ins. Co. v. Weller*, 98 Iowa 731, 68 N. W. 443.

³ *Turner v. Harvey*, Jac. 178; *Davies v. Cooper*, 5 Myl. & C. 270; *Roseman v. Canovan*, 43 Cal. 110; *Jackson v. Combs*, 7 Mack. (D. C.) 608, 1 L. R. A. 742; *Mitchell v. McDougall*, 62 Ill. 498; *Hayner v. McIlwain*, 53 Ill. App. 652; *Luthy v. Kline*, 56 Ill. App. 314; *Court v. Snyder*, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. 247; *Williams v. Beazley*, 3 J. J. Marsh. (Ky.) 577; *Potts v. Chapin*, 133 Mass. 276; *Williams v. Spurr*, 24 Mich. 335; *Drake v. Collins*, 5 How. (Miss.) 253; *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636; *People's Bank v. Bogaert*, 81 N. Y. 101, 37 Am. Rep. 481; *Nickley v. Thomas*, 22 Barb. (N. Y.) 652; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; *Wilkinson v. Suplee*, 166 Pa. St. 315, 31 Atl. 36; *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, 4 L. ed. 214; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748; *Pennybacker v. Laidley*, 33

W. Va. 624, 11 S. E. 39; *Dickson v. Pritchard*, 111 Wis. 310, 87 N. W. 292.

⁴ *Turner v. Harvey*, Jac. 178; *Dolman v. Nokes*, 22 Beav. 402; *Fox v. Mackreth*, 3 Bro. Ch. 45; *Stackpole v. Hancock*, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814; *Akers v. Martin*, 110 Ky. 335, 61 S. W. 465; *Nickley v. Thomas*, 22 Barb. (N. Y.) 652; *Bench v. Sheldon*, 14 Barb. (N. Y.) 66; *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.) 390, reversed on other grounds in 9 Wend. (N. Y.) 511; *Smith v. Beatty*, 2 Ired. Eq. (N. Car.) 456, 40 Am. Dec. 435. See also, *Active Concealment*. "Mere nondisclosure of material facts, however morally censurable, would, in my opinion, form no grounds for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial or fragmentary statement of fact, as that the holding of that which is not stated makes that which is stated absolutely false." *Peek v. Gurney*, L. R. 6 H. L. 377. For a good case il-

closure find their application in those instances where the parties deal at arm's length. Where no confidential relation, actual or implied, exists, one is not bound to make known facts equally within the means of knowledge of both parties; and upon failure so to do it will not give rise to an action for the avoidance or for the rescission of the contract.⁵ The above is the common-law rule. By weight of authority the same principle is applied in equity.⁶

illustrating the distinction between active concealment and silence, see *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401. See, however, *Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Perkins v. McGavock, Cooke* (Tenn.) 415; *Trigg v. Read, 5 Humphrey* (Tenn.) 529, 42 Am. Dec. 447.

⁵ *Keates v. Cadogan*, 10 C. B. 591, 70 E. C. L. 591; *Southerne v. Howe*, 2 Rolle 5; *Hill v. Balls*, 2 H. & N. 299; *Burnett v. Stanton*, 2 Ala. 181; *Armstrong v. Bufford*, 51 Ala. 410; *Moses v. Katzenberger*, 84 Ala. 95, 4 So. 237; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Cogel v. Kniseley*, 89 Ill. 598; *Roper v. Sangamon Lodge No. 6*, 91 Ill. 518, 33 Am. Rep. 60; *McAroy v. Wright*, 25 Ind. 22; *Dean v. Morey*, 33 Iowa 120; *Hobbs v. Parker*, 31 Maine 143; *Hall v. Thompson*, 1 Sm. & M. (Miss.) 443; *Stewart v. Dugin*, 4 Mo. 245, 28 Am. Dec. 348; *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416; *Kircher v. Conrad*, 9 Mont. 191, 23 Pac. 74, 7 L. R. A. 471, 18 Am. St. 731; *Jones v. Edwards*, 1 Nebr. 170; *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481; *Thompson v. Morris*, 5 Jones L. (N. Car.) 151; *Brown v. Gray*, 6 Jones L. (N. Car.) 103, 72 Am. Dec. 563; *Walsh v. Hall*, 66 N. Car. 233; *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454; *Kintzing v. McElrath*, 5 Pa. St. 467; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; *In re Butler's Appeal*, 26 Pa. St. 63; *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624; *McCall v. Davis*, 56 Pa. St. 431, 94 Am. Dec. 92; *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, 4 L. ed. 214; *Blydenburgh v. Welsh*, 1 Baldw. (U. S.) 331, Fed. Cas. No. 1583.

⁶ *Davies v. London & C. Ins. Co.*, 8

Ch. Div. 469; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Hemingway v. Coleman*, 49 Conn. 390, 44 Am. Rep. 243; *Pickering v. Day*, 3 Houst. (Del.) 474, 95 Am. Dec. 291; *Randolph v. Allen*, 73 Fed. 23, 19 C. C. A. 353, 41 U. S. App. 117; *Mitchell v. McDougall*, 62 Ill. 498; *Jackson v. Miner*, 101 Ill. 550; *Mills' Heirs v. Lee*, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118; *Smith v. Fisher*, 5 J. J. Marsh. (Ky.) 194; *Williams v. Beazley*, 3 J. J. Marsh. (Ky.) 577; *Hall v. Thompson*, 1 Sm. & M. (Miss.) 443; *Young v. Bumpass*, *Freem.* (Miss.) 241; *Jillett v. Union Nat. Bank*, 56 Mo. 304; *Conover v. Wardell*, 22 N. J. Eq. 492; *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827; *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581; *Smith v. Beatty*, 2 Ired. Eq. (N. Car.) 456, 40 Am. Dec. 435; *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624; *Neill v. Shamburg*, 158 Pa. St. 263, 27 Atl. 992; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; *In re Butler's Appeal*, 26 Pa. St. 63; *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39. "If the mistake is not in the expression of the agreement, but in some fact materially inducing it, the mere knowledge by one party of a mistake in the other party does not, in the absence of a duty to disclose it, constitute sufficient grounds, in equity, to have the agreement canceled. If the parties are at arm's length, either may remain silent. The case, however, is otherwise if there be a duty to disclose and the party who is under such duty does not disclose. He will then not be permitted by a court of equity to hold the other party to his agreement." *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135.

§ 122. **Fact peculiarly within the knowledge of one party.** The mere fact that circumstances material to the inducement of the contract are peculiarly within the knowledge of one of the parties does not, in the absence of any relation of trust and confidence, impose upon him the duty to impart such knowledge to the other.⁷ Consequently, when there are no peculiar circumstances calling for disclosure, such as some confidential or fiduciary relation existing between the parties, a purchaser, having superior knowledge of value, does not commit fraud merely by purchasing without disclosing his knowledge of the value of the thing purchased.⁸ So, on the other hand no legal obligation rests on the vendor to inform the purchaser that he is under such a mistake, when the mistake is not induced by the act of the vendor. The principle of *caveat emptor* applies.⁹

⁷ *Fox v. Mackreth*, 3 Bro. C. C. 45, 2 Cox 158, 2 R. R. 55; *Turner v. Harvey*, Jac. 178; *Ex parte Hammond*, 6 DeG. M. & G. 699; *Van Arsdale v. Howard*, 5 Ala. 596; *Otis v. Raymond*, 3 Conn. 413; *Mitchell v. McDougall*, 62 Ill. 498; *Jackson v. Miner*, 101 Ill. 550; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Comrs. Tippecanoe County v. Reynolds*, 44 Ind. 509; *Williams v. Beazley*, 3 J. J. Marsh. (Ky.) 577; *Smith v. Fisher*, 5 J. J. Marsh. (Ky.) 188; *Taylor v. Bradshaw*, 6 T. B. Mon. (Ky.) 145, 17 Am. Dec. 132; *Faulk v. Hough*, 14 La. Ann. 659; *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Williams v. Spurr*, 24 Mich. 335; *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827; *Shank v. Shoemaker*, 18 N. Y. 489; *Dambmann v. Schulting*, 75 N. Y. 55; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481; *McMichael v. Kilmer*, 76 N. Y. 36, reversing 12 Hun (N. Y.) 336; *Bench v. Sheldon*, 14 Barb. (N. Y.) 66; *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581; *Setzar v. Wilson*, 4 Ired. L. (N. Car.) 501; *Smith v. Beatty*, 2 Ired. Eq. (N. Car.) 456, 40 Am. Dec. 435; *Kintzing v. McElrath*, 5 Pa. St. 467; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; *In re Butler's Appeal*, 26 Pa. St. 63; *Neill v. Shamburg*, 158 Pa. St. 263, 27 Atl. 992; *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, 4 L. ed. 214.

⁸ *Pratt Land &c. Co. v. McClain*, 135 Ala. 452, 33 So. 185, 93 Am. St. 35. In the above case the plaintiff's property had increased in value on account of improvement in a nearby city. To same effect, *Burt v. Mason*, 97 Mich. 127, 56 N. W. 365. In the above case it was held that the vendee need not reveal the fact that a railroad was prospected close to the place bought. *Smith v. Beatty*, 2 Ired. Eq. (N. Car.) 456, 40 Am. Dec. 435. In the above case the lessee failed to disclose to the lessor that there was a valuable gold mine on the land. *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661. In the above case the vendor had no knowledge of sand chrome on his land, and the vendee failed to reveal its existence. *Guaranty Safe Deposit &c. Co. v. Liebold*, 207 Pa. 399, 56 Atl. 951; *Standard Steel Car Co. v. Stamm*, 207 Pa. 418, 56 Atl. 954. In the two preceding cases the vendee failed to reveal that a large manufacturing plant would be located near the property bought. *Boyd v. Leith* (Tex. Civ. App.), 50 S. W. 618. Vendee need not reveal that a railroad would pass close to the land. See also, *Dolman v. Nokes*, 22 Beav. 402; *Mitchell v. McDougall*, 62 Ill. 498. See, however, *Williams v. Beazley*, 3 J. J. Marsh. (Ky.) 577; *Perkins v. McGavock*, *Cooke* (Tenn.) 415.

⁹ *Ward v. Hobbs*, 3 Q. B. D. 150, 4

§ 123. **Silence where there is a duty to speak.**—It is well settled that silence, when there is a duty to disclose a material fact, constitutes fraud.¹⁰ This principle, while true, gives rise to difficulty because it is hard to determine just when there is a duty to speak. A review of the cases shows, however, that there is a duty to make a full disclosure when the parties stand in a confidential relation one to the other; there is also a duty to make a full disclosure where, by reason of the subject-matter with reference to which the parties are dealing or other circumstances, a duty is imposed, legal or equitable, upon the dominant party, to make known all the material facts known to him and not known to the other. The truth of this will be demonstrated in the succeeding sections of this chapter.

§ 124. **Relations of trust and confidence.**—No principle of law is better established than that whenever a party to a contract occupies a relation of trust and confidence, actual or implied, the dominant party must make a full disclosure of all material facts.¹¹

App. Cas. 13; *Keates v. Lord Cadogan*, 10 C. B. 591. See also, opinion of Blackburn, J., in *Smith v. Hughes*, L. R. 6 Q. B. 597; *Wilson v. Higbee*, 62 Fed. 723. Kent, in his Commentaries, states, "That as a general rule each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation." 2 Kent 483, 12th Ed. In regard to the above statement Benjamin says: "The courts of equity even fall far short of this principle." Benjamin on Sales, 7th Ed. 421. It was seen that Benjamin's criticism is justified, although there are many cases which use language similar to that used by Chancellor Kent. However, it will be found upon reviewing these cases that they were in the main decided upon other grounds, or that the party making the nondisclosure was also guilty of active concealment, or that the omission to disclose was so unconscionable as to prevent specific performance.

¹⁰ *Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *Loewer v. Harris*, 14 U. S. App. 615, 57 Fed. 368, 6 C. C. A. 394;

Cecil v. Spurger, 32 Mo. 462, 82 Am. Dec. 140; *Dambmann v. Schulting*, 75 N. Y. 55; *Ingram v. Morgan*, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626. See also, *Jackson v. Combs*, 7 Mackey (D. C.) 608, 1 L. R. A. 742.

¹¹ *Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *Davies v. London & C. Ins. Co.*, 8 Ch. Div. 469; *Dunne v. English*, L. R. 18 Eq. 524; *Dent v. Bennett*, 4 Myl. & C. 269; *Todd v. Wilson*, 9 Beav. 486; *Billage v. Southee*, 9 Hare 534; *Warren v. Schainwald*, 62 Cal. 56; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. 137; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Caldwell v. Davis*, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; *Heminway v. Coleman*, 49 Conn. 390, 44 Am. Rep. 243; *Daniel v. Brown*, 33 Fed. 849; *Capital Bank v. Rutherford*, 70 Ga. 57; *Poullain v. Poullain*, 76 Ga. 420, 4 S. E. 92; *Hopkins v. Watt*, 13 Ill. 298; *Mason v. Bauman*, 62 Ill. 76; *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59; *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Green v. Peeso*, 92 Iowa 261, 60 N. W. 531; *Purslow v. Jackson*, 93 Iowa 694, 62 N. W. 12; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125, 12

The necessity for a full and fair disclosure between parties that sustain a formal and technical fiduciary relation towards each other has already been given a somewhat thorough review under the title, "Fraud Where There is Fiduciary or Confidential Relation," in the chapter entitled "Fraud and Misrepresentation" and nothing further will be added here on that phase of the subject.¹²

§ 125. **Failure to disclose changes in fact.**—Although a contrary doctrine has been announced,¹³ it may be stated as a general rule that, if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterward altered to the knowledge of the party making the representation but not to the knowledge of the party to whom the representation was made, the alteration of the circumstances may well affect the course of conduct which may be pursued by the party to whom the representation is made. It is then the duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration in the circumstances.¹⁴ For instance, if, after a merchant has made a statement to a commercial agency as to his solvency, there is a change for the worse therein, it is his duty to notify such agency that parties with whom he has commercial

Am. Dec. 362; *Kruson v. Kruson*, 1 Bibb (Ky.) 183; *Prentiss v. Russ*, 16 Maine 30; *Franklin Bank v. Cooper*, 36 Maine 179; *Gray v. Emmons*, 7 Mich. 533; *Moore v. Mandlebaum*, 8 Mich. 435; *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651; *Finegan v. Theisen*, 92 Mich. 173, 52 N. W. 612; *Pomeroy v. Benton*, 57 Mo. 531; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 118; *Morris v. Budlong*, 16 Hun (N. Y.) 570; *Miller v. Curtiss*, 15 N. Y. Supp. 140, 39 N. Y. St. 383, 59 N. Y. Super. Ct. 503, affirmed without opinion in 133 N. Y. 622, 30 N. E. 1150; *Kline v. Kline*, 57 Pa. St. 120, 98 Am. Dec. 206; *Bennett v. McMillin*, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121; *Jeffries v. Wiester*, 2 Sawy. (U. S.) 135, Fed. Cas. No. 7254; *Crump v. United States Min. Co.*, 7 Gratt.

(Va.) 352, 56 Am. Dec. 116; *Sexton v. Sexton*, 9 Gratt. (Va.) 204; *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149; *Bosher v. Richmond & Co. Land Co.*, 89 Va. 455, 16 S. E. 360, 37 Am. St. 879; *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. 939; *Bell v. Bell*, 3 W. Va. 183; *Busian v. Milwaukee & C. R. Co.*, 56 Wis. 325, 14 N. W. 452; *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769.

¹² See *Anti-Fraud and Misrepresentation*, Ch. 4.

¹³ *Arkwright v. Newbold*, 17 Ch. Div. 301. See also, *Corbett v. Gilbert*, 24 Ga. 454.

¹⁴ *Trall v. Baring*, 4 DeG. J. & S. 318; *In re Scottish Petroleum Co.*, 23 Ch. Div. 413; *Loewer v. Harris*, 57 Fed. 368, 6 C. C. A. 394; *Janes v. Mercer University*, 17 Ga. 515; *Lindauer v. Hay*, 61 Iowa 663, 17 N. W. 98; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. 425.

dealings may not be misled as to the extent of credit they may safely give, and if he fails to do so and obtains credit on the strength of the original statement to the agency he is guilty of fraud.¹⁵ The same principle applies to a statement believed to be true at the time it is made, but subsequently discovered to be false. If one discovers its falsity before it is acted upon by the other party, he must correct the statement, otherwise, he is guilty of fraud.¹⁶ Likewise, it is fraud for another to secretly change the conditions and to procure another to act under an assumption that they have not been changed.¹⁷

§ 126. **Insurance cases.**—The insurer must to greater or less degree rely on the representations of the insured. Consequently the parties to a contract of insurance are considered as occupying a relation of trust and confidence, so that the insured must generally make a full disclosure of all facts material to the agreement, as the insurer acts on the assumption that a full disclosure has been made.¹⁸ Thus, the existence in the hands of the mortgagee of an outstanding unfiled chattel mortgage upon a stock of goods has been held a fact material to the risk in a contract of insurance of the goods, even though the instrument contained a clause that it "shall not be valid until and unless filed."¹⁹ This rule does not require the applicants to give information on a fact which the insurer is presumed to know unless there is a

¹⁵ *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. 425.

¹⁶ *Reynell v. Sprye*, 1 DeG. M. & G. 660; *Davies v. London & C. Ins. Co.*, 8 Ch. Div. 469; *Pettigrew v. Chellis*, 41 N. H. 95. In the case last cited it is held that if the mistake is not discovered until after the consummation of the contract the agreement induced thereby cannot be avoided because of failure to correct the same.

¹⁷ *Lancaster County Bank v. Albright*, 21 Pa. St. 228.

¹⁸ *Bates v. Hewitt*, L. R. 2 Q. B. 595; *Ionides v. Pender*, L. R. 9 Q. B. 531; *Blackburn v. Vigors*, 12 App. Cas. 531; *Hart v. British Ins. Co.*, 80 Cal. 440, 22 Pac. 302; *Chicago & C. R. Co. v. Thompson*, 19 Ill. 577; *Lycoming Ins. Co. v. Rubin*, 79 Ill. 402; *Walden v. Louisiana Ins. Co.*, 12 La. 134, 32 Am. Dec. 116; *Augusta Ins.*

& C. Co. v. Abbott, 12 Md. 348; *Stocker v. Merrimack & C. Ins. Co.* 6 Mass. 220; *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508; *Rosenheim v. American Ins. Co.*, 33 Mo. 230; *New York Bowery Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Burritt v. Saratoga County & C. Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Smith v. Aetna Life Ins. Co.*, 49 N. Y. 211; *Ely v. Hallett*, 2 Caines (N. Y.) 57; *Howell v. Cincinnati Ins. Co.*, 7 Ohio 276; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170, 7 L. ed. 98; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507, 9 L. ed. 512; *Sun Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 27 L. ed. 337.

¹⁹ *Modsen v. Farmers' & C. Ins. Co.*, 87 Nebr. 107, 126 N. W. 1086, 29 L. R. A. (N. S.) 97.

direct inquiry relative thereto; but any matter material to the risk and unknown to the insurer must be communicated.²⁰ However, where a written application is furnished by the insurer to the insured which contains questions to be answered by the latter, it is held that an innocent failure to communicate facts not inquired about will not avoid the policy.²¹ The insured, it is said in such a case, has a right to suppose that the insurer will make 'proper inquiries concerning all facts except such as are supposed to be known or are regarded as immaterial.'²² In the jurisdictions so holding mere nondisclosure does not avoid the policy,²³ in the absence of intentional bad faith on the part of the insured.²⁴ Concealment involves not only the materiality of the fact withheld, and which ought to have been communicated, but also the design and intention of the insured in withholding it.

²⁰ *Bebee v. Hartford County &c. Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 624; *Security Trust Co. v. Tarpey*, 182 Ill. 52, 54 N. E. 1041; *German-American Ins. Co. v. Norris*, 100 Ky. 29, 18 Ky. L. 537, 37 S. W. 267, 66 Am. St. 324; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *Richards v. Washington &c. Ins. Co.*, 60 Mich. 420, 27 N. W. 586; *De Longuemere v. Fire Ins. Co.*, 10 Johns. (N. Y.) 120; *Hey v. Guarantor's Liability Indemnity Co.*, 181 Pa. St. 220, 37 Atl. 402, 59 Am. St. 644; *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 235, 12 L. ed. 1061; *Wright v. Hartford Fire Ins. Co.*, 36 Wis. 522.

²¹ *Iowa Life Ins. Co. v. Zehr*, 91 Ill. App. 93; *Commonwealth v. Massachusetts Fire Ins. Co.*, 112 Mass. 116; *Washington Mfg. Co. v. Weymouth &c. Ins. Co.*, 135 Mass. 503; *Boggs v. American Ins. Co.*, 30 Mo. 63; *Gates v. Madison County Ins. Co.*, 5 N. Y. 469; *Rawls v. American &c. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280; *Browning v. Home Ins. Co.*, 71 N. Y. 508, 27 Am. Rep. 86; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77.

²² *Continental Ins. Co. v. Munns*, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430; *Seal v. Farmers' &c. Ins. Co.*, 59 Nebr. 253, 80 N. W. 807; *Arthur v. Palatine Ins. Co.*, 35 Ore. 27, 57 Pac.

62, 76 Am. St. 450; *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 235.

²³ *Continental Ins. Co. v. Munns*, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430; *Washington &c. Mfg. Co. v. Weymouth &c. Ins. Co.*, 135 Mass. 503; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98, 33 N. W. 31; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, 17 N. W. 726; *Seal v. Farmers' &c. Ins. Co.*, 59 Nebr. 253, 80 N. W. 807; *Hanover Fire Ins. Co. v. Bohn*, 48 Nebr. 743, 67 N. W. 774, 58 Am. St. 719; *Insurance Co. of North America v. Bachler*, 44 Nebr. 549, 62 N. W. 911; *Arthur v. Palatine Ins. Co.*, 35 Ore. 27, 57 Pac. 62, 76 Am. St. 450; *Koshland v. Hartford Fire Ins. Co.*, 31 Ore. 402, 49 Pac. 866; *Hey v. Guarantor's Liability Indemnity Co.*, 181 Pa. St. 220, 37 Atl. 402, 59 Am. St. 644; *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 235, 12 L. ed. 1061; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609; *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91.

²⁴ *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

If an inquiry is made about a material fact, and that fact is not disclosed upon such inquiry, it is very likely that the person questioned intended to withhold it; but if no inquiry is made the intention to withhold the fact is not so plain.²⁵

The insured can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and which actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent.²⁶ Consequently, where upon the face of the application a question appears to be not answered at all or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial.²⁷ The distinction between an answer apparently complete, but in fact incomplete and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurer, may be illustrated by two cases of fire insurance which are governed by the same rules in this respect as cases of life insurance. If on applying for insurance upon a building against fire, it is asked whether the property is encumbered, and for what amount, and the answer discloses one mortgage, but in fact there are two, the policy issued thereon is avoided.²⁸ But if to the same question he merely answers that the property is encumbered, without stating the amount of the encumbrances, the

²⁵ "Concealment is the designed and intentional withholding of any fact, material to the risk, which the assured in honesty and good faith ought to communicate." *Connecticut Fire Ins. Co. v. Colorado &c. Milling Co.*, 50 Colo. 424, 116 Pac. 154, quoting from *Clark v. Union Mut. Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721.

²⁶ *Penn Mut. Life Ins. Co. v. Mechanics' Sav. &c. Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

²⁷ *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Hall v. Peoples' Fire Ins. Co.*, 6 Gray (Mass.) 185; *Liberty Hall Assn. v. Housatonic Mut. Fire Ins. Co.*, 7 Gray (Mass.) 261; *American Life Ins. Co. v. Mahone*, 56 Miss. 180;

Carson v. Jersey City Ins. Co., 43 N. J. L. 300, 44 N. J. L. 210, 39 Am. Rep. 584; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Higgins v. Phoenix Ins. Co.*, 74 N. Y. 6; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520, 36 Am. Rep. 676; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28; *Phoenix Ins. Co. v. Rad-din*, 120 U. S. 183, 30 L. ed. 644; *Hosford v. Germania Ins. Co.*, 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. ed. 196; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492, 40 N. W. 386.

²⁸ *Towne v. Fitchburg &c. Ins. Co.*, 7 Allen (Mass.) 51.

issue of the policy without further inquiry is a waiver of the omission to state the amount.²⁹

§ 127. **Suretyship.**—It is hard to formulate any general rule applicable to this branch of the subject. In contracts of suretyship there is no universal obligation to make disclosure.³⁰ The law does not, as a rule, require that the party to whom the security is given shall seek out the surety and explain to him the nature and extent of the obligation, nor does it hold him responsible for fraudulent misrepresentation made to the surety by the principal, or by a third party, unless such misrepresentations are made with his knowledge or consent.³¹ Consequently the obligee or creditor is not required in the absence of inquiry to disclose to the surety the insolvency of his principal at the time the contract of surety is entered into.³² So far as the general character or reputation of the principal is concerned, it is to be assumed that

²⁹ *Nichols v. Fayette Fire Ins. Co.*, 1 Allen (Mass.) 63; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183. See further as to insurance in a subsequent volume under title Insurance.

³⁰ *Railton v. Matthews*, 10 Cl. & F. 934. For a discussion as to when disclosures are necessary, see *Opie v. Pacific Investment Co.*, 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778.

³¹ *Cobbet v. Brock*, 20 Beav. 524; *Wallace v. Wilder*, 13 Fed. 707; *Brown v. Davenport*, 76 Ga. 799; *Young v. Ward*, 21 Ill. 223; *Ladd v. Trustees of Township Forty-one*, 80 Ill. 233; *Anderson v. Warne*, 71 Ill. 20, 22 Am. St. 83; *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237; *Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196; *Home Ins. Co. v. Holway*, 55 Iowa 571, 39 Am. Rep. 179; *Graves v. Tucker*, 10 Sm. & M. (Miss.) 9; *Sooy v. State*, 39 N. J. L. 135; *Western New York Life Ins. Co. v. Clinton*, 66 N. Y. 326; *George v. Tate*, 102 U. S. 564, 26 L. ed. 232; *Mason Lumber Co. v. Buchtel*, 101 U. S. 633, 25 L. ed. 1072; *Dair v. United States*, 16 Wall. (U. S.) 1, 21 L. ed. 491; *Ryan v. United States*, 19 Wall. (U. S.) 514, 22 L. ed. 172; *United States v. Girault*, 11 How (U. S.) 22; *Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284; *Atlantic Trust & Co. v. Union Trust & Co. Corporation*, 110 Va.

286, 67 S. E. 182, 135 Am. St. 937; *Griffith v. Reynolds*, 4 Gratt. (Va.) 46. "It is the business of the surety to ascertain who the true principal is, and any false representations made to induce him to sign the obligation as to the principal, if unknown to the obligee, will not defeat his right to recover against the sureties." *Williams v. Morris*, — Ark. —, 138 S. W. 464. But it seems to be equally well settled that where, with the knowledge or assent of the creditor, there is a misrepresentation made to the surety with regard to any material fact, which, if known to him, might have prevented him from entering into the undertaking of suretyship, it will thereby be rendered invalid and the surety discharged from his liability. *Atlantic Trust & Co. v. Union Trust & Co. Corporation*, 110 Va. 286, 67 S. E. 182, 135 Am. St. 937.

³² *Roper v. Sangamon Lodge*, 91 Ill. 518, 33 Am. Rep. 60; *Ham v. Greve*, 34 Ind. 18; *Bank of Monroe v. Gifford*, 72 Iowa 750, 32 N. W. 669; *Sebald v. Citizens' Deposit Bank*, 31 Ky. L. 1244, 105 S. W. 130, 14 L. R. A. (N. S.) 376; *First National Bank v. Johnson*, 133 Mich. 700, 95 N. W. 975, 103 Am. St. 468; *Farmers' & Bank v. Braden*, 145 Pa. 473, 22 Atl. 1045; *Noble v. Scofield*, 44 Vt. 281.

the surety has informed himself, or, if not, that he is willing to take the risk involved on such knowledge as he may have.

It is well settled, however, that a person proposing to become surety for the conduct or contract of another has a right to be treated with perfect good faith.³³ Consequently, it is held by the weight of authority that if the creditor fails to reveal any defalcation, misappropriation or failure to account for a previous indebtedness, existing at the time of the execution of the contract of surety or guaranty, it will release the surety if unknown to him.³⁴ Thus, when an agent has acted dishonestly in his employment, the principal, with knowledge of the fact, cannot accept a surety for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out as a person worthy of confidence. The failure to communicate such knowledge, under such circumstances, would be a fraud upon the surety. The bad faith in withholding from the surety such information, so material to the risk, is manifested not only by the fact that the dishonest character of the agent is peculiarly within the knowledge of the principal, but the holding him out as a person entitled to confidence, by continuing him in the service, is held to be equivalent to a declaration that the principal has no knowledge of the dishonesty of the agent.³⁵ However, if the previous defalcation

³³ *Atlantic Trust &c. Co. v. Union Trust &c. Corporation*, 110 Va. 286, 67 S. E. 182, 135 Am. St. 937. See also, *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231.

³⁴ *Smith v. Bank of Scotland*, 1 Dow 272; *Railton v. Matthews*, 10 Cl. & F. 934; *Lee v. Jones*, 17 C. B. (N. S.) 482; *Cashin v. Perth*, 7 Grant (U. C.) 340; *Peers v. Oxford*, 17 Grant. (U. C.) 472; *Phillips v. Foxhall*, L. R. 7 Q. B. 666; *Gananogue v. Stunden*, 1 Ont. 1; *Guardian &c. Ins. Co. v. Thompson*, 68 Cal. 208, 9 Pac. 1; *Drabek v. Grand Lodge*, 24 Ill. App. 82; *Fishburn v. Jones*, 37 Ind. 119; *Wilson v. Monticello*, 85 Ind. 10; *Connecticut Life Ins. Co. v. Scott*, 81 Ky. 540; *Franklin Bank v. Cooper*, 36 Maine 179; *Franklin Bank v. Stevens*, 39 Maine 532; *Harrison v. Lumberman's &c.*

Ins. Co., 8 Mo. App. 37; *Farmers' Nat. Bank v. Van Slyke*, 49 Hun (N. Y.) 7, 1 N. Y. S. 508; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; *Wilmington &c. R. Co. v. Ling*, 18 S. Car. 116; *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 23 L. ed. 699, 51 How. Pr. (N. Y.) 413; *Remington Sewing-Machine Co. v. Kezer-tee*, 49 Wis. 409, 5 N. W. 809.

³⁵ *Guardian Fire Ins. Co. v. Thompson*, 68 Cal. 208, 9 Pac. 1; *Dinsmore v. Tidball*, 34 Ohio St. 411. See also, *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50. The above principle does not apply to sureties on official bonds. They are not discharged by fraud or default on the part of the principal, or failure on the part of the government to give information relative thereto. *San Francisco v. Staude*, 98 Cal. 560, 28 Pac. 778; *Fidelity &c. Co. v. Commonwealth*, 104 Ky. 579, 47 S. W.

is unknown to the creditor the surety is not discharged.³⁶ Likewise, in the absence of any attempt to conceal or culpable negligence, failure to reveal the untrustworthiness of an official does not release the surety.³⁷ But a secret agreement between the principal and the creditor, which in any way changes the surety's liability, is a fraud which will discharge him.³⁸ Thus, the non-disclosure of a secret partnership between the principal and his creditor has been held such fraud as would discharge the surety from his obligation.³⁹ So, if the surety understands and is led to believe that he is merely securing a particular debt or going security for a particular purpose, and a preexisting indebtedness, unknown to the security, is included in the amount secured, this is a material fact which will avoid the contract of the surety.⁴⁰

It appears from the foregoing that while, as between creditor

579; *Detroit v. Weber*, 26 Mich. 284; *Bower v. Commissioners*, 25 Pa. St. 69; *Harrisburg v. Guiles*, 192 Pa. St. 191, 44 Atl. 48; *Hallettsville v. Long*, 11 Tex. Civ. App. 180, 32 S. W. 567; *Farrar v. United States*, 5 Pet. (U. S.) 373, 8 L. ed. 159; *United States v. Boyd*, 5 How. (U. S.) 29; *Ryan v. United States*, 19 Wall. (U. S.) 514, 22 L. ed. 172; *Osborne v. United States*, 19 Wall. (U. S.) 577, 22 L. ed. 208, Fed. Cas. No. 10599; *State v. Bates*, 36 Vt. 387.

³⁶ *Home Ins. Co. v. Holway*, 55 Iowa 571, 8 N. W. 457, 39 Am. Rep. 179; *Amherst Bank v. Root*, 2 Metc. (Ky.) 522; *State v. Dunn*, 11 La. Ann. 549; *Farmington v. Stanley*, 60 Maine 472; *Tapley v. Martin*, 116 Mass. 275; *State v. Atherton*, 40 Mo. 209; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; *Domestic Sewing Mach. Co. v. Jackson*, 15 Lea (Tenn.) 418; *Screwmen's Ben. Assn. v. Smith*, 70 Tex. 168, 7 S. W. 793; *Ætna Life Ins. Co. v. Mabbett*, 18 Wis. 667.

³⁷ *Guardians of Stokesley Union v. Strother*, 22 L. T. 84; *Anaheim &c. Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048; *Atlantic &c. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *Ætna Life Ins. Co. v. Mabbett*, 18 Wis. 667. Where additional

security was taken on account of the gambling of the cashier, the fact that the gambling was not disclosed did not release the surety. The gambling related, not to the subject of the transaction, but to the general character of the cashier. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231.

³⁸ *Pendlebury v. Walker*, 4 Y. & C. 424; *Pidcock v. Bishop*, 3 B. & C. 605; *Comstock v. Gage*, 91 Ill. 328; *Springfield Engine &c. Co. v. Park*, 3 Ind. App. 173; *Peck v. Durett's Admr.*, 9 Dana (Ky.) 486.

³⁹ *Jungk v. Holbrook*, 15 Utah 198, 62 Am. St. 921. See also, *Phoenix Mut. Life Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 21; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. 972.

⁴⁰ *Stone v. Compton*, 5 Bing. 142; *Pidcock v. Bishop*, 3 B. & C. 605; *Hamilton v. Watson*, 12 Cl. & F. 109; *Wason v. Wareing*, 15 Beav. 151; *Owen v. Homan*, 3 Macn. & G. 378, 4 H. L. Cas. 997, 17 Jur. 861, 19 L. J. Ch. 549; *Doughty v. Savage*, 28 Conn. 146; *Comstock v. Gage*, 91 Ill. 328; *Fassnacht v. Emsing & Gagen Co.*, 18 Ind. App. 80, 47 N. E. 480, 63 Am. St. 322; *Warren v. Branch*, 15 W. Va. 21. See, however, *Hamilton v. Wilson*, 12 Cl. & F. 109; *Wythes v. Labouchere*, 3 DeG. & J. 593, 5 Jur. (N. S.) 499.

and surety there is no positive legal duty which requires the creditor to give information as to his relation with and circumstances of the debtor, he is bound to exercise good faith in his dealing with the surety. The surety is, at least, entitled to know the real nature of the transaction, and liability he is undertaking; and if the creditor undertakes to make known facts he is under no obligation to disclose he is bound to represent them as they are in all respects material to the surety. The creditor having undertaken to make known the facts, and his representation as to them being material and false, the surety cannot be held liable unless he has notice of the true character of the loan.⁴¹

§ 128. **Sales.**—Where there is no relation of a confidential or fiduciary character between the vendor and the vendee, neither is under any obligation to disclose to the other facts material to the sale unless there is a legal or equitable obligation to communicate them, so that he cannot innocently keep silence.⁴² It is held, however, that in the sale of real estate the vendor is bound to disclose any defect in the title to or encumbrance on the property sold, known to him and not known to the purchaser, and that fail-

⁴¹ *Atlantic Trust &c. Co. v. Union Trust &c. Corporation*, 110 Va. 286, 67 S. E. 182, 135 Am. St. 937. "A representation merely that the persons whose names appear on the note are 'good' does not constitute a warranty that the signatures are genuine." *Milan Bank v. Richmond*, 235 Mo. 532, 139 S. W. 352. In the above case the creditor, in order to induce the defendant to go his son's security represented that the son has already deposited with it a "good" note as collateral. It developed that the signatures to the collateral note were forged. The court used the above language in answer to the defense of forgery. The court said further that, "If the bank officials had had knowledge of the forgery, and then had made use of their possession of the note to induce respondent to become surety for his son a different question would be presented." "The additional statement of the cashier, and I am ready to say this note is all right, was but the expression of an opinion." The misrepresentation must be

one of fact, and not merely the expression of an opinion. *Evans v. Keeland*, 9 Ala. 42. As to the duties the creditor owes the surety after the contract of suretyship has been entered into, see *Davenport v. State Banking Co.*, 126 Ga. 136, 54 S. E. 977, 115 Am. St. 68, and note. As to the duty of the surety to make disclosures to the creditor, see *Opie v. Pacific Investment Co.*, 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778.

⁴² *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Saltonstall v. Gordon*, 33 Ala. 149; *Griel v. Lomax*, 89 Ala. 420, 6 So. 741; *Camp v. Camp*, 2 Ala. 632, 36 Am. Dec. 423; *Lockridge v. Foster*, 5 Ill. 569; *Fish v. Cleland*, 33 Ill. 238; *Whitesides v. Taylor*, 105 Ill. 496; *Smith v. Fisher*, 5 J. J. Marsh. (Ky.) 188; *Hall v. Thompson*, 1 Sm. & M. (Miss.) 443; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Torrey v. Buck*, 2 N. J. Eq. 366; *Inness v. Willis*, 48 N. Y. Super. Ct. 188.

ure so to do will render the contract voidable at the vendee's option.⁴³ And this has been held to be true even though the encumbrance is of record.⁴⁴ Likewise, he is bound to disclose a deficiency in quantity which is not open and apparent, and of which he knows.⁴⁵ As has been seen, the purchaser of real property is not bound to disclose to the vendor the presence of minerals, or any other fact which affects the value of the land, in the absence of any confidential relations.⁴⁶ However, if the vendee, upon inquiry, denies knowledge of their existence,⁴⁷ or intentionally misleads the vendor,⁴⁸ the transaction is fraudulent.⁴⁹

In the sale of personal property, there is ordinarily no duty on the part of the vendor to disclose open and apparent defects, or extrinsic matters affecting the value of the property, when there is an opportunity to inspect and the defects or extrinsic matters are equally within the observation of both parties.⁵⁰ The vendor of personal property is bound, however, to disclose defects in his

⁴³ *Edwards v. M'Leay*, 2 Swanst. 287; *Ward v. Packard*, 18 Cal. 391; *Crutchfield v. Danilly*, 16 Ga. 432; *Bryan v. Primm*, 1 Ill. 59; *Thomas v. Coultas*, 76 Ill. 493; *Anderson v. Buck*, 66 Iowa 490, 24 N. W. 10; *Nairn v. Ewalt*, 51 Kans. 355, 32 Pac. 1110; *Carr v. Callaghan*, 3 Litt. (Ky.) 365; *Glass v. Brown*, 6 T. B. Mon. (Ky.) 356; *Campbell v. Whittingham*, 5 J. J. Marsh. (Ky.) 96, 20 Am. Dec. 241; *Breckinridge v. Moore*, 3 B. Mon. (Ky.) 629; *Ruffner v. Ridley*, 81 Ky. 165, 4 Ky. L. 958; *Peak v. Gore*, 94 Ky. 533, 15 Ky. L. 278, 23 S. W. 356; *Tretheway v. Hulett*, 52 Minn. 448, 53 N. W. 1063; *Shiffer v. Dietz* (Sup. Ct. Spec. T.), 53 How Pr. (N. Y.) 372; *Babcock v. Case*, 61 Pa. St. 427, 100 Am. Dec. 654; *Johnson v. Pryor*, 5 Hayw. (Tenn.) 243; *Crawford v. Keebler*, 5 Lea (Tenn.) 547; *East Tennessee Nat. Bank v. First Nat. Bank*, 7 Lea (Tenn.) 420; *Max Meadows Land & Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Pollard v. Rogers*, 4 Call (Va.) 239; *Spencer v. Sandusky*, 46 W. Va. 582, 33 S. E. 221. See also, *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416 (as to sales of land by a trustee).

⁴⁴ *Napier v. Elam*, 6 Yerg. (Tenn.) 108.

⁴⁵ *Bedford v. Hickman*, 5 Call (Va.) 236, 2 Am. Dec. 590. See also, ante, § 79, Fraud.

⁴⁶ See ante, § 79 et seq., Fraud.

⁴⁷ *Smith v. Beatty*, 2 Ired. Eq. (N. Car.) 456, 40 Am. Dec. 435.

⁴⁸ *Caples v. Steel*, 7 Ore. 491.

⁴⁹ See ante, § 79 et seq., Fraud.

⁵⁰ *Burnett v. Stanton*, 2 Ala. 181; *Armstrong v. Bufford*, 51 Ala. 410; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Stewart v. Dugin*, 4 Mo. 245, 28 Am. Dec. 348; *Kircher v. Conrad*, 9 Mont. 191, 23 Pac. 74, 7 L. R. A. 471, 18 Am. St. 731; *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624. The following instruction, given by the trial court, has been approved: "When one sells personal property he impliedly warrants that it is merchantable and reasonably suited to the use intended, and that the seller knows of no latent defects. 'Latent defects' mean such defects as are hidden. The implied warranty, however, does not cover such defects which can be discovered by ordinary prudence and caution." *Puls v. Hornbeck*, 24 Okla. 288, 103 Pac. 665, 138 Am. St. 883. For the rule when the property is located at a distance, see *Hanks v. McKee*, 2 Litt. (Ky.) 227, 13 Am. Dec. 265. See ante, § 79, Fraud.

title.⁵¹ He is also bound to make known the encumbrances thereon,⁵² and latent defects therein of which he has knowledge, which will render the thing sold valueless for the purposes for which it is sold.⁵³ Thus it has been held that one who sells cattle at a sound price, with knowledge that they have Texas fever ticks on them, or any other infection affecting their value for the purposes for which they are bought, the infection not being easily detected by those having had no experience with it, and who fails to disclose his knowledge of the infection to the vendee, is guilty of the fraudulent concealment of a latent defect, for which he is liable, and the rule of caveat emptor does not apply. But the vendor is not answerable unless he had knowledge, prior to the time the sale was consummated, that the cattle had such ticks on them.⁵⁴ On the other hand, the purchaser of personal property is under no obligation to disclose to the seller any fact or circumstance affecting the value of the property, although such fact or circumstance may be particularly within his knowledge, and would defeat a sale if known to the vendor.⁵⁵

§ 129. **Warranties.**—The broad general principles relative to the necessity for a full and fair disclosure in the sale of chattels are somewhat restricted in their application by the law of implied

⁵¹ *Cross v. Gardner*, Carth. 90, 1 Sho. 68; *Peto v. Blades*, 5 Taunt. 657; *Bartholomew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251; *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 217; *Abbott v. Marshall*, 48 Maine 44.

⁵² *Merritt v. Robinson*, 35 Ark. 483; *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. 623; *Abbott v. Marshall*, 48 Maine 44; *Junkins v. Simpson*, 14 Maine 364. One impliedly warrants his title when he sells personal property as his own. *St. Anthony & Co. Elevator Co. v. Dawson*, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912, B. 1337. See also, *Bevan v. Muir*, 53 Wash. 54, 101 Pac. 485, 32 L. R. A. (N. S.) 588.

⁵³ *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110; *Puls v. Hornbeck*, 24 Okla. 288, 103 Pac. 665, 138 Am. St. 883; *Westmoreland v. Dixon*, 4 Hayw. (Tenn.) 223, 9 Am. Dec. 763. Compare with *Farren v. Dameron*, 99 Md. 323, 58 Atl. 367, 105 Am. St. 297.

See also, *Merchants' & Co. Bank v. Frazee*, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. 341; *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560 (sale of an automobile in an unsafe condition). See, however, *Court v. Snyder*, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. 247.

⁵⁴ *Puls v. Hornbeck*, 24 Okla. 288, 103 Pac. 665, 138 Am. St. 883.

⁵⁵ *Fox v. Mackreth*, 2 Bro. C. C. 400; *Turner v. Harvey*, Jac. 178; *Smith v. Fisher*, 5 J. J. Marsh. (Ky.) 188; *Williams v. Beazley*, 3 J. J. Marsh. (Ky.) 577; *Bench v. Sheldon*, 14 Barb. (N. Y.) 66; *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, 4 L. ed. 214. In the absence of any special circumstance which demands a full disclosure one purchasing a judgment is not bound to disclose facts affecting its value. In *re Butler's Appeal*, 26 Pa. St. 63.

warranties. As was seen in the preceding section, a vendor must disclose his title, and if he fails to do so the law implies a warranty of title in the sale of chattels, real or personal, in the actual or constructive possession of the vendor to a vendee, who honestly believes he is obtaining a clear title to the same. Furthermore, the implied warranty of title is a warranty of the whole title and protects against mortgages, liens, or other encumbrances.⁵⁶

There are few subjects of the law that appear, upon a cursory examination of the authorities, to be in such a hopeless state of confusion as that which relates to what constitutes proper exceptions to the rule of caveat emptor. It will be found, however, upon examination, that the cases on this subject are gov-

⁵⁶ *Western v. Short*, 12 B. Mon. (Ky.) 153; *Myers v. Smith*, 27 Md. 91; *Grose v. Hennessey*, 13 Allen (Mass.) 389; *Hunt v. Sackett*, 31 Mich. 18; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Hendrickson v. Back*, 74 Minn. 90, 76 N. W. 1019; *Davis v. Smith*, 7 Gil. (Minn.) 328; *Ranney v. Meisenheimer*, 61 Mo. App. 434; *Hickman v. Dill*, 39 Mo. App. 246; *Dryden v. Kellogg*, 2 Mo. App. 87; *Caproon v. Mitchell*, 77 Nebr. 562, 110 N. W. 378; *Hall v. Aitkin*, 25 Nebr. 360, 41 N. W. 192; *Partridge v. Dartmouth College*, 5 N. H. 286; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Higbie v. Rogers*, 63 N. J. Eq. 368, 50 Atl. 366; *McKnight v. Devlin*, 52 N. Y. 399, 11 Am. Rep. 715; *Rew v. Barber*, 3 Cow. (N. Y.) 272; *Bordewell v. Colie*, 1 Lans. (N. Y.) 141, affd. 45 N. Y. 494; *Vibbard v. Johnson*, 19 Johns. (N. Y.) 78; *McClure v. Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Hodges v. Wilkinson*, 111 N. Car. 56, 15 S. E. 941, 17 L. R. A. 545; *Clevenger v. Lewis*, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410n; *Patee v. Pelton*, 48 Vt. 182; *Baker v. McAllister*, 2 Wash. Terr. 48, 3 Pac. 581. "There is an implied warranty of title in sales of chattels, but not of quality." *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556n; *Lane v. Romer*, 2 Pin. (Wis.) 404, 2

Chand. (Wis.) 61. There is no implied warranty that the goods sold are the best of their kind, but merely that they are reasonably suitable for the purposes intended. *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Tennessee River & Co. v. Leeds*, 97 Tenn. 574, 37 S. W. 389; *Harris Bros. v. Waite*, 51 Vt. 480, 31 Am. Rep. 694. In the sale of realty the seller does not impliedly warrant his title to be perfect, but merely that it is marketable. *Revol v. Stroudback*, 107 La. 295, 31 So. 665; *Sisters of Mercy v. Benzinger*, 95 Md. 684, 53 Atl. 448; *Gump v. Sibley*, 79 Md. 165, 28 Atl. 977; *French v. Folsom*, 181 Mass. 483, 63 N. E. 938; *Conley v. Finn*, 171 Mass. 70, 50 N. E. 460, 68 Am. St. 399; *Womack v. Coleman*, 89 Minn. 17, 93 N. W. 663; *Mathews v. Lightner*, 85 Minn. 333, 88 N. W. 992, 89 Am. St. 558; *Hedderly v. Johnson*, 42 Minn. 443, 44 N. W. 527, 18 Am. St. 521; *Meyer v. Madreperla*, 68 N. J. L. 258, 53 Atl. 477, 96 Am. St. 536; *Kullman v. Cox*, 167 N. Y. 411, 60 N. E. 744, 53 L. R. A. 884; *Westfall v. Washlagel*, 200 Pa. 181, 49 Atl. 941. A warranty is an undertaking collateral to the express object of the contract, and, in the absence of fraud or an agreement to rescind, breach of warranty does not warrant the rescission of the contract by the purchaser, but an action for damages. *Gay Oil Co. v. Roach*, 93 Ark. 454, 125 S. W. 122, 137 Am. St. 95.

erned by certain general principles which, when applied, obviate much of the difficulty. It may be said that when chattels are sold generally for all purposes for which they are adapted, and the seller is not the manufacturer or producer, and the property is in existence and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim of *caveat emptor* applies, even though defects exist in the goods which are not discoverable on examination.⁵⁷ But where the purchaser has no opportunity to inspect the goods, and no knowledge of their quality, and no means of forming an opinion of his own with respect to their quality, then the reason of the rule fails. Upon such facts, an important exception has been ingrafted upon the rule, namely, that where the contract is for a certain kind of chattel, to be used for a particular purpose known to the seller, and it is impracticable or no opportunity is afforded the buyer to inspect the property before delivery, and where the property is kept for sale by the vendor as suitable for the particular purpose, and sold by him to the vendee for a sound price and as adapted and good for the purpose, there arises an implied warranty that the thing is reasonably fit for the special purpose intended by the vendee. This is true without reference to whether the transaction relates to an executory or completed contract, or whether made with a manufacturer or dealer.⁵⁸

⁵⁷ *Oil Well Supply Co. v. Watson*, 168 Ind. 603, 80 N. E. 157, 15 L. R. A. (N. S.) 868.

⁵⁸ *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 So. 12 (fish sold to dealer to be resold by him); *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135, 37 Am. St. 199 (sale of stallion for breeding purposes); *Oil Well Supply Co. v. Watson*, 168 Ind. 603, 80 N. E. 157, 15 L. R. A. (N. S.) 868 (sale of cable for drilling oil well); *Oil Well Supply Co. v. Priddy*, 41 Ind. App. 200, 83 N. E. 623 (sale of pipe for driving an oil well); *Zimmerman v. Druecker*, 15 Ind. App. 512, 44 N. E. 557 (cement for sidewalks); *Merchants' & Co. Sav. Bank v. Fraze*, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. 341 (sale of stallion for breeding purposes); *H. B. Smith Co. v. Williams*, 29 Ind. App. 336, 63 N. E. 318 (heater); *Shaw v. Smith*, 45

Kans. 334, 25 Pac. 886, 11 L. R. A. 681n (sale of flax-seed to be sown); *Fee v. Sentell*, 52 La. Ann. 1957, 28 So. 279; *New Birdsall Co. v. Keys*, 99 Mo. App. 458, 74 S. W. 12. In the two preceding cases second-hand machinery was sold for a specified purpose. *Little v. G. E. Van Syckle*, 115 Mich. 480, 73 N. W. 554 (sale of piano); *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949 (grain); *Landreth v. Wyckoff*, 67 App. Div. (N. Y.) 145, 73 N. Y. S. 388 (vegetable seeds); *Newman v. Wilson*, 78 Hun (N. Y.) 295, 28 N. Y. S. 914, 60 N. Y. St. 243 (vinegar); *Oil Well Supply Co. v. Davidson*, 28 Ohio C. C. 731, affd. 75 Ohio St. 611, 80 N. E. 1130 (sale of cable for drilling oil well); *Lenz v. Blake-McFall Co.*, 44 Ore. 569, 76 Pac. 356 (paper boxes); *Gold Ridge Min. Co. v. Tallmadge*, 44 Ore. 34, 74

Care must be taken, however, to adhere to the distinction above pointed out, and to distinguish between contracts to

Pac. 325, 102 Am. St. 602 (sale of water for mining purposes); McCormick Harvesting Machine Co. v. Nicholson, 17 Pa. Super. Ct. 188 (sale of cable for drilling wells); Pease v. Sabin, 38 Vt. 432, 91 Am. Dec. 364 (cheese sold to dealer to be shipped to foreign country); Getty v. Rountree, 2 Pin. (Wis.) 379, 2 Chand. (Wis.) 28, 54 Am. Dec. 138 (pump). See also, Olds Motor Works v. Shafer, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560 (sale of automobile in unsafe condition). Where a manufacturer contracts to supply an article, and the buyer communicates with the seller the purpose for which he intends the article, and relies upon the seller's judgment to furnish him an article that will answer his purpose, there is an implied warranty that it will be reasonably fit for the intended use. Snow v. Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509 (piano, sale by manufacturer to dealer); Main v. Dearing, 73 Ark. 470, 84 S. W. 640 (jewelry); Main v. El Dorado Dry Goods Co., 83 Ark. 15, 102 S. W. 681 (jewelry); Nashua Iron & Steel Co. v. Brush, 91 Fed. 213, 33 C. C. A. 456, 50 U. S. App. 461 (strap for beam engine); Cleveland Linseed Oil Co. v. Buchanan, 120 Fed. 906, 57 C. C. A. 498 (linseed oil); The Nimrod, 141 Fed. 215, *affd.* without opinion in 141 Fed. 834, 72 C. C. A. 300 (steam boiler for tug); Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987 (engine); Brenton v. Davis, 8 Blackf. (Ind.) 317, 44 Am. Dec. 769 (river boat); Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730 (whisky barrels); Robinson Machine Works v. Chandler, 56 Ind. 575 (saw mill); Alpha Checkrower Co. v. Bradley, 105 Iowa 537, 75 N. W. 369 (corn cutter); Marbury Lumber Co. v. Stearns Mfg. Co., 32 Ky. L. 739, 107 S. W. 200 (locomotive for logging railway); Queen City Glass Co. v. Pittsburg Clay Pot Co., 97 Md. 429, 55 Atl. 447 (clay pots to be used in the manufacture of glass); West End Mfg. Co. v. P. R. Warren Co., 198 Mass. 320, 84 N. E. 488 (manila-lined chip); West Mich. Furniture Co. v. Diamond Glue Co., 127 Mich. 651, 87 N. W. 92 (glue); Cram v. Gas Engine & Co., 75 Hun (N. Y.) 316, 26 N. Y. S. 1069, 58 N. Y. St. 201 (naphtha launch); Cooper v. Payne, 103 App. Div. (N. Y.) 118, 93 N. Y. S. 69 (knitting machine); Carleton v. Lombard, 149 N. Y. 137, 43 N. E. 422, *rev'd*, 78 Hun (N. Y.) 616, 28 N. Y. S. 1107, 59 N. Y. St. 882 (petroleum for export trade); League Cycle Co. v. Abrahams, 27 Misc. (N. Y.) 548, 58 N. Y. S. 306 (hubs and spokes); Baylies v. Weibezahl, 42 Misc. (N. Y.) 178, 85 N. Y. S. 355, 14 N. Y. Ann. Cas. 280 (pliers); Hauser v. Curran, 5 Ohio N. P. 224 (kiln for cooperage factory); Haines & Co. v. Young, 13 Pa. Super. Ct. 303 (uprights to support marble slabs used as partitions); Pullman Car Co. v. Metropolitan Street R. Co., 157 U. S. 94, 39 L. ed. 632, 15 Sup. Ct. 503 (brakes on traction cars); Gerst v. Jones, 32 Gratt. (Va.) 518, 34 Am. Rep. 773 (tobacco boxes); Woodle v. Whitney, 23 Wis. 55, 99 Am. Dec. 102 (corn cultivator). See also, Murray Iron Works v. De Kalb Electric Co., 103 Ill. App. 78; Brown v. Murphee, 31 Miss. 91; Thomas v. Simpson, 80 N. Car. 4. Firewood is not a manufactured article within the above rule. Correio v. Lynch, 65 Cal. 273, 3 Pac. 889. Some cases apparently draw a distinction between sales made by dealers and those made by manufacturers, and hold that an implied warranty will not rise in the case of the dealer, but that to the contrary the rule of caveat emptor applies. These cases are based upon the theory that the manufacturer must know the make-up of the goods and the quality of the material used, while the dealer has no knowledge on this subject. McCaa v. Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. 88; Cafre v. Lockwood, 22 App. Div. (N. Y.) 11, 47 N. Y. S. 916, 90 N. Y. St. 1091; Strauss v. Salzer, 58 Misc. (N. Y.) 573, 109 N. Y. S. 734; Livingston v. Stevenson, 163 Pa. 262, 29 Atl. 715. But it would seem that the true principle upon which these cases should be decided is whether an article of a

furnish an article that will be fit for a particular purpose, and a contract to make or supply a described and definite article. In the former a warranty is implied because of the contract to make or furnish the article specified for the accomplishment of a specific purpose. The accomplishment, or fitness for the accomplishment, of the purpose is the essence of the contract. In the latter instance the essence of the contract is the delivery of the article specified, and not the accomplishment of the purpose, and if it conforms to the pattern, model or description there is no warranty that it will answer the particular purpose intended by the buyer.⁵⁹

If food is sold to the purchaser to be used directly for domestic consumption, there is, as between the dealer and consumer, an implied warranty that the articles are sound and wholesome and fit for the purposes for which they were sold.⁶⁰ It is a

particular description is ordered, or whether it is the sale of an article for a specific purpose. See ante, text, this section. An implied warranty is not waived by merely receiving the goods. The vendee has a reasonable time in which to discover defects. *Northern Supply Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. 963, and note.

⁵⁹ *Jones v. Just*, L. R. 3 Q. B. 197; *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496; *Oil Creek Gold Min. Co. v. Fairbanks*, 19 Colo. App. 142, 74 Pac. 543; *Ottawa Bottle & Co. v. Gunther*, 31 Fed. 208; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973; *Ehrsam v. Brown*, 76 Kans. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877; *Ricketts v. Sisson*, 9 Dana (Ky.) 358, 35 Am. Dec. 141; *Dreyfus v. Lourd*, 111 La. 21, 35 So. 369; *Rice v. Forsyth*, 41 Md. 389; *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.) 52; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; *Cram v. Gas Engine & Co.*, 75 Hun (N. Y.) 316, 26 N. Y. S. 1069, 58 N. Y. St. 201; *Durbrow & Co. Mfg. Co. v. Cumming*, 35 App. Div. (N. Y.) 376, 54 N. Y. S. 818; *Jarecki Mfg. Co. v. Kerr*, 165 Pa. St. 529, 30 Atl. 1019, 44 Am. St. 674; *Mine Supply*

Co. v. Columbia Min. Co., 48 Ore. 391, 86 Pac. 789; *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. 46; *Mason v. Chappell*, 15 Gratt. (Va.) 572; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232, 41 Am. St. 33; *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 82 N. W. 229, 49 L. R. A. 859.

⁶⁰ Year Book, 9 Henry VI, 53; *Bigge v. Parkinson*, 7 H. & N. 955; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210, revg. 58 Ill. App. 382; *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 84; *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Craft v. Parker*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, 41 N. W. 690; *Sinclair v. Hathaway*, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327; *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 43 Hun (N. Y.) 71, 16 Am. St. 753; *Divine v. McCormick*, 50 Barb. (N. Y.) 116; *Hart v. Wright*, 17 Wend. (N. Y.) 267; *Goad v. Johnson*, 6 Heisk. (Tenn.) 340. The same rule applies where food is sold intended for an animal other than man. *Houk v. Berg* (Tex. Civ. App.), 105 S. W. 1176. See also, *French v. Vining*, 102

general rule, however, that where provisions are sold as merchandise to be resold by the vendee there is no implied warranty that they are fit for food.⁶¹ Consequently, it is held if an animal is sold to a retail butcher there is no implied warranty that it is fit for food, notwithstanding the vendor may know that the butcher buys the animal with the intention of slaughtering it and selling its meat to his customers for their consumption.⁶² In many jur-

⁶¹Mass. 132, 3 Am. Rep. 440 (sale of hay by which cow was poisoned); Coyle v. Baum, 3 Okla. 695, 41 Pac. 389 (implied warranty that oats sold were fit to be fed horses); Houston Cotton Oil Co. v. Trammell (Tex. Civ. App.), 72 S. W. 244, revd. on other grounds, 96 Tex. 598, 74 S. W. 899 (cotton seed meal sold to be fed cattle). See, however, National Cotton Oil Co. v. Young, 74 Ark. 144, 85 S. W. 92, 109 Am. St. 71; Lukens v. Freiund, 27 Kans. 664, 51 Am. Rep. 429.

⁶²Humphreys v. Comline, 8 Blackf. (Ind.) 516; Jones v. Murray, 19 B. Mon. (Ky.) 83; Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109; Ryder v. Neitte, 21 Minn. 70; Tomlinson v. Armour Co., 74 N. J. L. 274, 65 Atl. 883; Moses v. Mead, 1 Denio (N. Y.) 378, 43 Am. Dec. 676; Hyland v. Sherman, 2 E. D. Smith (N. Y.) 234; Rinschler v. Jelfie, 9 Daly (N. Y.) 469. There is no implied warranty on sale to a middleman. Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210. See also, Farren v. Dameron, 99 Md. 323, 58 Atl. 367, 105 Am. St. 297, which contains a discussion of the general principles governing the law of implied warranties. See also, cases cited in preceding note.

⁶³Howard v. Emerson, 110 Mass. 320, 14 Am. Rep. 608; Hanson v. Hartse, 70 Minn. 282, 73 N. W. 163, 68 Am. St. 527; Cotton v. Reed, 25 Misc. (N. Y.) 380, 54 N. Y. S. 143; Needham v. Dial, 4 Tex. Civ. App. 141, 23 S. W. 240; Warren v. Buck, 71 Vt. 44, 42 Atl. 979, 76 Am. St. 754. See, however, Truschel v. Dean, 77 Ark. 546, 92 S. W. 781 (implied warranty that certain grapes sold would stand shipment and be in a merchantable condition, so that the purchaser might resell them); Nixa Canning Co. v. Lehmann-Higginson Grocer

Co., 70 Kans. 664; 79 Pac. 141, 70 L. R. A. 653 (holding that where a manufacturer sold canned apples to a grocer he impliedly warranted the process by which they were canned); Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327 (holding that a baker impliedly warrants the wholesomeness of bread which he sells to a pedler who distributes it); St. Louis Brewing Assn. v. McEnroe, 80 Mo. App. 429 (implied warranty that the beer sold was reasonably fit for the purposes intended. It appeared that the beer was to be resold by the vendee). Nelson v. Armour Packing Co., 76 Ark. 352, 90 S. W. 288. In the above case the plaintiff bought canned tongue from a grocer; he then sued the packers for injuries due to the unwholesomeness of the food sold. It was held that he could not recover because the packers owed no direct duty to him, he having bought from the grocer. On the other hand, in Julian v. Laubenberger, 16 Misc. (N. Y.) 646, 38 N. Y. S. 1052, it was held that a consumer could not recover from a dealer for unwholesome canned salmon sold him. The court said: "The defendant sells a can of food. It is well known, and must be known to both parties, that he has not prepared it, that he has not inspected it, and that he is entirely ignorant of the contents of the can, except so far as he has purchased from reputable dealers in the market. It seems to me that it would be unreasonable to say that, at the time of the purchase here the vendee relied upon the superior knowledge of the vendor; but it must be assumed that both parties knew, and must have necessarily known, that the vendor was entirely ignorant of, and without means of ascertaining, the condition of the article sold, and that the means

isdictions the implied warranty of food stuffs is given a strict construction and is held to apply strictly to dealers who sell directly to consumers; thus it has been held that there is no implied warranty that hogs were fit for food when killed by farmers who were not dealers in provisions, and by them sold to purchasers intended for their domestic use.⁶³

The doctrine of implied warranty appears to be founded largely on an actual or presumed knowledge by the vendor, as manufacturer, grower or producer, of the qualities and fitness of the things sold for the purpose for which they are intended or desired, as far as such knowledge is reasonably attainable. Consequently a manufacturer is liable only for failing to exercise the proper degree of care and skill in the selection of material and in the manufacture of the same, but he impliedly warrants that he has done this.⁶⁴

of inspection were as much open to the purchaser as to the vendor. Under such circumstances, if the purchaser desires to protect himself, he must have recourse to an express warranty. The law cannot be so unreasonable as to inject into a contract what neither party had, or could have had, in mind at the time the contract was made."

⁶³ *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 538, 1 Am. St. 472. To same effect, *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884n, 126 Am. St. 436. See, however, *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 So. 12; *Hoover v. Peters*, 18 Mich. 51; *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. (N. Y.) 116; *Burch v. Spencer*, 15 Hun (N. Y.) 504; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 43 Hun (N. Y.) 71, 16 Am. St. 753; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364.

⁶⁴ *Beers v. Williams*, 16 Ill. 69; *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. 418; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. Misc. (N. Y.) 178, 85 N. Y. S.

St. 635; *Baylies v. Weibezahl*, 42 St. 355, 14 N. Y. Ann. Cas. 280; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290. See also, *Farren v. Dameron*, 99 Md. 323, 58 Atl. 367, 105 Am. St. 297. Some cases seem to go to the extent of holding that a manufacturer absolutely insures his products from latent defects. *Randall v. Newsome*, L. R. 2 Q. B. Div. 102; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290. Likewise a grower or producer impliedly warrants that the thing sold is free from any latent defects of which he knows, or ought to know. *Gardner v. Winter*, 117 Ky. 382, 25 Ky. L. 1472, 78 S. W. 143, 63 L. R. A. 647; *Prentice v. Fargo*, 53 App. Div. (N. Y.) 608, 65 N. Y. S. 1114, affd. without opinion, 173 N. Y. 593, 65 N. E. 1121. In the above case it is held that one who raises and harvests wheat, and sells it for seed grain, impliedly warrants that there are no latent defects arising from the manner of cultivation, harvesting or storing, that would render it unsuitable for seed. *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, 39 Am. St. 864. To same effect, *Gachet v. Warren*, 72 Ala. 288; *Frith v. Hollan*, 133 Ala. 583, 32 So. 494, 91 Am. St. 54; *Shaw v. Smith*, 45 Kans. 334, 25 Pac. 886, 11 L. R. A. 681n; *Shatto v. Abernethy*, 35 Minn. 538,

In case goods are sold by sample,⁶⁵ or description,⁶⁶ there is an implied warranty that the bulk of the commodity is equal in quality to the sample, or description, and corresponds to it in kind and character. A distinction is made between sales by sample when made by the manufacturer of the goods sold, and sales made by one who is a mere dealer in the goods, and not their manufacturer. In the former case it is held that the manufacturer impliedly warrants the goods sold are merchantable, and free from latent defects of which he knows, or ought to know, not dis-

29 N. W. 325; *Johnson v. Sproull*, 50 Mo. App. 121; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Prentice v. Fargo*, 53 App. Div. (N. Y.) 608, 65 N. Y. S. 1114, affd. in 173 N. Y. 593, 65 N. E. 1121; *Landreth v. Wyckoff*, 67 App. Div. (N. Y.) 145, 73 N. Y. S. 388; *Bell v. Mills*, 78 App. Div. (N. Y.) 42, 80 N. Y. S. 34; *Gubner v. Vick*, 42 Hun (N. Y.) 657, 6 N. Y. St. 4. But if the purchaser inspects the seeds and relies on his own judgment and past experience in such matters, or if he neglects to inspect them when an examination would disclose their unfitness, no implied warranty as to their fitness is raised. *Gardner v. Winter*, 117 Ky. 382, 25 Ky. L. 1472, 78 S. W. 143, 63 L. R. A. 647; *Bell v. Mills*, 68 App. Div. (N. Y.) 531, 74 N. Y. S. 224; *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504.

⁶⁵ *Magee v. Billingsley*, 3 Ala. 679; *Hughes v. Bray*, 60 Cal. 284; *Love v. Barnesville Mfg. Co.*, 3 Pen. (Del.) 152, 50 Atl. 536; *Spring v. Slayden-Kirksey Woolen Mills*, 106 Ill. App. 579; *Myer v. Wheeler*, 65 Iowa 390, 21 N. W. 692; *Phillipi v. Gove*, 4 Rob. (La.) 315; *Hall v. Plassan*, 19 La. Ann. 11; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Ideal Wrench Co. v. Garvin Mach. Co.*, 65 App. Div. (N. Y.) 235, 72 N. Y. S. 662; *Dayton v. Hooglund*, 39 Ohio St. 671; *Fraley v. Bispham*, 10 Pa. St. 320, 51 Am. Dec. 486; *Boyd v. Wilson*, 83 Pa. St. 319, 24 Am.

Rep. 176; *Selser v. Roberts*, 105 Pa. St. 242; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Wilkirson v. Randle* (Tex. Civ. App.), 29 S. W. 431; *Willings v. Consequa Pet. (C. C.)* 301, Fed. Cas. No. 17767; *King v. Graef*, 136 Wis. 548, 117 N. W. 1058, 128 Am. St. 1101. See also, note in 27 L. R. A. (N. S.) 922; *Hume v. Sherman Oil & C. Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390; *King v. Graef*, 136 Wis. 548, 117 N. W. 1058, 20 L. R. A. (N. S.) 86n.

⁶⁶ *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657; *Timken Carriage Co. v. Smith*, 123 Iowa 554, 99 N. W. 183; *Morse v. Moore*, 83 Maine 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. 783; *Wisconsin Red Pressed Brick Co. v. Hood*, 60 Minn. 401, 62 N. W. 550, 51 Am. St. 539; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 43 Hun (N. Y.) 71, 16 Am. St. 753; *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 67 N. W. 298, 57 Am. St. 563; *Lenz v. Blake*, 44 Ore. 569, 76 Pac. 356; *Borrekens v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85; *Springfield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (N. S.) 258, which contains an exhaustive note on the subject. For an interesting case on this subject see *Haynor Mfg. Co. v. Davis*, 147 N. Car. 267, 61 S. E. 54, 17 L. R. A. (N. S.) 193, in which it is held that the manufacturer of a beverage which is intended to be sold as a nonalcoholic drink, impliedly warrants that it is not subject to taxation as an alcoholic beverage. The court said: "The manufacturer, in selling through Guy, warranted against latent defects, that the article is merchantable, and can be

coverable upon ordinary examination.⁶⁷ In the latter instance there is no implied warranty that the goods sold are merchantable or of a certain quality or fitness, or free from latent defects not discoverable by reasonable diligence, when the defects are common to both sample and bulk.⁶⁸

Then the general rule first announced, i. e., that the bulk must correspond to the sample, applies in all its strictness.⁶⁹ If goods are sold without a chance on the part of the buyer to make an inspection, a warranty of their quality or fitness will as a general rule be implied.⁷⁰ There is, at least, an implied warranty that the goods are or will be merchantable.⁷¹ Even where there is opportunity for inspection, there is an implied warranty that there are no latent defects known to the vendor which are not made

lawfully sold by the purchaser, if bought for resale."

⁶⁷ *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Mody v. Gregson*, L. R. 4 Exch. 49; *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284; *Leggett v. Young*, 29 N. B. 675; *Price v. Kohn*, 99 Ill. App. 115; *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, 70 Kans. 664, 79 Pac. 141, 70 L. R. A. 653; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. 635. See also, *Jones v. Padgett*, L. R. 24 Q. B. Div. 650; *Pratt v. Metzger*, 78 Ark. 177, 95 S. W. 451; *Frederick Manufacturing Co. v. Devlin*, 127 Fed. 71, 62 C. C. A. 53; *Monroe v. Hickox & Co.*, 144 Mich. 30, 107 N. W. 719; *Hardt v. Western Electric Co.*, 84 App. Div. (N. Y.) 249, 82 N. Y. S. 835; *Durbrow & Co. v. Cuming*, 35 App. Div. (N. Y.) 376, 54 N. Y. S. 818; *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.*, 29 App. Div. (N. Y.) 300, 51 N. Y. S. 793, *affd.* 164 N. Y. 593, 58 N. E. 1086; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702n. In this case, however, there was an acceptance after a full and fair opportunity of inspection, which the warranty was held not to survive. This principle must not be confused with the one that where a known, described and definite article is sold by sample the manufacturer does not warrant that

it will answer the particular purpose for which the buyer intended it. See *ante*, note 59.

⁶⁸ *Parkinson v. Lee*, 2 East 314; *Price v. Kohn*, 99 Ill. App. 115; *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Remy v. Healy*, 161 Mich. 266, 126 N. W. 202, 29 L. R. A. (N. S.) 139n. See also, *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Carnochan v. Gould*, 1 Bailey Law (S. Car.) 179, 19 Am. Dec. 668.

⁶⁹ See, however, *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. 329.

⁷⁰ *Jones v. Just*, L. R. 3 Q. B. 197; *Huntington v. Lowe*, 3 La. Ann. 377; *Gallagher v. Waring*, 9 Wend. (N. Y.) 20; *Morse v. Union Stock-yard Co.*, 21 Ore. 289, 28 Pac. 2, 14 L. R. A. 157; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910; *Merriam v. Field*, 39 Wis. 578. It is held, however, that this principle applies only where inspection is impracticable, or impossible. *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110, 25 Am. Dec. 276.

⁷¹ *Blackwood v. Cutting Co.*, 76 Cal. 212, 18 Pac. 248, 9 Am. St. 199; *Davis v. Sweeney*, 75 Iowa 45, 39 N. W. 174; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. 526; *Standard Rope and Twine Co. v. Olmem*, 13 S. Dak. 296, 83 N. W. 271.

known to the vendee.⁷² Consequently when a vendor sells a diseased or unsound animal, and this disease is known to him, and is hidden in its nature, the sale is voidable.⁷³ Thus the sale of an impotent bull,⁷⁴ blind horse,⁷⁵ or the sale of cattle suffering from contagious disease,⁷⁶ has been held a fraud on the vendee. In cases where no warranty is implied the vendee must either judge for himself, or exact an express warranty.⁷⁷ As a general rule the existence of an express warranty in a written contract excludes any implied warranty on the same subject therefrom.⁷⁸ Some cases lay down a rule so strict that it would seem to exclude any implied warranty from a writing which contained an express

⁷² *Wisconsin &c. Brick Co. v. Hurd Refrigerator Co.*, 60 Minn. 401, 62 N. W. 550, 51 Am. St. 539; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *McGavock v. Ward, Cooke (Tenn.)* 403; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. 537. See also, *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560.

⁷³ *Downing v. Dearborn*, 77 Maine 457, 1 Atl. 407; *Duvall v. Medtart*, 4 H. & J. (Md.) 14; *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530; *Dixon v. M'Clutchee*, Add. (Pa.) 322; *Hough v. Evans*, 4 McCord (S. Car.) 169; *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421; *Stevens v. Fuller*, 8 N. H. 463; *Cardwell v. McClelland*, 3 Sneed (Tenn.) 150; *Paddock v. Strobridge*, 29 Vt. 470, a marked case. And see *Johnson v. Wallower*, 15 Minn. 472, 18 Minn. 288; *Stewart v. Wyoming Cattle Rancho Co.*, 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. 101. There is authority to the effect that the concealment must be made with intent to deceive. *Hanson v. Edgerly*, 29 N. H. 343; *Binnard v. Spring*, 42 Barb. (N. Y.) 470. See also, ante, § 128, Sales.

⁷⁴ *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. 552.

⁷⁵ *Maynard v. Maynard*, 49 Vt. 297. See also, *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110 (glandered mules); *State v. Fox*, 79 Md. 514, 29 Atl. 601, 47 Am. St. 424, in which a glandered horse was sold, the seller

representing that it had a bad cold.

⁷⁶ *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421. See also, *Puls v. Hornbeck*, 24 Okla. 288, 103 Pac. 665, 138 Am. St. 883.

⁷⁷ *Moore v. Paving Co.*, 118 Ala. 563, 23 So. 798; *Court v. Synder*, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. 247; *Scott v. Renick*, 1 B. Mon. (Ky.) 63, 35 Am. Dec. 177.

⁷⁸ *Oil Creek Gold Min. Co. v. Fairbanks*, 19 Colo. App. 142, 74 Pac. 543; *Reynolds v. General Electric Co.*, 141 Fed. 551, 73 C. C. A. 23; *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S. E. 222; *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854; *White v. Gresham*, 52 Ill. App. 399; *Reeves v. Byers*, 155 Ind. 535, 58 N. E. 713; *Lombard Water-Wheel &c. Co. v. Great Northern Paper Co.*, 101 Maine 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180; *Walter A. Wood &c. Co. v. Bobbst*, 56 Mo. App. 427; *Fairbanks &c. Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *Beck &c. Iron Co. v. Holbeck*, 109 Mo. App. 179, 82 S. W. 1128; *Dowagiac Mfg. Co. v. Mahon*, 13 N. Dak. 516, 101 N. W. 903; *G. Ober & Sons Co. v. Blalock*, 40 S. Car. 31, 18 S. E. 264; *Dwight Bros. Paper Co. v. Western Paper Co.*, 114 Wis. 414, 90 N. W. 444; *LaCrosse Plow Co. v. Helgeson*, 127 Wis. 622, 106 N. W. 1094; *Northern Supply Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. 963; *Boothby v. Scales*, 27 Wis. 626. See also, *Davis v. Sweeney*, 75 Iowa 45, 39 N. W. 174.

warranty. However, they may both be present in the same contract, when not incompatible with each other. Thus, it has been held that the fact that there was an express warranty in the written contract would not exclude an implied warranty upon another matter, concerning which the express warranty was silent.⁷⁹ Consequently, it has been held that an express warranty of title does not exclude an implied warranty that the thing conveyed is sound.⁸⁰ Nothing further will be added at this point relative to implied warranties on the sale of real estate. The duty of the seller to disclose his title having been considered in treating the preceding subject of sales, this subject will also be touched upon in the succeeding paragraph on leases.

§ 130. **Leases.**—As a general rule the doctrine of caveat emptor is applicable to the relation of lessor and lessee. It extends to all parts and appurtenances of the property leased.⁸¹ Consequently, it is held by the weight of authority that in the absence of fraud there is no implied warranty as to the fitness of the leased premises for the purposes for which they are leased.⁸² This rule

⁷⁹ *Bucy v. Pitts Agricultural Works*, 89 Iowa 464, 56 N. W. 541. See also, *Bigge v. Parkinson*, 7 H. & N. 955; *Wilcox v. Owens*, 64 Ga. 601; *Hawley & c. Furnace Co. v. Van Winkle & c. Machine Works*, 4 Ga. App. 85, 60 S. E. 1008; *Merriam v. Field*, 24 Wis. 640. "The general rule denies an implied warranty as to any matter or particular which may be brought within the purview or intendment of the special warranty. But there may be an implied warranty so wholly independent of anything contemplated in the express warranty as to stand by virtue of its own distinctive force. In other words, the two warranties may be so distinct and separate that both may stand at the same time, and both be enforced." *Aultman & c. Co. v. Hunter*, 82 Mo. App. 632. To same effect, *Blackmore v. Fairbanks*, 79 Iowa 282, 44 N. W. 548.

⁸⁰ *Castellano v. Peillon*, 2 Mart. (N. S.) (La.) 466; *Houston v. Gilbert*, 3 Brev. (S. Car.) 63, 5 Am. Dec. 542; *Trimmier v. Thomson*, 10 S. Car. 164. See, however, *Wren v. Wardlaw*, Minor (Ala.) 363, 12 Am. Dec. 60,

in which it is said: "The warranty of the title expressed is an exclusion of all other warranties not expressed, and conclusive that the defendant did not warrant the quality or soundness of the slave." It has also been held that where words purport to create an express warranty and the warranty expressed thereby is, in fact, merely equivalent to the warranty which the law would imply, the contract will not be treated as containing an express warranty. *Heath Dry Gas Co. v. Hurd*, 193 N. Y. 255, 86 N. E. 18, 25 L. R. A. (N. S.) 60, and note.

⁸¹ *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. 485; *Franklin v. Tracy*, 117 Ky. 267, 25 Ky. L. 1409, 77 S. W. 1112, 63 L. R. A. 649; *Whitmore v. Orono & c. Paper Co.*, 91 Maine 297, 64 Am. St. 229; *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. 469; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858, 33 L. R. A. 449, 52 Am. St. 872.

⁸² *Morton v. Hanes*, 162 Mich. 366, 127 N. W. 269, 139 Am. St. 566, and note. *Clifton v. Montague*, 40 W.

has been given a strict application, regardless of whether the property leased was to be used as a dwelling or apartment house,⁸³ or for other purposes.⁸⁴ It follows that unless a landlord agrees with his tenant before the execution of the lease to repair the leased premises, he cannot, in the absence of a statute, be compelled to do so, and cannot be held liable for repairs.⁸⁵ The landlord ordinarily has a right to assume that the tenant will go and look at the premises himself, and is not bound to tell him that they

Va. 207, 21 S. E. 858, 33 L. R. A. 449, 52 Am. St. 873.

⁸³ *Fisher v. Lighthall*, 4 Mackey (D. C.) 82, 54 Am. Rep. 258; *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. 485; *Franklin v. Tracy*, 117 Ky. 267, 25 Ky. L. 1409, 77 S. W. 1112, 63 L. R. A. 649; *Foster v. Peyser*, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. 469; *Murray v. Albertson*, 50 N. J. L. 167, 13 Atl. 394, 7 Am. St. 787. Some cases hold that there is an implied contract that a furnished house, to let for a short time, is in proper condition for immediate occupation as a dwelling. *Ingalls v. Hobbs*, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. 460, and cases cited. See also, note to *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 52 N. W. 986, 38 Am. St. 473n. It is difficult to see, however, why any distinction should be made between leases for a long and short period, and there are cases denying the existence of any distinction. *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. 744.

⁸⁴ *Erskine v. Adeane*, L. R. 8 Ch. 756; *Sieber v. Blanc*, 76 Cal. 173; *Davidson v. Fischer*, 11 Colo. 583, 19 Pac. 652, 7 Am. St. 267; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. 622; *Estep v. Estep*, 23 Ind. 114; *Libbey v. Tolford*, 48 Maine 316, 77 Am. Dec. 229; *Toole v. Beckett*, 67 Maine 544, 24 Am. Rep. 54; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 45 Am. Rep. 344; *Dutton v. Gerrish*, 9 Cush. (Mass.) 89, 55 Am. Dec. 45; *Clark v. Babcock*, 23 Mich. 164; Har-

pel v. Fall, 63 Minn. 520, 65 N. W. 913; *Wilkinson v. Clauson*, 29 Minn. 91; *Kerr v. Merrill*, 4 Mo. App. 592; *Scott v. Simons*, 54 N. H. 426; *Mullen v. Rinear*, 45 N. J. L. 520; *Murray v. Albertson*, 50 N. J. L. 167, 13 Atl. 394, 7 Am. St. 787; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Simons v. Seward*, 22 Jones & S. (N. Y.) 406; *McGlashan v. Tallmadge*, 37 Barb. (N. Y.) 313; *Post v. Vetter*, 2 E. D. Smith (N. Y.) 248; *Edwards v. New York & C. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Kabus v. Frost*, 18 Jones & S. (N. Y.) 72; *Huber v. Baum*, 152 Pa. St. 626, 630, 26 Atl. 101; *Hazlett v. Powell*, 30 Pa. St. 293; *Harlan v. Lehigh Coal & Co.*, 35 Pa. St. 287; *Wein v. Simpson*, 2 Philadelphia (Pa.) 158; *Banks v. White*, 1 Sneed (Tenn.) 613; *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620; *Lynch v. Ortlieb*, 70 Tex. 727, 8 S. W. 515; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858, 33 L. R. A. 449, 52 Am. St. 872. See also, *Petz v. Voight Brewery Co.*, 116 Mich. 418, 74 N. W. 651, 72 Am. St. 531.

⁸⁵ *Delaney v. Johnson*, 95 Ark. 131, 128 S. W. 859. A covenant is never implied that a lessor will make any repairs. *Kirby v. Wylie*, 108 Md. 501, 70 Atl. 213, 129 Am. St. 451; *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. 469; *Sheets v. Selden*, 74 U. S. 423, 19 L. ed. 169. Consequently, if the promise to repair is made after the execution of the lease, it is gratuitous and without consideration, and it cannot form the basis of an action for its breach. *Glenn v. Hill*, 210 Mo. 291, 109 S. W. 27, 16 L. R. A. (N. S.) 699. See also, *Goot v. Gandy*, 2 El. & Bl. 845; *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147n, 20

are in bad repair or even ruinous, if the condition can be discovered by inspection.⁸⁶ However, the foregoing rules are not without exception. Thus, the lessor is liable when the premises contain some hidden defect or defects which render the premises dangerous and uninhabitable, of which dangerous elements or defects the landlord has, or in the exercise of reasonable diligence would have, some knowledge, and of which the lessee is ignorant.⁸⁷ Under this principle it has been held that if the lessor fails to disclose that the leased premises are liable to communicate a serious and contagious disease,⁸⁸ or fails to reveal the existence of a hidden cesspool which impairs the health of the occupant,⁸⁹ or fails to make known a dangerous condition resulting from the original method of con-

Am. St. 650; *Joyce v. DeGiverville*, 2 Mo. App. 596; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Cory v. Mann*, 14 How. Pr. (N. S.) (N. Y.) 163.

⁸⁶ *Keates v. Earl Cadogan*, 10 C. B. 591; *Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819; *Foster v. Peyser*, 9 Cush. (Mass.) 242; *Krueger v. Fer-rant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. 767; *Cleves v. Willoughby*, 7 Hill (N. Y.) 83; *Doyle v. Union Pacific Co.*, 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. 333.

⁸⁷ *Thum v. Rhodes*, 12 Colo. App. 245, 55 Pac. 264; *Archer v. Blalock*, 97 Ga. 719, 25 S. E. 391; *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. 485; *Coke v. Gutkese*, 80 Ky. 598, 4 Ky. L. 545, 44 Am. Rep. 499; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. 469. The landlord is liable, if by the exercise of reasonable diligence, he would have discovered the defect. *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 54 Am. St. 823; *Willcox v. Hines*, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. 770. See also, *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901, 15 Am. St. 199; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295.

⁸⁸ *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122. In the above case the premises were infected with smallpox; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429 (infected with diphtheria); *Eaton v. Winne*, 20 Mich. 156, 14 Am. Rep. 377 (land rented for sheep pasture infected with disease known as "scab"); *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164 (infected with smallpox). See also, *Long v. Chicago & C. R. Co.*, 48 Kans. 28, 28 Pac. 977, 15 L. R. A. 319, 30 Am. St. 271; *Snyder v. Gorden*, 46 Hun (N. Y.) 538; *Span v. Ely*, 8 Hun (N. Y.) 255; *Missouri & C. R. Co. v. Wood*, 95 Tex. 223, 66 S. W. 449, 56 L. R. A. 592, 93 Am. St. 834. The same rule applies as between innkeeper and guest. *Gilbert v. Hoffman*, 66 Iowa 205, 23 N. W. 632, 55 Am. Rep. 263. As to the necessity of the landlord having knowledge of the infected condition of the premises, see *Long v. Chicago & C. R. Co.*, 48 Kans. 28, 28 Pac. 977, 15 L. R. A. 319, 30 Am. St. 271; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429.

⁸⁹ *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. 469; *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Maywood v. Logan*, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. 431 (water on premises infected). It has been held that failure to disclose defect in plumbing does not render the landlord liable in fraud. *Blake v. Ranous*, 25 Ill. App. 486. But it

struction or from decay,⁹⁰ he is liable for the injury which reasonably may, and in fact does, result from such concealed dangers. This liability of the landlord for failure to disclose does not, however, arise out of any contractual relation, express or implied. It is grounded on the principle that one who delivers an article which he knows to be dangerous to another ignorant of its qualities, without giving him notice thereof, is liable for the injuries reasonably liable to result, and which in fact do result. In failing to disclose concealed defects and dangers the lessor is deemed guilty of a failure to perform a duty which he owes the lessee.⁹¹

§ 131. Commercial paper.—It is sometimes stated that one who negotiates commercial paper is bound to disclose all material facts which affect its validity and value, when they are peculiarly within his knowledge.⁹² It then becomes important to determine what are considered material facts. The statements referred to as made in some of the cases may be too broad in some respects and too narrow in others to fit all cases. But there are well

does entitle the tenant to vacate the premises and terminate the contract. *Pursel v. Teller*, 10 Colo. App. 488, 51 Pac. 436.

⁹⁰*Coke v. Gutkese*, 80 Ky. 598, 4 Ky. L. 545, 44 Am. Rep. 499; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 54 Am. St. 823; *Willcox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. 761. But he is not liable for failure to disclose secret conditions which render the property unsafe, when, through no fault or negligence of his own, he is unaware of their existence. *Angevine v. Knox-Goodrich* (Cal.), 31 Pac. 529; *Thum v. Rhodes*, 12 Colo. App. 245, 55 Pac. 264; *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. 323; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Kern v. Myll*, 94 Mich. 477, 54 N. W. 176; *Henkle v. Murr*, 31 Hun (N. Y.) 28; *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782; *Marshall v. Heard*, 59 Tex. 266. Not only this, but in some jurisdictions it is held that the lessor is under no obliga-

tion to inspect the premises, and exercises care and diligence in an effort to discover latent defects.. *Franklin v. Tracy*, 117 Ky. 267, 25 Ky. L. 1409, 77 S. W. 1112, 63 L. R. A. 649.

⁹¹*Coke v. Gutkese*, 80 Ky. 598, 4 Ky. L. 545, 44 Am. Rep. 499; *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. 469; *Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. 761; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 54 Am. St. 823. See also, *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. 485; *Franklin v. Tracy*, 117 Ky. 267, 25 Ky. L. 1409, 77 S. W. 1112, 63 L. R. A. 649; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471. See, however, *Chadwick v. Woodward*, 13 Abb. (N. C.) (N. Y.) 441, reported in note, 46 Am. Rep. 474.

⁹²*Prentiss v. Russ*, 16 Maine 30; *Hoopes v. Newman*, 2 Sm. & M. (Miss.) 71; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404. See however, *Ex parte Hammond*, 6 De G. M. & G. 699.

defined instances in which the vendor of such an instrument must make disclosure, and several in regard to which he is even treated as a warrantor.⁹³ It is generally held that the seller of a negotiable instrument is under an obligation to disclose the known insolvency of the maker, and if he fails to do so he is guilty of fraud.⁹⁴ It is also well settled that the seller of commercial paper, even though the thing sold is a promissory note endorsed without recourse, impliedly warrants the genuineness of the signatures of prior parties attached thereto,⁹⁵ that the instrument itself is a genuine obligation of the sort it purports to be,⁹⁶ and that he has

⁹³ "The law on the sale of commercial paper implies a warranty on the part of the vendor of title and that the instrument is genuine, and also as stated by Judge Story that the vendor 'has no knowledge of any facts which prove the instrument if originally valid to be worthless either by failure of the maker, or by its being already paid, or otherwise to have become void or defunct.' But no case has been cited supporting the proposition that there is any implied warranty or representation on the part of the vendor of bill valid in the hands of the endorsee, that it was drawn against funds, or that it was not accommodation paper." *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481.

⁹⁴ *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Bridge v. Batchelder*, 9 Allen (Mass.) 394. In the above case the concealment was accompanied with false representations. *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148. He does not, however, warrant that the maker is solvent. *Challiss v. McCrum*, 22 Kans. 157, 31 Am. Rep. 181; *Milliken v. Chapman*, 75 Maine 306, 46 Am. Rep. 386; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. 708; *Burgess v. Chapin*, 5 R. I. 225; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152. See, however, *Stewart v. Orvis*, 47 How. Pr. (N. Y.) 518.

⁹⁵ *State v. Corning State Sav. Bank*, 139 Iowa 338, 115 N. W. 937; *Challiss v. McCrum*, 22 Kans. 157, 31 Am.

Rep. 181; *Ware v. McCormack*, 96 Ky. 139, 28 S. W. 157; *Palmer v. Courtney*, 32 Nebr. 773, 49 N. W. 754; *Dumont v. Williamson*, 18 Ohio St. 515, 98 Am. Dec. 186; *Hall v. Latimer*, 81 S. Car. 90, 61 S. E. 1057. "By indorsing a negotiable instrument the indorser admits the signature and capacity of every prior party. This includes the existence and capacity of a firm; and by the same reasoning the existence and capacity of a corporation." *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. 479. However it is held by the weight of authority that, as between the drawee and a good-faith holder of a draft, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled; and if not noticed, and payment is made, the money cannot be recovered. *State Bank v. First Nat. Bank*, 87 Nebr. 351, 127 N. W. 244, 29 L. R. A. (N. S.) 100n.

⁹⁶ *Snyder v. Reno*, 38 Iowa 329; *Russell v. Critchfield*, 75 Iowa 69, 39 N. W. 186; *Smith v. McNair*, 19 Kans. 330, 27 Am. Rep. 117; *Ware v. McCormack*, 96 Ky. 139; *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 69; *Worthington v. Cowles*, 112 Mass. 30; *Ripley v. Case*, 86 Mich. 261, 49 N. W. 46; *Brown v. Ames*, 59 Minn. 476, 61 N. W. 448; *Palmer v. Courtney*, 32 Nebr. 773, 49 N. W. 754; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 535; *Frank v. Lanier*, 91 N. Y. 112; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298, 24 N. E. 994; *McClure v. Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; *Dumont v. Wil-*

title to the paper which gives him authority to sell it.⁹⁷

§ 132. **Stock subscriptions and sales.**—Nondisclosure in the procurement of stock subscription is usually accompanied with fraud and active concealment, and will be found discussed in the chapter on Fraud.⁹⁸ It must be borne in mind, however, that the false and fraudulent representations from which a subscriber may be released do not consist alone of positive affirmation as to existing facts or conditions, but they may consist of the suppression of a material fact that the party in good faith was bound to disclose.⁹⁹ As was intimated in the preceding section the same

liamson, 18 Ohio St. 515, 98 Am. Dec. 186; Aldrich v. Jackson, 5 R. I. 218; Uteley v. Donaldson, 94 U. S. 29, 24 L. ed. 54; Giffert v. West, 33 Wis. 617. The above rule has been said to apply where a negotiable note is indorsed without recourse. Seeley v. Reed, 28 Fed. 164; Palmer v. Courtney, 32 Nebr. 773, 49 N. W. 754. There is no question but what this is true when the indorser knows the instrument transferred to be worthless (Dayton v. Tillotson, 39 Iowa 404) or invalid. Challiss v. McCrum, 22 Kans. 157, 31 Am. Rep. 181; Blethen v. Lovering, 58 Maine 437; Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152. See, however, Freeman v. Guyer, 13 Ill. 652; Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171. The above principles do not apply to persons negotiating public or corporate securities, other than bills and notes. Otis v. Cullum, 92 U. S. 447, 23 L. ed. 496.

⁹⁷ Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. 708; Frazer v. D'Invilleers, 2 Pa. St. 200, 44 Am. Dec. 190; Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152. It is provided by the negotiable instrument law, §§ 65 and 66, original draft, that (§ 65) every person negotiating an instrument by delivery, or by a qualified indorsement, warrants first, that the instrument is genuine and in all respects what it purports to be; second, that he has good title to it; third, that all prior parties had capacity to contract; fourth, that he has no knowledge of any fact which would impair the

validity of the instrument to render it valueless. But when the negotiating is by delivery only, the warranty extends in favor of no other holder than the immediate transferee. The provisions of subdivision 3 of this section do not apply to persons negotiating public or corporate securities other than bills and notes. (§ 66.) Every indorser who indorses without qualification warrants to all subsequent holders, in due course, first, the matters and things in subdivisions 1, 2 and 3 of the next preceding section; and, second, that the instrument is, at the time of his indorsement, valid and subsisting. In addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any such indorser who may be compelled to pay it. On the question of the indorsee's knowledge of the infirmity, see Bank of Sampson v. Hatcher, 151 N. Car. 359, 66 S. E. 308, 134 Am. St. 989.

⁹⁸ See ante, Ch. 4, Fraud and Misrepresentation.

⁹⁹ Central R. of Venezuela v. Kisch, L. R. 2 H. L. 99; Stewart v. Wyoming Cattle Rancho Co., 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. 101; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. 340. See Alabama Foundry & Works v. Dallas, 127 Ala. 513, 29 So. 459. Other parties were represented as subscribers, but there was a failure to disclose that these

general rule governing sales of commercial paper applies to the sale and transfer of corporate stock.¹ The transferer impliedly warrants that the stock sold is genuine, that is to say, that it is not a forgery, but he does warrant that the stock was legally issued.²

§ 133. **Compromise.**—While courts may refuse to give effect to the compromise of a claim which the claimant knew to be without any foundation whatever,³ they do not require the parties negotiating a compromise of a claim, about which there is a good faith dispute, to disclose facts affecting the validity or extent of the claim,⁴ in the absence of any confidential relation between the parties thereto. Ordinarily they deal at arm's length; but there may be cases in which there is a relation of trust and confidence even between parties making a compromise. Thus the parties to a family settlement often sustain a relation of trust and confidence one to the other. Consequently the parties and their agents

subscriptions were paid in property at an overvaluation. *Coles v. Kennedy*, 81 Iowa 360, 46 N. W. 1088, 25 Am. St. 503. In the above case it was represented that a well-known business man was a bona fide subscriber. *New Jersey Stone Co. v. Vreeland*, 29 N. J. Eq. 651. In the above case there was simulated opposition to the acceptance of the subscription. *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. 939. The promoter failed to reveal that he and another person held an option on the land to be purchased. *Weissiger v. Richmond Ice & Co.*, 90 Va. 795, 20 S. E. 361; *Bosher v. Richmond & Co. Land Co.*, 89 Va. 455, 16 S. E. 360, 37 Am. St. 879. In the two preceding cases the officers issued a false statement of the financial condition of such corporations. See also, *Thomp. Corp.* (2d ed.), § 718.

¹ See ante, note 97, concerning negotiable instruments.

² *Harvey v. Dale*, 96 Cal. 160, 31 Pac. 14; *First Nat. Bank v. Drew*, 191 Ill. 186, 60 N. E. 856; *Higgins v. Illinois & Co. Bank*, 193 Ill. 394, 61 N. E. 1024; *Harter v. Elzroth*, 111 Ind. 159, 12 N. E. 129; *Maze v. Owingsville Banking Co.*, 23 Ky. L. 574, 63

S. W. 428; *White v. Robinson*, 50 Mich. 73, 14 N. W. 704; *People's Bank v. Kurtz*, 99 Pa. St. 344; *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496. As to the Louisiana law on this subject, see *Meyer v. Richards*, 163 U. S. 385, 41 L. ed. 199, 16 Sup. Ct. 1148. If it is a bond that is sold the seller does not warrant that it will be paid. *Ketchum v. Duncan*, 96 U. S. 659, 24 L. ed. 868. As to the duty of a stockholder to disclose the insolvency of the corporation upon sale of its stock, see *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148. In the above case the purchaser bought the stock of his own accord and the vendor had made no previous offer to sell. The holder of power of attorney to transfer stock impliedly warrants its genuineness. *Oliver v. Bank of England* (1901), 1 Ch. 652; *Boston & Co. v. Richardson*, 135 Mass. 473.

³ See post, Ch. 9, Consideration.

⁴ *Turner v. Green* (1895), 2 Ch. 205, 72 L. T. 763; *Jackson v. Miner*, 101 Ill. 550; *Mills' Heirs v. Lee*, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118. See also, *Daly v. Bush Tunnel R. Co.*, 129 Fed. 513, 64 C. C. A. 87; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401.

are usually under a legal obligation to communicate to the others all material facts known to them, which affect the rights to be dealt with.⁵

⁵ Gordon v. Gordon, 3 Swanst. 471; Bowen v. Kutzner, 167 Fed. 281. One representing a surety is not, for that reason, wholly absolved from the duty of making inquiries or deductions from facts within his knowledge, nor is he entitled to rely blindly on such information as the opposite party sees fit to communicate, without seeking other information that may be of advantage to his client. Daly v. Bush Tunnel R. Co., 129 Fed. 513, 64 C. C. A. 87.

CHAPTER VII.

DURESS AND UNDUE INFLUENCE.

- | | |
|--|---|
| § 140. What is meant by such terms. | § 153. Attorney and client. |
| 141. When it affects the contract. | 154. Physician and patient. |
| 142. How it affects the contract. | 155. Religious advisers. |
| 143. General rule as to avoidance of contract because of duress. | 156. Other confidential relations. |
| 144. Duress of goods. | 157. Mental weakness. |
| 145. Duress by imprisonment. | 158. Inadequacy of consideration. |
| 146. Duress by threat and oppression. | 159. Unconscionable contracts. |
| 147. When presumed. | 160. Contract with expectant heirs, and the like. |
| 148. Relation of parties. | 161. Ratification. |
| 149. Family relations. | 162. In <i>pari delicto</i> , principle of when not applicable to contracts procured through undue influence. |
| 150. Guardian and ward. | |
| 151. Husband and wife. | |
| 152. Principal and agent. | |

§ 140. What is meant by such terms.—There are three well defined periods of development in the law relative to duress. By ancient authorities it was held that duress could only exist where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant, or courageous man of his free will. The resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of the man of courage.¹ At a subsequent period it was stated by text writers and courts of last resort that duress, sufficient to render the contract voidable must be of a nature to overcome the will of a person of ordinary firmness or courage. This statement of the rule is still found in many recent authorities.² Within recent

¹ *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. The above case is a valuable one on this subject. Bracton 1, 2 Chap. 5; 1 Blackstone Commentaries 131; Coke's Littleton 253.

² *Bosley v. Shanner*, 26 Ark. 280;

Andrews v. Connolly, 145 Fed. 43; *Hines v. Hamilton Co.*, 93 Ind. 266; *Williamson-Halsell Frazier Co. v. Ackerman*, 77 Kans. 502, 94 Pac. 807; *United States Banking Co. v. Veale*, 84 Kans. 385, 114 Pac. 229; *Bryant v. Levy*, 52 La. Ann. 1649, 28 So.

years, however, the rule has been further modified and rendered more flexible. Courts now hold and text-books affirm that the test is not whether the threat was sufficient to overcome the will of a man of courage, or of ordinary courage, but whether it actually overcame the will of the person threatened. Under the modern rule the law takes into consideration, not so much the nature of the threat, but the effect of the threat or violence on the mind of the person subjected thereto. Under the modern doctrine the law extends its protection to an individual without reference to whether he is strong or weak intellectually, and does not measure his rights by an arbitrary yard stick avowedly applicable only to men of ordinary intellect, firmness or courage. Duress is now determined by the standard of the individual affected and not merely by the nature of the threat.⁸

191; *Harmon v. Harmon*, 61 Maine 227, 14 Am. Rep. 556; *Higgins v. Brown*, 78 Maine 473, 5 Atl. 269; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Detroit Nat. Bank v. Blodgett*, 115 Mich. 160, 73 N. W. 120; *Flanigan v. Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6; *Wolfe v. Marshal*, 52 Mo. 167; *Wilkinson v. Hood*, 65 Mo. App. 491; *Horton v. Bloedorn*, 37 Nebr. 666, 56 N. W. 321; *Brown v. Pierce*, 7 Wall. (U. S.) 205, 19 L. ed. 134; *Walla Walla Fire Ins. Co. v. Spencer*, 52 Wash. 369, 100 Pac. 741; *Simmons v. Trumbo*, 9 W. Va. 358; *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, 60 Am. St. 115; *Barrett v. Mahnken*, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. 953; *United States v. Huckabee*, 16 Wall. (U. S.) 414. Perhaps the reason this latter statement of the rule persists is that in the absence of any showing to the contrary the coerced party will be presumed to be a person of ordinary courage and constancy.

⁸*Hartford & C. Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651; *Burr v. Burton*, 18 Ark. 214; *McCarthy v. Taniska*, 84 Conn. 377, 80 Atl. 84; *International Harvester Co. v. Voboril*, 187 Fed. 973, 110 C. C. A. 311; *Stanley v. Dunn*, 143 Ind. 495, 42 N. E. 908; *Rose v. Owen*, 42 Ind. App. 137,

85 N. E. 129. *Baldwin v. Hutchison*, 8 Ind. App. 454, 35 N. E. 711, per *Gavin, J.*: "Counsel for appellant contend that the threats were not sufficient to constitute duress, because not of such character as should have reasonably excited the fears actually caused, and cite *Hines v. Board*, 93 Ind. 266, and *Darling v. Hines*, 5 Ind. App. 319, 32 N. E. 109. The case in hand is easily distinguished from those by the fact that appellee was a man of weak mind, ignorant of the law and his rights, as was actually known to appellant. The threats made, unquestionably, did excite the fear and belief that appellant could and would carry them out. It comes with an ill grace from appellant to say that appellee ought not to have been so badly scared. We deem the law to have been well stated by *Morse, J.*, in the case of *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, where it is said: 'It has been held by some of the courts that mere threats of criminal prosecution, when neither warrant has been issued nor proceedings commenced, do not constitute duress (*Buchanan v. Sahlein*, 9 Mo. App. 552; *Higgins v. Brown*, 78 Maine 473, 5 Atl. 269; *Town Council of Cahaba v. Burnett*, 34 Ala. 400), and by others that a threat of arrest, for which there is no ground, does not constitute duress, as the party could not be put in fear thereby

Under these later decisions duress may be defined as any course of action or conduct which may actually or reasonably coerce the will of the party oppressed and exists when the contract results from such coercion.⁴ There are two forms of duress: it may be either of the person, or of the goods of the party.⁵ Duress in either of the foregoing instances may be either actual or threatened. Duress of the person may be accomplished by unlawful imprisonment or violence. This unlawful imprisonment or violence may be directed directly against the other party to the contract, or the husband or wife, parent or child, or other near relative of such party. The foregoing principles will be discussed and illustrated in the succeeding sections of this chapter.

Undue influence is closely allied to duress; indeed it has been held that "duress is but the extreme of undue influence."⁶ The compulsion exercised is merely insufficient to constitute technical duress.⁷ Duress implies that the coerced party is compelled to execute the contract against his will; undue

(*Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *Preston v. Boston*, 12 Pick. (Mass.) 12). But these rules do not seem to have any regard to the condition of the mind of the person acted upon by the threat, or to take into consideration the age, disposition, or intellect of the person so threatened, and leave the old, the ignorant, the weak and the timid at the mercy of the bully or to the scoundrel who operates upon their fears to extort money from them." *Overstreet v. Dunlap*, 56 Ill. App. 486; *Youngs v. Simm*, 41 Ill. App. 28; *Callendar Sav. Bank v. Loos*, 142 Iowa 1, 120 N. W. 317; *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, 24 Am. St. 166; *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524; *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6; *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560. *First Nat. Bank v. Sargeant*, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296; *Nebraska Mut. Bond & Assn. v. Klee*, 70 Nebr. 383, 97 N. W. 476; *Earle v. Norfolk & C. Hosiery Co.*, 36 N. J. Eq. 188; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395;

James v. Roberts, 18 Ohio 548; *Parmentier v. Pater*, 13 Ore. 121, 9 Pac. 59; *Sulzner v. Cappeau-Lemley & Co.* (Pa.), 83 Atl. 103; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. It is not "the true policy of the law to make an arbitrary and unyielding rule in such cases to apply to all alike, without regard to age, sex, or condition of mind. Weak and cowardly people and old and ignorant persons are the ones that need the protection of the courts, and they are the ones usually operated upon and influenced by threats." *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, 24 Am. St. 166; 3 *Elliott Ev.*, § 2177.

⁴ *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129; *Price v. Bank of Poyette*, 144 Wis. 190, 128 N. W. 895.

⁵ *Callendar Sav. Bank v. Loos*, 142 Iowa 1, 120 N. W. 317; *Foot v. Depoy*, 126 Iowa 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. 365; *Smithwick v. Whitley*, 152 N. Car. 369, 67 S. E. 913; *Harris v. Cary*, 112 Va. 362, 71 S. E. 551.

⁶ *Commercial Nat. Bank v. Wheelock*, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. 738.

⁷ *Edwards v. Bowden*, 107 N. Car. 58, 12 S. E. 58.

influence denotes that the party influenced entered into a contract because of a moral, social or domestic force exerted so as to control the free action of his will, even though assent thereto may have been apparently freely and voluntarily given.⁸ Undue influence bears much the same relation to duress that constructive fraud sustains to actual fraud, and might properly be designated as constructive duress. In short, undue influence is the abuse of power derived from a confidential relation actual or implied; consequently a contract is voidable at the option of the servient party when induced by the unconscionable use of power afforded by parental, marital, or other such fiduciary or confidential relations existing between the parties, or by mental weakness, or necessity, or extravagance of an expected heir, or one sustaining that character, on the part of one of the parties. These principles will be discussed later. "The doctrine of equity concerning undue influence is very broad and is based upon principles of highest morality, it reaches every case and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed."⁹

§ 141. When it affects the contract.—A contract cannot be avoided for either duress or undue influence, unless it controls the free action of the servient party's will.¹⁰ It is elementary that

⁸ *Munson v. Carter*, 19 Nebr. 293, 27 N. W. 208; *Hartnett v. Hartnett*, 42 Nebr. 23, 60 N. W. 362. See also, *Central Bank of Fredrick v. Cope-land*, 18 Md. 305, 81 Am. Dec. 597.

⁹ *Parker's Admr. v. Parker*, 45 N. J. Eq. 224, 16 Atl. 537. See also, *Smith v. Kay*, 7 H. L. Cas. 750; *Zimmerman v. Bitner*, 79 Md. 115; *Munson v. Carter*, 19 Nebr. 293, 27 N. W. 208; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. 357; *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638; *Du Bose v. Kell*, — S. Car. —, 71 S. E. 371; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361. No distinct line of demarcation can be drawn between duress and undue influence, however, because courts have used these terms interchangeably.

¹⁰ The following cases are cases of duress which support the text. *Love v. State*, 78 Ga. 66, 3 S. E. 893, 6 Am.

St. 234; *Van Alstine v. McAl- don*, 141 Ill. App. 27; *McAl- don v. Van Al- stine*, 135 Ill. App. 396; *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129; *Williamson-Halsell Frazier Co. v. Ackerman*, 77 Kans. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; *Knight v. Brown*, 137 Mich. 396, 100 N. W. 602; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Roloson v. De Hart & Rigge*, 134 Mo. App. 633, 114 S. W. 88; *Jewelers' League v. DeForest*, 80 Hun (N. Y.) 376, 30 N. Y. S. 88, 61 N. Y. St. 827, *Bykman, J.*: "Judge Story says relief is administered in such cases to a party 'where he does an act or makes a contract when he is under duress or the influence of extreme terror, or of threats or apprehension short of duress. For in cases of this sort he has no free will, but stands in vinculis.' (1 Story

there can be no valid agreement until the free consent of each party thereto is gained. But neither duress¹¹ nor attempted

Eq. Juris. [10th ed.], § 239). We do not find that the mother in this case was at any time subjected to such influence as would overcome her free agency. She was never terrorized in any way, and she never was intimidated by the apprehension of any serious evil. There was no constraint over her person, and she was not placed in dread of any personal injury. * * * She was neither placed under apprehension of injury nor subjected to intimidation, and that seems to be essential within all the authorities. * * * The leading case on the subject in this state is Eadie v. Slimman (26 N. Y. 9), and the latest case is Adams v. The Irving National Bank (116 N. Y. 606, 23 N. E. 7). Both of those cases manifest the severity with which courts of equity scrutinize transactions in which covenants or written instruments have been obtained by threats of undue influence, but the facts in this case do not bring it within the scope of the decision in either of the cases." Smithwick v. Whitley, 152 N. Car. 369, 67 S. E. 913; Schoellhamer v. Rometsch, 26 Ore. 394, 38 Pac. 344; Walla Walla Fire Ins. Co. v. Spencer, 52 Wash. 369, 100 Pac. 741; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; Batavia Bank v. North, 114 Wis. 637, 90 N. W. 1016. See also, Price v. Bank of Poynette, 144 Wis. 190, 128 N. W. 895. The following cases have to do with undue influence. The influence exerted must deprive the party of his free agency. Shea v. Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. 215; Earle v. Norfolk &c. Hosiery Co., 36 N. J. Eq. 188; Du Bose v. Kell, — S. Car. —, 71 S. E. 371; Farnsworth v. Noffsinger, 46 W. Va. 410, 33 S. E. 246. It must be an act he would not have done had he followed his own free judgment. Kelly v. Perrault, 5 Idaho 221, 48 Pac. 45; Seward v. Seward, 59 Kans. 387, 53 Pac. 63. The will of the person subjected to the duress or undue influence must be overcome. Mallow v. Walker, 115 Iowa 238, 88 N. W. 452; Towson v. Moore, 173 U. S. 17. It must be such as to in fact make the

action the result of another's will. Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 151; Farnsworth v. Noffsinger, 46 W. Va. 410, 33 S. E. 246; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. 788. He must be as one *in vinculis*. Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. 505; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001; Erwin v. Hedrick, 52 W. Va. 537, 44 S. E. 165; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. 788. See also, Ball v. Ward, 76 N. J. Eq. 8, 74 Atl. 158; Meyer v. Fishburn, 65 Nebr. 626, 91 N. W. 534; Haydock v. Haydock, 33 N. J. Eq. 494, 38 Am. Rep. 385.

¹¹ Bosley v. Shanner, 26 Ark. 280; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714; St. Louis &c. R. Co. v. Thomas, 85 Ill. 464; Eberstein v. Willets, 134 Ill. 101, 24 N. E. 967; Yates v. Royal Ins. Co., 200 Ill. 202, 65 N. E. 726; Stanley v. Dunn, 143 Ind. 495, 42 N. E. 908; James v. Dalbey, 107 Iowa 463, 78 N. W. 51; Feller v. Green, 26 Mich. 70; Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120; Barger v. Farnham, 130 Mich. 487, 90 N. W. 281; Flanigan v. City of Minneapolis, 36 Minn. 406, 31 N. W. 359; Alexander v. Pierce, 10 N. H. 494; Dunham v. Griswold, 100 N. Y. 224; Barrett v. Weber, 125 N. Y. 18, 25 N. E. 1068; Phillips v. Henry, 160 Pa. 24, 28 Atl. 477; Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. 115. The danger must not only exist but it must operate on the mind as the controlling motive for the performance of the act sought to be avoided. Wilkerson v. Bishop, 47 Tenn. 24. A note has been held procured by duress when it appears that the threats were made a few days prior to the giving of such note and had not been retracted. Taylor v. Jaques, 106 Mass. 291. As a general rule mere angry words, or vexations, or annoyances (Brower v. Callender, 105 Ill. 88; Hagan v. Waldo, 168 Ill. 646, 48 N. E. 89; Adams v. Stringer, 78 Ind. 175; Gabbey v. Forgeus, 38 Kans. 62, 15 Pac. 866); or idle impotent threats (Rendleman v. Rendle-

exercise of undue influence¹² will affect the validity of an agreement if the contract is not induced thereby. A party cannot avoid a contract because of threats made or influences exerted which in no way influence his action. From the foregoing it appears that it is not every influence exerted that will be considered as undue influence. The influence which the law not only refuses to recognize, but repudiates, is undue influence, denominated "undue" because it is unrighteous, illegal, and designed to perpetrate a wrong. It must amount to fraud or coercion. The grantor must be overreached and deceived by some false representation or stratagem, or by coercion, physical or moral.¹³ It is generally held that solicitations and entreaties,¹⁴ fair argument and persuasion,¹⁵ or appeals to the emotions or affections¹⁶ do not amount to undue influence unless they overcome the will of the person and take away his ability to act as a free agent.¹⁷

§ 142. How it affects the contract.—Ordinarily, contracts

man, 156 Ill. 568, 41 N. E. 223; Van Deventer v. Van Deventer, 46 N. J. L. 460; Miller v. Miller, 68 Pa. 486; or persuasion (Hamilton v. Smith, 57 Iowa 15, 10 N. W. 276, 42 Am. Rep. 711; Parker v. Lancaster, 84 Maine 512, 24 Atl. 952; Batavia Bank v. North, 114 Wis. 637, 90 N. W. 1016); do not constitute duress.

¹²Borchers v. Barckers, 143 Mo. App. 72, 122 S. W. 357. If it appears that the party was active in executing the transaction and was in fact putting through a fixed purpose of his own, undue influence cannot be said to exist. McMillan v. McMillan, 184 Ill. 230, 56 N. E. 302; Gardner v. Lightfoot, 71 Iowa 577, 32 N. W. 510; Wright's Exr. v. Wright, 32 Ky. L. 659, 106 S. W. 856; White v. Johnson, 4 Wash. 113, 29 Pac. 932.

¹³Davis v. Culver, 13 How. Pr. (N. Y.) 62; Fjone v. Fjone, 16 N. Dak. 100, 112 N. W. 70.

¹⁴Bowdoin College v. Merritt, 75 Fed. 480, 169 U. S. 551, 18 Sup. Ct. 415, 42 L. ed. 850; Rogers v. Higgins, 57 Ill. 244.

¹⁵Rogers v. Higgins, 57 Ill. 244; Sturtevant v. Sturtevant, 116 Ill. 340,

6 N. E. 428; Beith v. Beith, 76 Iowa 601, 41 N. W. 371; Seward v. Seward, 59 Kans. 387, 53 Pac. 63; Hammond v. Welton, 106 Mich. 244, 64 N. W. 25; Latham v. Udell, 38 Mich. 238; Taylor v. Taylor, 6 Ired. Eq. (N. Car.) 26; Longenecker v. Zion & C. Church, 200 Pa. 567, 50 Atl. 244; Hummel v. Kistner, 182 Pa. 216, 37 Atl. 815; Du Bose v. Kell, — S. Car. —, 71 S. E. 371; Seat v. McWhirter, 93 Tenn. 542, 29 S. W. 220; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. 718.

¹⁶Adair v. Craig, 135 Ala. 332, 33 So. 902; Sawyer v. White, 122 Fed. 223; Burt v. Quisenberry, 132 Ill. 385, 24 N. E. 622; Mallow v. Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158; Fjone v. Fjone, 16 N. Dak. 100, 112 N. W. 70; Doran v. McConlogue, 150 Pa. St. 98, 24 Atl. 357; Orr v. Pennington, 93 Va. 268, 24 S. E. 928; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. 788.

¹⁷This branch of the subject has been more fully developed in the law of wills and the reader is referred to books on that subject for a full discussion.

obtained by duress¹⁸ or undue influence¹⁹ are merely voidable at the option of the party coerced or unduly influenced, and not void.²⁰ However, duress or undue influence when actually exercised with effect, furnishes grounds for the avoidance of any contract. Thus the principle that the law favors compromise has no application to a case where the settlement is obtained by coercion. Duress will vitiate and render voidable a compromise agreement the same as any other contract.²¹

§ 143. **General rule as to avoidance of contract because of duress.**—The general rule as to avoidance of contracts because of duress is thus stated in a comparatively recent text-book: "Duress considered as a ground for avoiding a contract consists of any of the following acts committed or threatened by one of the parties, or with his connivance, and causing the other to enter into the contract: 1. Unlawful imprisonment of the other party. 2. Imprisonment of the other party procured through the abuse of

¹⁸ Ormes v. Beadel, 2 De Gex F. & J. 333; Royal v. Goss, 154 Ala. 117, 45 So. 231; Deputy v. Stapleford, 19 Cal. 302; Eberstein v. Willets, 134 Ill. 101, 24 N. E. 967; Veach v. Thompson, 15 Iowa 380; Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. 446; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Miller v. Minor Lumber Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524; Mundy v. Whittemore, 15 Nebr. 647, 19 N. W. 694; Oregon Pac. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137; Commercial Nat. Bank v. Wheelock, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. 738; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. See also, McClintock v. Cummins, 2 McLean (U. S.) 98 Fed. Cas. No. 8,698; Thompson v. Niggley, 53 Kans. 664, 35 Pac. 290, 26 L. R. A. 803; Inhabitants of Worcester v. Eaton, 13 Mass. 371; Robinson v. Gould, 11 Cush. (Mass.) 55. But see Belote v. Henderson, 5 Cold. (Tenn.) 471, 98 Am. Dec. 432. Only the servient party can plead duress. The dominant party is bound. Peirce v. McIntire, 2 Dane Abr. 224. However, there may be such fraud in the execution of the contract as to render it void. Palmer v. Poor, 121

Ind. 135, 22 N. E. 984, 6 L. R. A. 469. The above case was a suit on a promissory note. It was held there could be no recovery since because of the duress practiced the note was never delivered. If the duress is such that the person on whom it is imposed, is converted into a mere automaton for the purpose of obeying the command and registering the will of the person who imposes it the contract then becomes null and void. Royal v. Goss, 154 Ala. 117, 45 So. 231.

¹⁹ Burton v. McMillan, 52 Fla. 469, v. Roach, 139 Ind. 275, 38 N. E. 822; 42 So. 849, 120 Am. St. 220; Tucker Somes v. Skinner, 16 Mass. 348; Fisher v. Publishing Association, 85 Mich. 472, 48 N. W. 622.

²⁰ George Conlon & Co. v. East, 189th St. Bldg & Co., 141 App. Div. (N. Y.) 441, 126 N. Y. S. 226. In case the oppressed party seeks to rescind he must rescind in toto. He cannot accept the benefits of the agreement and avoid its burdens. Royal v. Goss, 154 Ala. 117, 45 So. 231.

²¹ Tucker v. Roach, 139 Ind. 275, 38 N. E. 822; Baldwin v. Hutchinson, 8 Ind. App. 454, 35 N. E. 711; Taylor v. Patrick, 1 Bibb (Ky.) 168; Holland v. Hoyt, 14 Mich. 238; Gering

lawful process or made unjustly oppressive. 3. Imprisonment of the husband or wife, parent or child, or other near relative of the other party. 4. Unlawful and great bodily harm to the other party or his near relative. 5. Unlawful seizure, detention, or destruction of the property of such person."²²

§ 144. **Duress of goods.**—Originally the common-law rule relative to duress was narrow; by it duress meant only duress of the person, and even in that instance nothing short of duress amounting to a reasonable apprehension of imminent danger to life, limb or liberty was sufficient to avoid a contract or to enable a party to recover money paid.²³ Courts of equity would, however, set aside contracts when there was imposition on the servient party of such character as to overcome his free agency. Gradually the courts of law extended the doctrine so as to recognize duress of property as a sort of moral duress which might, equally with duress of person, constitute a defense to a contract induced thereby, and that duress of property would entitle one to recover money paid under its influence.²⁴ Consequently, it is

v. School District No. Twenty-eight, 76 Nebr. 219, 107 N. W. 250.

²² Benj. Contract (2d ed.) 217.

²³ Skeate v. Beale, 11 A. & E. 983; Sumner v. Ferryman, 11 Mod. 201; Whitt v. Blount (Ga.), 53 S. E. 205; Wells v. Adams, 88 Mo. App. 215; First Nat. Bank v. Sargent, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296; Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. 447. "In examining the authorities upon the question as to what pressure or constraint amounts to duress, justifying the avoidance of contracts made, or the recovery back of money paid, under its influence, one is forcibly impressed," says Justice Mitchell, "with the extreme narrowness of the old common-law rule on the one hand and with the great liberality of the equity rule on the other. At common law, 'duress' meant only duress of the person, and nothing short of such duress amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid. But courts of equity would unhesitatingly set aside

contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence; and the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifesting or apprehension of physical force." Joannin v. Ogilvie, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. 581.

²⁴ Joannin v. Ogilvie, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. 581. See also, Kilpatrick v. Germania Life Ins. Co., 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 111 Am. St. 722. "To constitute duress [of goods] it is sufficient if the will

now well settled that payment of a void tax to prevent the seizure, or, if seized, to prevent the sale of personal property, may be considered as paid or given under duress, and may be recovered.²⁵ Likewise, if money is paid or a note given to prevent the seizure of goods under an execution illegally or improperly issued or used²⁶ or to release goods from an attachment fraudulently obtained,²⁷ it is considered as being paid or given under such coercion as to amount to duress.²⁸ It has been held that a refusal to permit one to draw on his bank account until a certain contract

be constrained by the unlawful presentation of a choice between comparative evils, as inconvenience and loss by the detention of property, loss of property altogether, or compliance with an unconscionable demand." *Harris v. Cary*, 112 Va. 362, 71 S. E. 551. During the transition which the common law underwent in reaching the conclusion that there may be duress of goods, there developed what now seems a very artificial distinction to the effect that one who paid money induced by duress of goods might recover it but that an executory contract induced thereby could not be avoided. The action was in debt for money had and received. *Skeate v. Beale*, 11 Ad. & El. 983; *Atlee v. Backhouse*, 3 M. & W. 633. See also, *Edwards v. Handley*, Hard. (Ky.) 602, 3 Am. Dec. 745; *Hazelrigg v. Donaldson*, 2 Metc. (Ky.) 445; *Bingham v. Sessions*, 6 Sm. & M. (Miss.) 13; *Foshay v. Ferguson*, 5 Hill (N. Y.) 154; *Williams v. Phelps*, 16 Wis. 80. That is to say, if a person paid money to recover goods unlawfully detained he could recover it, but if he gave a promissory note to induce their surrender he could not defeat recovery on the note because of duress. *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. 363. But it would seem this doctrine has been generally repudiated in this country. *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. 363. See also, note to *Hatter v. Greenlee*, 1 Porter (Ala.) 222, 26 Am. Dec. 370.

²⁵ *Bailey v. Goshen*, 32 Conn. 546, 87 Am. Dec. 191; *Hennel v. Vanderburgh County*, 132 Ind. 32, 31 N. E. 462; *Greenabaum v. King*, 4 Kans. 332, 96 Am. Dec. 172; *Nickodemus v.*

East Saginaw, 25 Mich. 456; *Lyon v. Receiver of Taxes*, 52 Mich. 271; 17 N. W. 829; *Minor Lumber Co. v. Alpena*, 97 Mich. 499, 56 N. W. 926; *Ætna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593; *Dale v. New York*, 71 App. Div. (N. Y.) 227, 75 N. Y. S. 576, 1123; *Kelley v. Rhoads*, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. 904. However, if the payment is made without compulsion, even though the tax assessed is illegal, it cannot be recovered, as where one pays an illegal tax in order to secure the rebate allowed for prompt payment the amount so paid cannot be recovered. *Louisville v. Becker*, 139 Ky. 17, 129 S. W. 311, 28 L. R. A. (N. S.) 1045. And the general rule is that a voluntary payment cannot be recovered, a protest being necessary in some cases and even a protest will not always make a payment involuntary or under duress within the rule of the text. *Lee v. Templeton*, 13 Gray (Mass.) 476. But when payment is made not only to procure the discount but also to prevent the issuance of a threatened warrant, it is made under compulsion and recovery may be had. *Stowe v. Stowe*, 70 Vt. 609, 41 Atl. 1024.

²⁶ *Thurman v. Burt*, 53 Ill. 129; *Snell v. State*, 43 Ind. 359; *Hollingsworth v. Stone*, 90 Ind. 244.

²⁷ *Spaids v. Barrett*, 57 Ill. 289; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367; *Downing v. Ely*, 125 Mass. 369; *Adams v. Reeves*, 68 N. Car. 134, 12 Am. Rep. 627; *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787.

²⁸ The rule is that money paid voluntarily with full knowledge of the facts cannot be recovered. How-

was executed, amounts to duress.²⁹ Duress finds further illustration in those cases where property is wrongfully obtained or detained by a carrier,³⁰ or collector of duties,³¹ or other person,³² and money paid or notes given by the one entitled to possession as a condition precedent to the delivery of the property, may be recovered or avoided.³³ It has been held that equity will grant relief to a minority stockholder who has been compelled to surrender stock to one controlling the corporation by reason of the former's pecuniary necessities and unconscionable demands accompanied by threats of the latter to entirely destroy the value of the stock.³⁴

ever, there is a class of cases where, although there be a legal remedy, a person's situation or the situation of his property is such that the legal remedy would not be adequate to protect him from irreparable injury; where the circumstances and the necessity to protect himself or his property otherwise than by resort to legal remedies, may operate as stress or coercion upon him to comply with the illegal demands. In such cases his act will be deemed to have been done under duress. *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. 581.

²⁹ *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21, 7 Am. St. 202.

³⁰ *Ashmole v. Wainwright*, 2 Q. B. 837; *Tutt v. Ide*, 3 Blatchf. (U. S.) 249; *Lafayette & Co. v. Pattison*, 41 Ind. 312; *Chamberlain v. Reed*, 13 Maine 357, 29 Am. Dec. 506; *Fargusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Baldwin v. Liverpool & Co. S. S. Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *Beckwith v. Frisbie*, 32 Vt. 559. See also, *St. Louis & Co. v. Gorman*, 79 Kans. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637n, holding voidable at the shipper's election a special contract limiting the carrier's common-law liability which he rightfully refused to sign but which he was compelled to sign by means of a refusal to transport cattle already in the carrier's possession unless the contract was signed.

³¹ *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. 5; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137, 9 L. ed. 373; *Maxwell*

v. Griswold, 10 How. (U. S.) 242, 13 L. ed. 405; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

³² *Lonergan v. Buford*, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. 684; *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178; *Pemberton v. Williams*, 87 Ill. 15; *Bennett v. Ford*, 47 Ind. 264; *Lightfoot v. Wallis*, 12 Bush. (Ky.) 498; *Chase v. Dwinal*, 7 Greenl. (Maine) 134, 20 Am. Dec. 352; *Whitlock Mach. Co. v. Holway*, 92 Maine 414, 42 Atl. 799; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *McCabe v. Shaver*, 69 Mich. 25, 36 N. W. 800; *Stenton v. Jerome*, 54 N. Y. 480; *Scholey v. Mumford*, 60 N. Y. 498; *McPherson v. Cox*, 86 N. Y. 472; *White v. Heylman*, 34 Pa. St. 142; *Motz v. Mitchell*, 91 Pa. St. 114; *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. 363.

³³ It has been held that a payment made to liberate tools of trade (*Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178), or a cargo (*Fargusson v. Winslow*, 34 Minn. 384, 25 N. W. 942), or a ship (*Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271), or lumber (*Chase v. Dwinal*, 7 Greenl. (Maine) 134, 20 Am. Dec. 352), may be recovered when such articles are illegally held. It has also been held that money paid to an officer in order to induce him to return personally to the owner is not voluntarily paid and may be recovered. *Alston v. Durant*, 2 Strob. (S. Car.) 257, 49 Am. Dec. 596; *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787.

³⁴ *Harris v. Cary*, 112 Va. 362, 71 S. E. 551.

The general rule relative to involuntary payment is usually stated thus: "To constitute coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment."³⁵ There is authority for the proposition that there can be no duress of real estate such as will render a payment of money on account thereof involuntary.³⁶ This statement is not true, however, in its broad sense. There may be duress of realty as well as of personalty although perhaps not as readily seen in the former as in the latter instance.³⁷ Thus it has been held that under certain circumstances the assertion of an unfounded lien on real property³⁸ or the demand of an extortionate bonus for the release of a mortgage³⁹ may amount to duress. There is authority to the effect that the payment of a void tax to prevent the sale of real estate in satisfaction of such tax, is not

³⁵ *Radich v. Hutchins*, 95 U. S. 210, 24 L. ed. 409; *Loneragan v. Buford*, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. 684; *Brumagim v. Tillinghast*, 18 Cal. 265; *Harris v. Cary*, 112 Va. 362, 71 S. E. 551. As to what does not constitute involuntary payment see *New Orleans & C. R. Co. v. Louisiana Const. & Improvement Co.*, 109 La. 13, 94 Am. St. 395, and note 33 So. 51. See also, *Buck v. Houghtaling*, 110 App. Div. (N. Y.) 52, 96 N. Y. S. 1034.

³⁶ *Fleetwood v. New York*, 2 Sandf. (N. Y.) 475; *Forrest v. Mayor of New York*, 13 Abb. Pr. (N. Y.) 350. See note 45 Am. Dec. 160.

³⁷ See *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. 581; *Fout v. Giraladin*, 64 Mo. App. 165; *Wells v. Adams*, 88 Mo. App. 215.

³⁸ *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. 581.

³⁹ *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 111 Am. St. 722. See also, *Whitcomb v. Harris*, 90 Maine 206, 38 Atl. 138; *Cazenove v. Cutler*, 4 Metc. (Mass.) 246; *McMurtrie v. Keenan*, 109 Mass. 185;

Klein v. Bayer, 81 Mich. 233, 45 N. W. 991; *Wells v. Adams*, 88 Mo. App. 215; *Fout v. Giraladin*, 64 Mo. App. 165; *First Nat. Bank v. Sargeant*, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296; *Vick v. Shinn*, 49 Ark. 70, 4 S. W. 60, 4 Am. St. 26; *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733; *Savannah Sav. Bank v. Logan*, 99 Ga. 291, 25 S. E. 692; *Patterson v. Cox*, 25 Ind. 261; *Hipp v. Crenshaw*, 64 Iowa 404, 20 N. W. 492; *Wessel v. D. S. B. Johnson Land & Co.*, 3 N. Dak. 160, 54 N. W. 922, 44 Am. St. 529; *Shuck v. Interstate Bldg. & C. Association*, 63 S. Car. 134, 41 S. E. 28. See, however, *Mariposa Co. v. Bowman, Deady* (U. S.) 228, Fed. Cas. No. 9089; *Vereycken v. Vanden Brooks*, 102 Mich. 119, 60 N. W. 687, per *Montgomery, J.*: "The general rule is that, to constitute a payment involuntary, it must be under such circumstances as precludes the exercise of the free will of the payor. There must be either duress of the person or the property. Some courts have held that there can be no duress of real property which remains in the possession of the payor, but most courts hold the contrary. *State v. Nelson*, 41 Minn. 25,

under compulsion, and must be regarded as voluntary.⁴⁰ But by the weight of authority the payment of an illegal tax under protest or the like to prevent the sale of real estate is not voluntary and such payment may be recovered.⁴¹ Thus it has been held that payment of a tax made to enable a deed to be recorded,⁴² to

42 N. W. 548; *Pemberton v. Williams*, 87 Ill. 15; *White v. Heylman*, 34 Pa. St. 142; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217. So it has been held that if the mortgagee of land require that the mortgagor pay more than is legally due, for the purpose of preventing a foreclosure by advertisement, this is such a compulsory payment as entitles the party to sue and recover back the excess. But it is to be noted that in such a case the mortgagee, by his own act, unaided by any process of court, has it within his power to deprive the mortgagor of his title. Such was not the case here. All that the plaintiff had done was to file a bill to obtain a decree of the court fixing the amount due. Before any decree could pass against the present plaintiff, he was entitled to his day in court. Under these circumstances, we think that there was no duress of property such as the law recognizes. See *Forbes v. Appleton*, 5 Cush. (Mass.) 115; *Benson v. Monroe*, 7 Cush. (Mass.) 125; *Taylor v. Board*, 31 Pa. St. 73; *Oceanic Steamship Co. v. Tappan*, 16 Blatchf. (U. S.) (C. C.) 296; *Fed. Cas. No. 10405*; *Mariposa Co. v. Bowman*, *Deady* (U. S.) (C. C.) 228; *Fed. Cas. No. 9089*."

⁴⁰ *Sonoma County Tax Case*, 8 Sawyer 312, 13 Fed. 789; *Bucknell v. Story*, 46 Cal. 589, 13 Am. Rep. 220; *Phelan v. San Francisco*, 120 Cal. 1, 52 Pac. 38; *Otis v. People*, 196 Ill. 542, 63 N. E. 1053; *Davies' Exrs. v. Galveston*, 16 Tex. Civ. App. 13, 14 S. W. 145. It has been held that a sale of land for taxes made under an unconstitutional law does not constitute a cloud upon the title, and therefore, payment of such tax to prevent a sale is voluntary, though made under protest, and cannot be recovered. *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512. However, a distinction is drawn between taxes levied under an unconstitution-

al statute and cases where the statute under which the proceedings to levy the tax are taken is constitutional and where the illegality thereof is claimed from some irregularity or defect in the statutory proceedings. In the latter case payment to prevent the sale of real estate in payment of such tax has been declared involuntary and capable of being recovered. *Whitney v. Port Huron*, 88 Mich. 268, 50 N. W. 316, 26 Am. St. 291. See also, *Thompson v. Detroit*, 114 Mich. 502, 72 N. W. 320.

⁴¹ *Whitney v. Port Huron*, 88 Mich. 268, 50 N. W. 316, 26 Am. St. 291; *Breucher v. Port Chester*, 101 N. Y. 240, 4 N. E. 272; *Bowns v. May*, 120 N. Y. 357, 24 N. E. 947; *Stephen v. Daniels*, 27 Ohio St. 527; *Whittaker v. Deadwood*, 12 S. Dak. 608, 82 N. W. 202. Especially is this true where the plaintiff's right would have been cut off, if he had not paid the assessment or enjoined the sale. *Gill v. Oakland*, 124 Cal. 335, 57 Pac. 150. In many states the return or recovery of void or illegal taxes is provided for by statutes. See *White v. Smith*, 117 Ala. 232, 23 So. 525; *Wilmington v. Ricaud*, 90 Fed. 214; *Donch v. Lake County*, 4 Ind. App. 374, 30 N. E. 204; *Simonson v. West Harrison*, 5 Ind. App. 459, 32 N. E. 585; *Iowa R. Land Co. v. Woodbury County*, 64 Iowa 212, 19 N. W. 915; *Topeka Commercial &c. Co. v. Harper County*, 63 Kans. 351, 65 Pac. 660; *McGee v. Salem*, 149 Mass. 238, 21 N. E. 386; *Monroe Water Co. v. Frenchtown*, 98 Mich. 431, 57 N. W. 268; *Western Ranches v. Custer County*, 28 Mont. 278, 72 Pac. 659; *People v. Matthias*, 84 App. Div. (N. Y.) 122, 81 N. Y. S. 1105; *Day v. Pelican*, 94 Wis. 503, 69 N. W. 368.

⁴² *State v. Nelson*, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300n. See, however, *Weston v. Luce County*, 102 Mich. 528, 61 N. W. 15.

facilitate the sale of land⁴³ or to redeem from a tax sale⁴⁴ may be recovered.

§ 145. **Duress by imprisonment.**—Duress by imprisonment was recognized at common law.⁴⁵ Imprisonment in the sense in which it is used here is the restraint of personal liberty whether in prison or elsewhere.⁴⁶ But mere imprisonment is not alone sufficient to establish duress.⁴⁷ It is necessary to show either an unlawful imprisonment, or abuse of, or oppression under lawful process, or legal detention, such as overcomes the free will of the party detained.⁴⁸

⁴³ *Gage v. Saginaw*, 128 Mich. 682, 87 N. W. 1027.

⁴⁴ *American Baptist Missionary Union v. Hastings*, 67 Minn. 303, 69 N. W. 1078. See also, *Keehn v. McGillicuddy*, 19 Ind. App. 427, 49 N. E. 609. See, however, *Phillips v. Jefferson County*, 5 Kans. 412; *Wabaunsee County v. Walker*, 8 Kans. 431; *Dickinson County v. National Land Co.*, 23 Kans. 196; *Shane v. St. Paul*, 26 Minn. 543, 6 N. W. 349; *Fleetwood v. New York*, 4 N. Y. Super. Ct. 475; *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. ed. 926; *Powell v. St. Croix Supervisors*, 46 Wis. 210, 50 N. W. 1013.

⁴⁵ *Bush v. Brown*, 49 Ind. 573, 19 Am. Rep. 695; *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6. See also, 3 Elliott Ev., § 2168.

⁴⁶ *First Nat. Bank v. Bryan*, 62 Iowa 42, 17 N. W. 165; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511. Courts of admiralty pay no respect to agreements of seamen to forfeit their wages, extorted from them at sea or in places where the power of the ship's master is supreme. *The Fred E. Sander*, 95 Fed. 829.

⁴⁷ *Clem v. Guncun*, 94 U. S. 664; *McCarthy v. Taniska*, 84 Conn. 377, 80 Atl. 84; *Smith v. Atwood*, 14 Ga. 402; *Jones v. Peterson*, 117 Ga. 58, 43 S. E. 417; *Taylor v. Cottrell*, 16 Ill. 93; *Heahs v. Dunham*, 95 Ill. 583; *Neally v. Greenough*, 25 N. H. 325.

⁴⁸ *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170; *Jones v. Peterson*, 117 Ga. 58, 43 S. E. 417; *Taylor v. Cottrell*, 16 Ill. 93; *Heaps v. Dunham*, 95 Ill. 583; *Grimes v. Briggs*, 110 Mass. 446; *Fulton v. Gregory*, 130 Mass. 176; *Prichard v.*

Sharp, 51 Mich. 432, 16 N. W. 798; *Holmes v. Hill*, 19 Mo. 159; *Nealley v. Greenough*, 25 N. H. 325; *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157; *Pflaum v. McClintock*, 130 Pa. St. 369, 18 Atl. 734; *Meacham v. Newport*, 70 Vt. 67, 39 Atl. 631. Where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress. *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. 207; *Whitt v. Blount* (Ga.), 53 S. E. 205; *Schommer v. Farwell*, 56 Ill. 542; *Bane v. Detrick*, 52 Ill. 19; *Rollins v. Lashus*, 74 Maine 218; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Hackett v. King*, 6 Allen (Mass.) 58; *Sweet v. Kimball*, 166 Mass. 332; *Seiber v. Price*, 26 Mich. 518; *Fossett v. Wilson*, 59 Miss. 1; *Breck v. Blanchard*, 22 N. H. 303; *Richardson v. Duncan*, 3 N. H. 508; *Clark v. Pease*, 41 N. H. 414; *Osborn v. Robbins*, 36 N. Y. 365, 4 Abb. Prac. (N. S.) (N. Y.) 15; *Guillaume v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141; *Reinhard v. City*, 49 Ohio St. 257, 31 N. E. 35; *Phelps v. Zuschlag*, 34 Tex. 371; *Baker v. Morton*, 12 Wall. (U. S.) 150, 20 L. ed. 262; *Behl v. Schuett*, 104 Wis. 76, 80 N. W. 73. Notwithstanding the arrest may be for a just cause and under a valid process, yet if it is made for an illegal purpose, and if the person so arrested pays money for his release, he may be considered as having paid under

§ 146. **Duress by threat and oppression.**—The common law originally recognized but two kinds of duress. One of them has just been discussed, i. e., duress by imprisonment.⁴⁹ The other was duress per minas. Duress per minas was a threatened or impending hardship and was held to exist when a person was threatened with loss of life, limb, or mayhem, or with imprisonment.⁵⁰ Since under the definition just given, duress per minas may arise when one is threatened with personal injury, it is well settled that threats of violence may constitute duress.⁵¹ Thus it has been held that threats of mob violence⁵² or fear of physical injury and abandonment by husband, may constitute such duress.⁵³ Nor is marriage excepted from the operation of the foregoing principles. Notwithstanding the rule that the law requires that marriages shall not lightly be set aside, yet if one of the parties has been coerced by abduction or terror or fright caused by threats of physical violence, the marriage may be annulled.⁵⁴

duress of imprisonment, and be permitted to recover such payment. *Mayer v. Oldham*, 32 Ill. App. 233; *Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243, 55 Am. St. 406; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Richardson v. Duncan*, 3 N. H. 508; *Reinhard v. Columbus*, 49 Ohio St. 257, 31 N. E. 35; *Fillman v. Ryon*, 168 Pa. St. 484, 32 Atl. 89; *Phelps v. Zuschlag*, 34 Tex. 371; *Heckman v. Swartz*, 64 Wis. 48, 24 N. W. 473. Some cases lay down a rule, largely dictum, to the effect that where one believes he has a cause of action against others, and by lawful process causes him to be arrested and imprisoned, and the one so arrested voluntarily executes a deed or makes a contract, or pays the money claimed for his deliverance, he cannot avoid such deed, or contract for duress by imprisonment, or reclaim the money as extorted from him, although, in fact, the plaintiff had no good cause of action. *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157.

⁴⁹ See § 145 ante.

⁵⁰ *Whitt v. Blount*, 124 Ga. 671, 53 S. E. 205; 2 Bacon Abr. 156. "Duress is of two kinds—duress of im-

prisonment, when a man actually loses his liberty, and duress per minas, where the hardship is only threatened and impending." *Bush v. Brown*, 49 Ind. 573, 19 Am. Rep. 695. *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6. See also, 3 *Elliott Ev.*, § 2168.

⁵¹ *Burr v. Burton*, 18 Ark. 214; *Russell v. McCarty*, 45 Ga. 197; *Mollere v. Harp*, 36 La. Ann. 471 (threat to take life); *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560; *Bueter v. Bueter*, 1 S. Dak. 94, 45 N. W. 208, 8 L. R. A. 562; *Bogle v. Hammons*, 49 Tenn. (2 Heisk.) 136; *Brown v. Pierce*, 74 U. S. (7 Wall.) 205, 19 L. ed. 134 (threat to take life unless contract executed); *Baker v. Morton*, 79 U. S. (12 Wall.) 150, 20 L. ed. 262.

⁵² *Doolittle v. McCullough*, 7 Ohio St. 299; *Baker v. Morton*, 12 Wall. (U. S.) 150, 20 L. ed. 262; *Brown v. Pierce*, 7 Wall. (U. S.) 205, 19 L. ed. 134.

⁵³ *Berry v. Berry*, 57 Kans. 691, 47 Pac. 837, 57 Am. St. 351. See also, *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Tapley v. Tapley*, 10 Minn. 448, 88 Am. Dec. 76; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Rep. 623.

⁵⁴ *Scott v. Sebright*, L. R. 12 Prob. Div. 21; *Quecaly v. Waldron*, 126 La.

However, if the threat is unreasonable and the danger not imminent, it cannot well amount to duress.⁵⁵ Thus it has been held that mere angry words and looks by a paralyzed husband cannot amount to duress.⁵⁶

Under the modern theory there may be duress of goods or of the person unaccompanied with a threatened physical injury or imprisonment.⁵⁷ It follows that if one's business necessities are taken advantage of in such a manner as to impress payment with an involuntary character the amount so paid may be recovered in a proper case. Thus, where a lessee wrongfully refuses to join his lessor in making proof of loss by fire until he pays the former a sum which he does not owe, the payment may be recovered.⁵⁸ Likewise, where money or a contract is illegally obtained under such circumstances as threaten great loss or risk in respect to property or person without any legal or other adequate remedy⁵⁹ or where obtained by threat and fear of the destruction of property⁶⁰ they are procured by duress, and the money so paid may be recovered or the contract avoided.

258, 52 So. 479, 27 L. R. A. (N. S.) 803n (plaintiff assaulted and threatened with further violence by armed relatives); *Marsh v. Whittington*, 88 Miss. 400, 40 So. 326 (coerced by armed relatives); *Hampstead v. Plaistow*, 49 N. H. 84; *Ferlat v. Goujon*, *Hopk. Ch. (N. Y.)* 478, 14 Am. Dec. 554; *Willard v. Willard*, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529. See, however, *Meredith v. Meredith*, 79 Mo. App. 636.

⁵⁵ *Barrett v. Mahnken*, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. 953.

⁵⁶ *Van Deventer v. Van Deventer*, 46 N. J. L. 460. See also, *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61.

⁵⁷ *Callender Sav. Bank v. Loos*, 142 Iowa 1, 120 N. W. 317.

⁵⁸ *Guetzkow Bros. Co. v. Breese*, 96 Wis. 591, 72 N. W. 45, 65 Am. St. 83. See also, *Corkle v. Maxwell*, 3 Blatchf. (U. S.) 413, Fed. Cas. No. 3231; *Degraff v. Ramsey*, 46 Minn. 319, 48 N. W. 1135; *Lehigh Coal & Co. v. Brown*, 100 Pa. St. 338.

⁵⁹ *United States v. Ellsworth*, 101 U. S. 170, 25 L. ed. 862; *Swift v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. 244; *Chicago & C. R. Co. v. Coal Co.*, 79 Ill. 121; *Chicago v. Waukesha & C. Brewing Co.*,

97 Ill. App. 583; *Searle v. Gregg*, 67 Kans. 1, 72 Pac. 544; *Dana v. Kemble*, 17 Pick. (Mass.) 545; *Cunningham v. Munroe*, 15 Gray (Mass.) 471; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *McMurtrie v. Keenan*, 109 Mass. 185; *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997; *State v. Nelson*, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300n; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. 581; *Westlake v. St. Louis*, 77 Mo. 47; *Tandy v. Elmore-Cooper & Co.*, 113 Mo. App. 409, 87 S. W. 614; *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 44 Nebr. 463, 62 N. W. 899; *First Nat. Bank v. Sargeant*, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296; *Peters Ricker & Co. v. R. Co.*, 42 Ohio St. 275; *Ratterman v. American Exp. Co.*, 49 Ohio St. 608, 32 N. E. 754; *Lehigh & Co. v. Brown*, 100 Pa. St. 338; *Guetzkow Bros. v. Breese*, 96 Wis. 591, 72 N. W. 45, 65 Am. St. 83.

⁶⁰ *Spaids v. Barrett*, 57 Ill. 289; *Foshay v. Ferguson*, 5 Hill (N. Y.) 154; *Motz v. Mitchell*, 91 Pa. St. 114; *French v. Shoemaker*, 14 Wall. (U. S.) 314, 20 L. ed. 852; *United States v. Huckabee*, 16 Wall. (U. S.) 414.

It is well settled by the weight of authority that threats of criminal prosecution which will lead to imprisonment may constitute duress.⁶¹ This is especially true when the imprisonment threatened seems imminent,⁶² as where the coerced party believes that a warrant has already been issued,⁶³ or where the wife knows her husband is in custody though not under arrest.⁶⁴ Some of the cases expressly limit the doctrine of duress by threat of criminal prosecution to instances where the imprisonment threatened is immediate.⁶⁵ As a result of this principle it has been held that a threat to bring criminal proceedings against one who is in another state or country does not constitute duress.⁶⁶ It has also been held, that a mere threat of criminal prosecution when no warrant has been issued nor proceedings begun and there is no immediate danger, does not constitute duress.⁶⁷ These last-mentioned prin-

⁶¹ *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. 207; *Walbridge v. Arnold*, 21 Conn. 424; *Baldwin v. Hutchinson*, 8 Ind. App. 454, 35 N. E. 711; *Gohegan v. Leach & Co.*, 24 Iowa 509; *Thompson v. Niggley*, 53 Kans. 664, 35 Pac. 290, 26 L. R. A. 803; *Winfield Nat. Bank v. Croco*, 46 Kans. 620, 26 Pac. 939; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525, 27 N. E. 1010; *Bryant v. Peck*, 154 Mass. 460, 28 N. E. 678; *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146; *Weiser v. Welch*, 112 Mich. 134, 70 N. W. 438; *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, 24 Am. St. 166; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Hargreaves v. Korcek*, 44 Nebr. 660, 62 N. W. 1086; *Beindorf v. Kaufman*, 41 Nebr. 824, 60 N. W. 101; *Horton v. Bloedorn*, 37 Nebr. 666, 56 N. W. 321; *Springfield Fire & Marine Ins. Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37, 46 Am. St. 571; *James v. Roberts*, 18 Ohio 548; *Western Avenue Building Assn. v. Walters*, 7 Ohio C. C. 202; *Morrison v. Faulkner*, 80 Tex. 128, 15 S. W. 797; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; *Nack v. Prang*, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. 848; *McCormick Harvesting Mach. Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727.

⁶² *Morrill v. Nightingale*, 93 Cal.

452, 28 Pac. 1068, 27 Am. St. 207; *Green v. Moss*, 65 Ill. App. 594; *Bradley v. Irish*, 42 Ill. App. 85; *Winfield Nat. Bank v. Croco*, 46 Kans. 620, 26 Pac. 939; *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524; *Wilkerson v. Hood*, 65 Mo. App. 491; *Horton v. Bloedorn*, 37 Nebr. 666, 56 N. W. 321.

⁶³ *Bradley v. Irish*, 42 Ill. App. 85.

⁶⁴ *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524.

⁶⁵ *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Youngs v. Simm*, 41 Ill. App. 28; *Harmon v. Harmon*, 61 Maine 227, 14 Am. Rep. 556; *Taylor v. Jacques*, 106 Mass. 291; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. 589; *Flanigan v. Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Phillips v. Henry*, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. 706. In the case of *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. 589, it is said: "Threats of criminal prosecution unaccompanied by threats of immediate imprisonment do not constitute duress."

⁶⁶ *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524; *Phillips v. Henry*, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. 706.

⁶⁷ *St. Louis R. Co. v. Thomas*, 85 Ill. 464; *Loan & Assn. v. Hollander*, 62

ciples should be applied with caution, however, for most of the cases sustaining them are based on the old theory that the threat must be such as to overcome the mind of a person of ordinary courage. Under the modern doctrine all that is necessary to constitute duress in this respect is a threat sufficient to overcome the mind of the person actually threatened, whether he be a person possessed of courage greater or less than that of the ordinary person.⁶⁸ Not only this, but a threat of arrest or prosecution may be more persuasive than a levy on a seizure of goods.⁶⁹ A distinction may in some cases be drawn between threats of arrest made by a private individual and those made by public officials vested with power to carry them into execution by arrest and prosecution.⁷⁰ Thus it has been held that the payment of a license fee under threats of prosecution by town officials is not voluntarily made and may be recovered.⁷¹

The authorities differ as to whether the threatened arrest or imprisonment must be unlawful. There is no question that duress may exist where there is a threat of unlawful imprisonment.⁷² Likewise, if the threat of lawful imprisonment is unlawfully used in order to procure a contract,

Ill. App. 58; *Hines v. Hamilton* County, 93 Ind. 266; *Harmon v. Harmon*, 61 Maine 227, 14 Am. Rep. 556; *Hilborn v. Bucknam*, 78 Maine 482, 7 Atl. 272, 57 Am. Rep. 816; *Higgins v. Brown*, 78 Maine 473, 5 Atl. 269; *Thorn v. Pinkham*, 84 Maine 101, 24 Atl. 718; *Claffin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54; *Buchanan v. Sahlein*, 9 Mo. App. 552.

⁶⁸ Duress may be caused by threats of a criminal prosecution of a husband, wife, child or other near relative of the person whose action is thereby controlled, though no crime has in fact been committed nor prosecution begun. If the contracting party has been put in such fear as to be deprived of the free will power essential to contractual capacity, the transaction thereby induced may be avoided. *International Harvester Co. v. Voboril*, 187 Fed. 973, 110 C. C. A. 311. See cases first cited in note 1 of this section and matter at the beginning of this chapter.

⁶⁹ *Neumann v. La Crosse*, 94 Wis. 103, 68 N. W. 654.

⁷⁰ *Chicago v. Waukesha &c. Brewing Co.*, 97 Ill. App. 583.

⁷¹ *Chicago v. Sperbeck*, 69 Ill. App. 562; *Harvey v. Olney*, 42 Ill. 336; *Neumann v. La Crosse*, 94 Wis. 103, 68 N. W. 654. See, however, *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256, where it is held that the threat of a tax collector, who has no authority to issue a warrant or make an arrest, to have a warrant issued and have the person prosecuted unless he pays his tax, does not make the payment involuntary, since the danger threatened is not urgent or immediate. One who voluntarily repays money alleged to have been stolen, when not paid under an unlawful agreement, cannot recover such payment on being acquitted of the charge. *Puckett v. Roquemore*, 55 Ga. 235. A statement made by the court that a child will be sent to the reformatory unless bond is given for his support has been held to operate as duress. *St. Thomas v. Yearsley*, 22 Ont. App. 340.

⁷² *Bane v. Detrick*, 52 Ill. 19; *Harvey v. Olney*, 42 Ill. 336; *Bush v.*

duress may exist.⁷³ By the weight of authority where a contract is made or money paid under coercion of a threat of imprisonment, if such threat overpowers the mind of the person threatened, duress exists, no matter whether the threat is for lawful or unlawful imprisonment, the contract so given may be rescinded or the money so paid recovered.⁷⁴ In practically all of the foregoing cases it will be found, however, that there was some abuse of the threatened legal process, or that the threat was made to a relative. Thus it has been held that the execution of written securities extorted by means of threats of prosecution for criminal offenses of which the party threatened was guilty in fact, but which were in no manner connected with the demands for which compensation was sought, may be avoided by the party executing them not only in the hands of the original payee, but in the hands of an assignee if such assignee had notice of the cir-

Brown, 49 Ind. 573, 19 Am. Rep. 695; Baldwin v. Hutchison, 8 Ind. App. 454, 35 N. E. 711; Kennedy v. Roberts, 105 Iowa 521, 75 N. W. 363; Foss v. Hildreth, 10 Allen (Mass.) 76; Cribbs v. Sowle, 87 Mich. 340, 49 N. W. 587, 24 Am. St. 166; Foshay v. Ferguson, 5 Hill (N. Y.) 154; James v. Roberts, 18 Ohio 548; Springfield & Co. Ins. Co. v. Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37, 46 Am. St. 571; Landa v. Obert, 78 Tex. 33, 14 S. W. 297; Morrison v. Faulkner, 80 Tex. 128, 15 S. W. 797; Neumann v. La Crosse, 94 Wis. 103, 68 N. W. 654.

⁷³ Hartford & Co. Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651; Richardson v. Duncan, 3 N. H. 508; Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. 447. See also, Fillman v. Ryon, 168 Pa. St. 484, 32 Atl. 89; Meacham v. Newport, 70 Vt. 67, 39 Atl. 63; Behl v. Schuett, 104 Wis. 76, 80 N. W. 73.

⁷⁴ Williams v. Bayley, L. R. 1 H. L. 200; Hartford & Co. Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651; Town of Sharon v. Gager, 46 Conn. 189; Burton v. McMillan, 52 Fla. 469, 42 So. 849, 120 Am. St. 220; Bane v. Detrick, 52 Ill. 19; Heaton v. Norton County State Bank, 59 Kans. 281, 52 Pac. 876; same case 5 Kans. App. 498, 47 Pac. 576; Thompson v.

Niggley, 53 Kans. 664, 35 Pac. 290, 26 L. R. A. 803; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525 (where the subject is carefully considered); Bryant v. Peck & Co., 154 Mass. 460, 28 N. E. 678; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Taylor v. Jacques, 106 Mass. 291; Miller v. Minor Lumber Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524; Davis v. Luster, 64 Mo. 43; Nebraska Mut. Bond Assn. v. Klee, 70 Nebr. 383, 97 N. W. 476; Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. 447; Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Springfield & Co. Ins. Co. v. Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37, 46 Am. St. 571; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Phelps & Johnson v. Zuschlag, 34 Tex. 371; Fay v. Oatley, 6 Wis. 42. See also, Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. 153. See, however, Gregor v. Hyde, 62 Fed. 107, 10 C. C. A. 290; Mullin v. Leamy, 80 N. J. L. 484, 79 Atl. 257. Many of the cases which give expression to an unqualified statement of the rule that a threat of either lawful or unlawful imprisonment may amount to duress are cases in which a near relative of one of the contracting par-

cumstances under which the securities were taken.⁷⁵ It has also been held an abuse of legal process to lure a foreign debtor

ties was threatened with arrest. For a case drawing a distinction between threats to arrest the party himself and threats to arrest a relative, see *Giddings v. Iowa Sav. Bank*, 104 Iowa 676, 74 N. W. 21. See also, generally, 3 Elliott Ev., §§ 2182, 2183.

⁷⁵ *Thompson v. Niggley*, 53 Kans. 664, 35 Pac. 290, per Allen, J., 26 L. R. A. 803: "It is impossible to extract from the cases any complete definition which has been uniformly adhered to. There are cases holding that mere threats of criminal prosecution when no warrant has been issued, do not constitute duress. *Higgins v. Brown*, 78 Maine 473, 5 Atl. 269; *Harmon v. Harmon*, 61 Maine 277; *Buchanan v. Sahlein*, 9 Mo. App. 552. This court, however, held, in the case of *Winfield Nat. Bank v. Croco*, 46 Kans. 620, 26 Pac. 939, that, 'if the creditor operated upon the fears of the husband by threats of arrest and imprisonment, believed by him to be imminent, and thus overcame his will, and through fear and undue influence compelled him to sign the mortgage, the signature is not binding; and if the wife was induced to execute the mortgage from fear, excited by threats made to her by the creditor of an illegal criminal prosecution against her husband, the instrument thus obtained will not be binding upon her.' This case settles the question as to the necessity that a prosecution should have been actually commenced in order to establish duress, but does not touch the point presented here as to whether duress can be predicated on threats of a lawful arrest and prosecution. It appears from the testimony of Niggley himself that he was guilty of the offenses for which he was threatened with prosecution, and the duress consisted mainly, if not entirely, in the fears excited in the mind of the defendant by threats of such prosecution. There are many cases holding that the threat of a lawful arrest does not constitute duress in such sense as to discharge the person threatened from liability on a contract which he has been induced

to sign by means of such threats. *Nealley v. Greenough*, 25 N. H. 325; *Compton v. Bunker Hill Bank*, 96 Ill. 301; *Eddy v. Herrin*, 17 Maine 338; *Clark v. Turnbull*, 47 N. J. Law, 265; *Mundy v. Whittemore*, 15 Nebr. 647, 19 N. W. 694; *Sanford v. Sornborger*, 26 Nebr. 295, 41 N. W. 1102. For other cases, see 6 Am. and Eng. Ency. of Law, p. 64 et seq. We have examined a great number of cases declaring this doctrine, in all of which it appeared that the threat made was of a prosecution for the particular matter for which payment or settlement was sought. In many of the older cases, as well as in some of the latter ones, the arrest threatened was on process issued, or to be issued, in a civil action, for the collection of the plaintiff's demand. In this case the threats made were of a prosecution for offenses in no wise connected with Summers' claim. The facts that Niggley was guilty of violations of the law of the state, and that Summers, his attorney, and friends knew of the facts showing his guilt themselves, and were witnesses to the unlawful sales of liquor, were used as a menace to drive Niggley into a settlement of Summers' claim. The court of appeals of New York expressly denies the doctrine that the threats must be of an unlawful arrest. In *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, it was held 'that money paid by a wife in settlement of her husband's debt upon the threat by the creditor to arrest the husband if the debt was not paid, may be recovered back, although there was lawful grounds for arresting the husband.' The case of *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741, also holds that duress may be exercised through threats of prosecution for an offense of which the party is actually guilty. See also, *Phelps v. Zuschlag*, 34 Texas 371; *Taylor v. Jaques*, 106 Mass. 291; *Davis v. Luster*, 64 Mo. 43. In *Seiber v. Price*, 26 Mich. 518, it was said: 'An arrest by legal warrant, on a criminal charge, to compel the satisfaction of a mere private civil demand, is a

by false promises into the creditor's state and then arrest him and thus procure a settlement.⁷⁶ Consequently it may be stated as a general rule that if resort, in bad faith, is had to arrest,⁷⁷ or, in general, if it is resorted to⁷⁸ or a threat is made to resort thereto⁷⁹ for the purpose of compelling the payment of a private claim or demand, and a party is thus coerced, duress exists.⁸⁰ Other authorities, however, lay down the rule that contracts executed under threat of lawful imprisonment cannot be avoided

misuse of process, a fraud upon the law, and an illegal arrest as respects the party who knowingly and purposefully perverts the machinery of the law in that way. And papers obtained under the pressure of such a proceeding by the party promoting it are at least voidable as against him, at the election of the party thus constrained to make them." See also, *Berry v. Berry*, 57 Kans. 691, 47 Pac. 837, 57 Am. St. 351. See also, *Kelsey v. Hobby*, 16 Pet. (U. S.) 269, 10 L. ed. 961; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Gard v. Arnold*, 157 Mo. 538, 57 S. W. 1035; *Breck v. Blanchard*, 22 N. H. 303; *Mayer v. Walter*, 64 Pa. 283.

⁷⁶ *Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243, 55 Am. St. 406. See also, *Wanzer v. Bright*, 52 Ill. 35; *Dunlap v. Cody*, 31 Iowa 260; *Williams v. Reed*, 29 N. J. L. 385; *Townsend v. Smith*, 47 Wis. 623, 3 N. W. 439, 32 Am. St. 793.

⁷⁷ *Behl v. Schuett*, 104 Wis. 76, 80 N. W. 73.

⁷⁸ *Mayer v. Oldham*, 32 Ill. App. 233; *White v. Rubber Co.*, 181 Mass. 339, 63 N. E. 885; *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 58; *Hackett v. King*, 6 Allen (Mass.) 58; *Seiber v. Price*, 26 Mich. 518; *Holbrook v. Cooper*, 44 Mich. 373, 6 N. W. 850; *Clark v. Pease*, 41 N. H. 414; *Osborn v. Robbins*, 36 N. Y. 365, 4 Abb. Prac. (N. S.) (N. Y.) 15; *In re Work's Appeal*, 59 Pa. St. 444; *Fillman v. Ryan*, 168 Pa. St. 484, 32 Atl. 89; *Phelps & Johnson v. Zuschlag*, 34 Tex. 371; *Brownell v. Talcott*, 47 Vt. 243; *Fay v. Oatley*, 6 Wis. 42; *Heckman v. Swartz*, 64 Wis. 48, 24 N. W. 473.

⁷⁹ *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. 207; *Bane v. Deitrick*, 52 Ill. 19; *Taylor v.*

Jacques, 106 Mass. 291; *Miller v. Bryden*, 34 Mo. App. 602; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. 447.

⁸⁰ See ante, § 145, Duress by imprisonment. "It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his efforts to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose. * * * We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is whether his liability to imprisonment was used against him, by way of a threat, to force a

for duress.⁸¹ In this connection it would be well to note that one cannot have a marriage annulled on account of duress when he enters into such relation because threatened with prosecution for seduction unless the marriage is contracted. If he would rather enter into marriage than the penitentiary the law affords him no relief.⁸²

Ordinarily the institution or threatened institution of a civil suit, or ordinary legal proceedings to enforce a legal de-

settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcome his, he may avoid the settlement." *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

⁸¹ *Gregor v. Hyde*, 62 Fed. 107, 10 C. C. A. 290 (statutory); *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. 153; *Knapp v. Hyde*, 16 Barb. (N. Y.) 80. In connection with this case however, see, *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. 447; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *McCormick Harvesting Machine Co. v. Miller*, 54 Nebr. 644, 74 N. W. 1061; *Bodine v. Morgan*, 37 N. J. Eq. 426. "A demand made under the urgency of an intimation that, if not complied with, the law will be appealed to, cannot reasonably be claimed to be either extortion or duress." *Mullin v. Leamy* (N. J. L.), 79 Atl. 257, quoting from *Sooy v. State*, 38 N. J. L. 324; *Thorn v. Pinkham*, 84 Maine 101, 24 Atl. 718, 30 Am. St. 335n. In the above case it is said that if the threat is made under a good faith belief that there is just ground for causing the arrest of the other party the settlement obtained thereby cannot be avoided for duress. Some cases draw a distinction between threats of lawful arrest made directly to the party himself and threats made to a third person that unless settlement was made a relative of such third person would be arrested. *Giddings v. Iowa Sav. Bank*, 104 Iowa 676, 74 N. W. 21. See, however, *Gregor v. Hyde*, 62 Fed. 107, 10 C. C. A. 290; *Bailey*

v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. 153. For good cases illustrating the extent to which one may go without being guilty of duress, see, *Roloson v. DeHart*, 134 Mo. App. 633, 114 S. W. 1122. In the above case it appears that the one accused of stealing the defendant's goods was with others called in and confronted with the charge of robbery, and told that settlement was desired. No threats whatever were made. The accused denied the charge but admitted the evidence was strong enough to send him to the penitentiary. The court held his contract of settlement binding. *Roth v. Holmes* (Tenn.), 52 S. W. 699. Fear of imprisonment, when there has been no threats thereof, does not constitute duress. *Felton v. Gregory*, 130 Mass. 176; *Roloson v. DeHart & Riggs*, 134 Mo. App. 633, 114 S. W. 1122. See, however, *Greenwell v. Negley*, 31 Ky. L. 144, 101 S. W. 961. In the above case, however, the parties were partners and there was some misrepresentation on the part of the dominant party.

⁸² *Griffin v. Griffin*, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937; *Collins v. Ryan*, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814, and note; *Blankenmiester v. Blankenmiester*, 106 Mo. App. 390, 80 S. W. 706; *Ingle v. Ingle* (N. J. Eq.), 38 Atl. 953; *Thorne v. Farrar*, 57 Wash. 441, 107 Pac. 347, 27 L. R. A. (N. S.) 385, 135 Am. St. 995. See also, *McCarthy v. Taniska*, 84 Conn. 377, 80 Atl. 84 (contract in settlement of bastardy proceeding). See, however, *Hawkins v. Hawkins*, 142 Ala. 571, 38 So. 640, 110 Am. St. 53 (case of inexperienced boy).

mand does not constitute duress,⁸³ even though it may be made in a period of business depression.⁸⁴ Thus an agreement or settlement induced by a threat to commence legal proceedings for the removal of a dam,⁸⁵ or for the collection of a debt contracted during infancy⁸⁶ to foreclose a chattel,⁸⁷ or other mortgage,⁸⁸ to sue out a writ of attachment⁸⁹ or levy executions,⁹⁰ or a threat by an officer to arrest an execution debtor and take him to jail unless he secures the debt, the officer having in his possession at the time legal process requiring him to take the debtor into custody,⁹¹

⁸³ *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Stover v. Mitchell*, 45 Ill. 213; *Swanston v. Ijams*, 63 Ill. 165; *Kerting v. Hilton*, 152 Ill. 658, 38 N. E. 941; *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629; *Van Alstine v. McAlldon*, 141 Ill. App. 27; *Snyder v. Braden*, 58 Ind. 143; *Buck v. Axt*, 85 Ind. 512; *Town of Ligonier v. Hakerman*, 46 Ind. 552, 15 Am. Rep. 323; *Dickerman v. Lord*, 21 Iowa 338, 89 Am. Dec. 579; *Hill v. Phixton*, 13 Ky. L. 333; *Baltimore v. Lefferman*, 4 Gil. (Md.) 425, 45 Am. Dec. 145; *Kingsbury v. Sargent*, 83 Maine 230, 22 Atl. 105; *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Forbes v. Appleton*, 5 Cush. (Mass.) 115; *Emmons v. Scudder*, 115 Mass. 367; *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689; *Vereycken v. Vanden Brooks*, 102 Mich. 119, 60 N. W. 687; *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115; *Minneapolis Land Co. v. McMillan*, 78 Minn. 287, 82 N. W. 591; *Wolfe v. Marshal*, 52 Mo. 167; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61; *Weber v. Kirkendall*, 44 Nebr. 766, 63 N. W. 35; *Jones v. Houghton*, 61 N. H. 51; *Morris v. Tuthill*, 72 N. Y. 575; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; *Peebles v. Pittsburgh*, 101 Pa. St. 304, 47 Am. Rep. 714; *Flack v. National Bank*, 8 Utah 193, 30 Pac. 746; *Burnham v. Strafford*, 53 Vt. 610; *York v. Hinkle*, 80 Wis. 624, 50 N. W. 895, 27 Am. St. 73. A threat to sue by one who has the legal right to do so does not usually amount to duress. *Walla Walla Fire Ins. Co. v. Spencer*, 52 Wash. 369, 100 Pac. 741.

⁸⁴ *Morton v. Morris*, 72 Fed. 392, 18 C. C. A. 611. See also, Thus a mere demand for counter security and threats that if the counter security were not given, legal proceedings would be commenced to compel the plaintiff to give an account and make settlement of his administration, such demand and threat being induced by information that the plaintiff had lost money at gambling does not amount to such duress as will avoid the surety given. *Hunt v. Bass*, 17 N. Car. 292, 24 Am. Dec. 274; *Sanborn v. Bush*, 41 Tex. Civ. App. 24, 91 S. W. 883.

⁸⁵ *Manigault v. S. M. Ward & Co.*, 123 Fed. 707, *affd.* 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. 127.

⁸⁶ *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555.

⁸⁷ *Pease v. Francis*, 25 R. I. 226, 55 Atl. 686.

⁸⁸ *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733; *Rodgers v. Wittenmeyer*, 88 Cal. 553, 26 Pac. 369; *Savannah Sav. Bank v. Logan*, 99 Ga. 291, 25 S. E. 692; *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629; *Buck v. Axt*, 85 Ind. 512; *Stout v. Judd*, 10 Kans. App. 579, 63 Pac. 662; *Vereycken v. Vanden Brooks*, 102 Mich. 119, 60 N. W. 687; *Wessel v. Mortgage Co.*, 3 N. Dak. 160, 54 N. W. 922, 44 Am. St. 529.

⁸⁹ *Lehman Durr & Co. v. Schackelford*, 50 Ala. 437; *Waller v. Cralle*, 47 Ky. 11; *Bolln v. Metcalf*, 6 Wyo. 1, 42 Pac. 12.

⁹⁰ *Wilcox v. Howland*, 23 Pick. (Mass.) 167.

⁹¹ *Bunker v. Steward (Maine)*, 4 Atl. 558.

has in each of the foregoing instances been held not to have been procured through duress. The mere threat to bring a good faith action, maintainable at law, does not amount to duress. If the party threatened would rather pay than resort to litigation he is remediless.⁹² However, if a civil proceeding actually begun or threatened is wrongful and oppressive in its nature and brought or threatened with the intention of coercing the adverse party and does in fact coerce such party into the payment of money or the formation of a contract, such payment or contract is made under duress and may be avoided.⁹³ Thus a threat to institute receiver-ship proceedings against a certain company at a time when it would ruin the company's business and affect the reputation of the defendant, constitutes such duress as will avoid the defendant's contract to pay a specified sum of money in order to save the business of the company and his own reputation from being falsely attacked.^{93a} Likewise, it has been held that a bond given, or money paid to release property seized in attachment proceedings oppressively instituted or conducted may be cancelled or recovered.⁹⁴ It has also been held that when an invalid and unfounded claim for a lien upon real property is filed and the necessities of the defendant's business require that this lien be immediately discharged, payment under such circumstances was

⁹² *Peckham v. Hendren*, 76 Ind. 47; *Lester v. Mayor &c. of Baltimore*, 29 Md. 415, 96 Am. Dec. 542; *Benson v. Monroe*, 7 Cush. (Mass.) 125, 54 Am. Dec. 716. See also, *Buch v. Houghtaling*, 110 App. Div. (N. Y.) 52, 96 N. Y. S. 1034 (margin transaction).

⁹³ *Footte v. DePoy*, 126 Iowa 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. 365. See also, *Watkins v. Baird*, 6 Mass. 506; *Behl v. Schuett*, 104 Wis. 76, 80 N. W. 73; *Guetzkow v. Breese*, 96 Wis. 591, 72 N. W. 45.

^{93a} *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129. See also, *Callender Sav. Bank v. Loos*, 142 Iowa 1, 120 N. W. 317. See, however, *McCammon v. Shantz*, 26 Misc. (N. Y.) 476, 57 N. Y. S. 515.

⁹⁴ *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10. In the above case oysters were seized under a writ of at-

tachment fraudulently obtained. The plaintiff in order to save his property from perishing was compelled to pay an exorbitant claim and execute a release for all damages sustained. *Collins v. Westbury*, 2 Bay (S. Car.) 211, 1 Am. Dec. 643. In the above case defendant's property was seized by writ of attachment while he was moving from one home to another. The circumstances were such that he could not await the slow process of the law to establish his rights. In order to gain the release of his property he signed the bond sued on. *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367. In the above case a writ of attachment was sued out for the purpose of extorting money. The property levied on was perishable and the plaintiff's business would have been greatly damaged had the attachment not been immediately removed.

made under duress and that it might be recovered.⁹⁵ A threatened civil action may also amount to duress where the parties are not on an equal footing. Thus, threats made against a person of inferior intellect,⁹⁶ or an aged man weakened in body and mind⁹⁷ to the effect that certain civil proceedings will be instituted, have been held such duress as will avoid a contract induced thereby. Threatening litigation while the defendant is ill,⁹⁸ or to continue litigation when the circumstances are oppressive⁹⁹ has been held to amount to duress.

Duress may exist even where there is no threat of legal proceedings, civil or criminal, and where there is no imprisonment of the individual or any threatened violence to his person. Under this principle a special written contract which limited a carrier's common-law liability, extorted from a shipper who had refused to sign it by prohibiting the shipment of cattle already in its possession unless the plaintiff signed the paper tendered him, has been held to have been procured by duress and to be voidable at the option of the shipper.¹ The

⁹⁵ *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. 581.

⁹⁶ *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. In the above case there were also threats of criminal proceedings. The alleged claim arose from illness said to have been caused by eating a meal at defendant's hotel.

⁹⁷ *Foote v. DePoy*, 126 Iowa 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. 365. In the above case guardianship proceedings had been instituted, the aged party in order to procure their dismissal entered into an unconscionable agreement.

⁹⁸ *Heinlein v. Imperial & Co. Ins. Co.*, 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. 409.

⁹⁹ *First Nat. Bank v. Sargeant*, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. (N. S.) 296.

¹ *St. Louis & Co. R. Co. v. Gorman*, 79 Kans. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637n. For further illustrations of this principle in cases where contracts of shipment were extorted by some sort of compulsion, see, *York Manufacturing Co. v. Illinois & Co. R. Co.*, 3 Wallace (U. S.) 107;

Chicago R. I. & P. R. Co. v. Cotton, 87 Ark. 339, 112 S. W. 742; *Evansville & T. H. R. Co. v. McKinney*, 34 Ind. App. 402, 73 N. E. 148; *Cleveland & C. C. & St. L. R. Co. v. Hollowell*, 172 Ind. 466, 88 N. E. 680; *Kansas & Co. R. Co. v. Reynolds*, 17 Kans. 251; *Atchison T. & S. F. R. Co. v. Dill*, 48 Kans. 210, 29 Pac. 148; *Atchinson T. & S. F. R. Co. v. Mason*, 4 Kans. App. 391, 46 Pac. 31; *Parker v. Atlantic & Co. R. Co.*, 133 N. Car. 335, 45 S. E. 658, 63 L. R. A. 827; *Missouri & Co. R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Gulf & Co. R. Co. v. Batte* (Tex. Civ. App.), 107 S. W. 632. In the above case it is held that the mere fact the plaintiff did not ask for time to read the contract before attaching his signature thereto would not necessarily make it binding if it was procured under duress. For the application of this principle to telegraph companies, see *Kirby v. Western Union Telegraph Co.*, 4 S. Dak. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. 765. It is obvious that if the goods offered or presented for transportation are of such a character that the carrier is under no obligation to transport

payment of an illegal or excessive rate charged for gas, water or the like, by a public service corporation cannot be recovered if voluntarily made.² But if the excessive rate is paid as a matter of necessity in order to obtain what one is justly entitled to when the parties do not stand on equal terms and there is a threat to turn off the gas,³ or water⁴ unless the company's demands are complied with and damage will result from such action, recovery may be had.⁵ However, the mere threat to do what one has a legal right to do does not ordinarily amount to duress.⁶ Nor does the threat to withhold from the party a legal right which he has an adequate remedy to enforce constitute in the eyes of the law such duress as will avoid a contract induced thereby.⁷ But where one has the advantage of the other, where delay or a resort to the

the same he may impose his own terms for carrying them. *Wilson v. Atlantic Coast Line Co.*, 133 Fed. 1022, 66 C. C. A. 486, *affd.* 129 Fed. 774 (circus paraphernalia including wild animals). *Chicago M. & St. P. R. Co. v. Wallace*, 66 Fed. 506, 30 L. R. A. 161, 14 C. C. A. 257 (circus paraphernalia including wild animals). *Russell v. Pittsburgh & C. R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214 (cars of sleeping car co.)

² *Cincinnati v. Gaslight & Coke Co.*, 53 Ohio St. 278, 41 N. E. 239.

³ *Indiana & C. Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868. See also, *New Orleans & C. Banking Co. v. Paulding*, 12 Rob. (La.) 378.

⁴ *Panton v. Duluth Gas & C. Co.*, 50 Minn. 175, 52 N. W. 527, 36 Am. St. 635; *St. Louis & C. Brew. Assn. v. St. Louis (Mo.)*, 37 S. W. 525; *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4.

⁵ *Corkle v. Maxwell*, Fed. Cas. No. 3231, 3 Blatchf. (U. S.) 413, *Ferguson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *DeGraff v. Ramsey*, 45 Minn. 319, 48 N. W. 1135; *Guetzkow v. Breese*, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83. If the purchaser merely refuses to pay for goods in his possession and adopts a course of action which if persisted in will ruin the vendor, a contract entered into by the vendor induced by the oppressive conduct of the vendee will be held voidable at the former's op-

tion. *Snyder v. Stribling*, 18 Okla. 168, 89 Pac. 222, *aff.*, 215 U. S. 261, 30 Sup. Ct. 73. Duress or undue influence may exist where a grossly oppressive and unfair advantage is taken of another's necessities or distress. *Snyder v. Stribling*, 18 Okla. 168, 89 Pac. 222, *affd.* *Snyder v. Rosenbaum*, 215 U. S. 261, 30 Sup. Ct. 73.

⁶ *Miller v. Davis (Colo.)*, 122 Pac. 793. See also, *Kansas City & C. R. Co. v. Graham (Tex. Civ. App.)*, 145 S. W. 632. Threats to convey or lease mortgaged property when the mortgagee has the right to do this, *Goos v. Goos*, 57 Nebr. 294, 77 N. W. 687, or threats to advance no more money by a member of a mining partnership unless the other member executed a contract tendered him does not amount to duress. *Connolly v. Bouck*, 174 Fed. 312, 98 C. C. A. 184. The refusal of township officials to call an election to authorize the issuance of bonds for a certain public improvement, unless a certain private enterprise would agree to help pay for such improvement has been held not to amount to duress. *Electric Plaster Co. v. Blue Rapids City Tp.*, 77 Kans. 580, 96 Pac. 68. Ordinarily it is not duress to threaten to do that which a party has a right to do. *United States Banking Co. v. Veale*, 84 Kans. 385, 114 Pac. 229.

⁷ *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265; *Electric Plastering Co. v. Blue Rapids City Tp.*, 77 Kans. 580, 96 Pac. 68. See also, *Sanborn v.*

law is indifferent to the one, but may produce serious loss and injury to the other, it is unconscionable to press such advantage to the obtaining of unjust demands, and this might well amount to extortion.⁸

§ 147. When presumed.—The existence of a confidential relation creates a presumption of influence which imposes upon the one holding the position of influence and receiving the benefit the burden of proving an absence of undue influence by showing that the servient party acted upon competent and independent advice of another, or such facts as will satisfy the court that the dealing was at arm's length, or that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties, or, as some of the authorities say, that it was beneficial to the other party.⁹ In some cases undue influence will be inferred from the nature of the transaction alone; in others, from the nature of the transaction and the exercise of occasional and habitual influence.¹⁰ The full application of the foregoing principles will be developed in the subsequent sections of this chapter.

§ 148. Relation of parties.—Under this topic no fiduciary or blood relations will be discussed, but instead reference is had to the relation which the parties sustain to the contract itself. The validity of the contract may depend first, on whether the

Bush, 41 Tex. Civ. App. 24, 91 S. W. 883.

⁸ Beckwith v. Frisbie, 32 Vt. 559.

⁹ Hensan v. Cooksey, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. 345; Fjone v. Fjone, 16 N. Dak. 100, 112 N. W. 70. Equity will closely scrutinize such contracts. In the above case mother deeded property to son. A fiduciary relation exists in every case "in which there is confidence reposed on one side and the resulting superiority and influence on the other, the relation of the duties involved in it need not be legal; may be moral, social, domestic, or merely personal." Hensan v. Cooksey, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. 345; Irwin v. Sample, 213 Ill. 160, 72 N. E. 687. See also, Kyle v. Perdue, 95 Ala. 579, 10 So. 103; Barnard v. Gantz, 140 N. Y.

249, 35 N. E. 430; Gibson v. Hammang, 63 Nebr. 349, 88 N. W. 500; Disch v. Timm, 101 Wis. 179, 77 N. W. 196. It is not, however, in every case of close relationship, even of blood, that a presumption of undue influence arises from the relationship alone, and there is reason for saying that the presumption being merely prima facie may only cast upon the dominant party the burden of introducing or proceeding with the evidence to meet it as distinguished from the burden of proof in the sense of ultimately establishing the issue. See ante, Ch. 4, Fraud and Misrepresentation.

¹⁰ Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Sears v. Shafer, 6 N. Y. 268. See ante, Ch. 6, Failure to disclose material facts.

adverse party or a third person practiced the duress committed, or second, it may depend on whether the threats were made directly to and against the promisor, or to or against a third person. From what has been said in the preceding sections of this chapter, it is obvious that if the duress is practiced by the dominant party to the contract the party oppressed may avoid the agreement.¹¹ Duress or undue influence may, however, be practiced by one not a party to the agreement, if he acts as the agent of¹² or in collusion with^{12a} the dominant party. Likewise, if the facts constituting the duress are known by the other party to the contract, or if he is not a bona fide purchaser of the agreement so obtained¹³ the oppressed party may avoid the agreement so induced. However, if the duress practiced is not the act of the dominant party or his agent, and is committed without his knowledge or consent, and is not taken advantage of by him for the purpose of obtaining the agreement there is no such duress as will afford grounds for the avoidance of the agreement.¹⁴ It is

¹¹ See ante, § 141 et seq., and *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. 207; *James v. Roberts*, 18 Ohio 548; *Bueter v. Bueter*, 1 S. Dak. 94, 45 N. W. 208, 8 L. R. A. 652; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

¹² *Winfield National Bank v. Croco*, 46 Kans. 620, 26 Pac. 939; *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524; *Springfield & Co. Ins. Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37, 46 Am. St. 571; *Neumann v. LaCrosse*, 94 Wis. 103, 68 N. W. 654; *McCormick Harvesting Machine Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727. The foregoing cases lay down the principle that the contract may be avoided notwithstanding the agent had no authority to commit the duress practiced. They are based on the theory that if the principal accepts the benefits of the contract so obtained he takes it subject to all defenses.

^{12a} *Dimmitt v. Robbins*, 74 Tex. 441, 12 S. W. 94; *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112; *Brown v. Peck*, 2 Wis. 261. In the case of *Dimmitt v. Robbins*, 74 Tex. 441, 12

S. W. 94, it appears that Dimmitt was held up by robbers and borrowed money from Robbins to meet their demands. The court lays down the rule quoting from *Prothier Obligations*, Vol. I, page 115, that "if being attacked by robbers, I descry a person to whom I promise a sum of money for delivering me out of their hands" the agreement is valid. The applicability of this principle to the present case, however, was denied because Robbins was found to be in collusion with the robbers.

¹³ *Line v. Blizzard*, 70 Ind. 23; *Helm v. Helm*, 11 Kans. 19; *Goodrich v. Cushman*, 34 Nebr. 460, 51 N. W. 1041; *Doolittle v. McCullough*, 7 Ohio St. 299. In the last case above cited a deed of assignment was procured through threats of mob violence, the assignee knowing the means by which it had been procured.

¹⁴ *Rogers v. Adams*, 66 Ala. 600; *Line v. Blizzard*, 70 Ind. 23; *Green v. Scranage*, 19 Iowa 461, 87 Am. Dec. 447; *Ely v. Hartford Life Ins. Co.*, 110 S. W. 265, 33 Ky. L. 272; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. 446; *Springfield & Co. v. Donovan*, 147 Mo. 622, 49 S. W. 500. In the foregoing cases duress

likewise obvious that if compulsion amounting to duress is brought to bear directly on the promisor the agreement is voidable at his option.¹⁵ It is also true as a general rule that if the threats are not directed against the promisor he cannot in law be said to have been coerced or subjected to duress.¹⁶ Thus it has been held that a creditor cannot avoid a contract obtained from his debtor by duress,¹⁷ nor, as a general rule will duress of the principal re-

was exercised by a husband to procure the signature of his wife to a note. The duress practiced being unknown to the adversary party. *Mutual &c. Life Assn. v. Cleveland &c. Mills*, 27 C. C. A. 212, 82 Fed. 508; *Beals v. Neddo*, 2 Fed. 41, 1 McCrary (U. S.) 206; *Moog v. Strang*, 69 Ala. 98; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Frasurè v. McGuire* (Ky.), 66 S. W. 1015; *Springfield &c. Co. v. Donovan*, 147 Mo. 622, 49 S. W. 500. In the foregoing cases the wife signed a mortgage because coerced in so doing by the husband. "Duress, to be available as a defense, must have been exercised upon the person who sets it up as a defense by the person who claims the benefit of the contract, or by some one acting in his behalf or with his knowledge." *Mullin v. Leamy*, 80 N. J. L. 484, 79 Atl. 257. The wife's fear of her husband's criminal prosecution when communicated by the husband and not the creditor does not amount to duress. *Mutual &c. Life Assn. v. Cleveland &c. Mills*, 82 Fed. 508, 27 C. C. A. 212; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147. There are cases, however, which hold that the coerced party may avoid the contract induced by duress even though the other party is ignorant thereof. *Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191 (duress exercised by labor union); *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Barry v. Equitable Life Assur. Society*, 59 N. Y. 587; *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112. Thus, where the assignment of a life insurance policy was procured through duress practiced by the assignor's husband the assignee was not permitted to hold the policy as against the assignor even though he had no knowledge of the duress practiced. *Barry*

v. Equitable Life Assur. Society, 59 N. Y. 587. Likewise, it has been held that where the wife signed a mortgage because of threats made by the husband she might avoid such mortgage, even though the mortgagee was ignorant of the method by which her signature was procured. *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597. The above case lays down the principle that if the execution of the mortgage was procured by the husband's acting in the mortgagor's interest and for their benefit their acceptance of the mortgage implies an adoption of his agency. In some states it is provided by statute that a homestead can be conveyed only by the free and unrestrained act of both the husband and wife. In the states possessing such a statute a mortgage of the homestead signed by the wife under duress of the husband is void and unenforceable, even though the mortgagee is ignorant of the method by which it was procured. *First Nat. Bank v. Bryan*, 62 Iowa 42, 17 N. W. 165; *Berry v. Berry*, 57 Kans. 691, 47 Pac. 837, 57 Am. St. 351. The latter case holds the mortgage absolutely void and not even binding on the one who does consent voluntarily.

¹⁵ See *Hunt v. Hunt*, 94 Ga. 257, 21 S. E. 515; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, and many other cases cited in the preceding sections which might be added here.

¹⁶ *Oak v. Dustin*, 79 Maine 23, 7 Atl. 815, 1 Am. St. 281; *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442. See also, *George Colon & Co. v. East 189th St. Bldg. &c. Co.*, 141 App. Div. (N. Y.) 441, 126 N. Y. S. 226.

¹⁷ *Lewis v. Bannister*, 16 Gray (Mass.) 500.

lieve the surety when he enters into such contract freely, voluntarily, and with knowledge of the duress practiced.¹⁸ Other courts announce a general rule to the effect that duress of the principal relieves the surety,¹⁹ if he becomes surety without knowledge of the duress practiced on his principal.²⁰ However, the threatened imprisonment or prosecution of the husband or wife, parent or child, or other near relative may operate as duress. It is well settled that the wife may be subjected to duress by the arrest or threatened arrest of her husband,²¹ or the parent when the threat is directed against the child,²² or other near rela-

¹⁸ *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931; *Tucker v. State*, 72 Ind. 242; *Oak v. Dustin*, 79 Maine 23, 7 Atl. 815, 1 Am. St. 281; *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *East Stroudsburg Nat. Bank v. Seiple*, 13 Pa. Dist. 575.

¹⁹ *Singer Mfg. Co. v. Ferrell* (Ky.), 48 S. W. 1078; *Wilkerson v. Hood*, 65 Mo. App. 491; *Hyatt v. Robinson*, 15 Ohio 372; *Jones v. Turner*, 5 Litt. (Ky.) 147 (false imprisonment). See also, *United States v. Tingey*, 5 Pet. (U. S.) 115 (false imprisonment).

²⁰ *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9, 12 Am. St. 356; *Griffith v. Sitgreaves*, 90 Pa. St. 161.

²¹ *Holt v. Agnew*, 67 Ala. 360; *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *International Harvester Co. v. Voboril*, 187 Fed. 973, 110 C. C. A. 311; *Burton v. McMillan*, 52 Fla. 469, 42 So. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. 220; *Jones v. Dannenberg Co.*, 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271; *Mills v. Hudgins*, 97 Ga. 417, 24 S. E. 146 (husband and son threatened); *Line v. Blizzard*, 70 Ind. 23; *Brooks v. Berryhill*, 20 Ind. 97; *Giddings v. Iowa & Co. Bank*, 104 Iowa 676, 74 N. W. 21; *First National Bank v. Bryan*, 62 Iowa 42, 17 N. W. 165; *Singer Mfg. Co. v. Rawson*, 50 Iowa 634; *Green v. Scranage*, 19 Iowa 461, 87 Am. Dec. 447; *Heaton v. Norton County State Bank*, 59 Kans. 281, 52 Pac. 876; same case, 5 Kans. App. 498, 47 Pac. 576; *Winfield National Bank v. Croco*, 46 Kans. 620, 26 Pac. 939. Threat to tell plaintiff's husband that her son had embezzled defendant's money. Plaintiff feared this would drive her husband insane and

in order to prevent the disclosure being made to him executed the contract, held executed under duress. *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555; *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146; *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193; *Miller v. Minor Lumber Co.*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. 524; *Leflore v. Allen*, 80 Miss. 298, 31 So. 815; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Hargreaves v. Korcek*, 44 Nebr. 660, 62 N. W. 1086; *Davis v. Smith*, 68 N. H. 253, 42 Atl. 384, 73 Am. St. 584; *Barrett v. Weber*, 125 N. Y. 18, 25 N. E. 1068; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, 15 Am. St. 447, 6 L. R. A. 491; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Williams v. Walker & Co.*, 18 S. Car. 577; *Delta County Bank v. McGranahan*, 37 Wash. 307, 79 Pac. 796; *Mack v. Prang*, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. 848; *City National Bank v. Kusworm*, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. 880. A conveyance has been held procured by duress when the threats were made prior to the execution of the deed but were not repeated at the time she signed it. *Leflore v. Allen*, 80 Miss. 298, 31 So. 815. This principle has also been applied where the woman was coerced by threats against her intended husband. *Rau v. Von Zedlitz*, 132 Mass. 164.

²² *Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551n; *Southern Express Co. v. Duffey*, 48 Ga. 358; *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. 153; *Youngs v. Simm*, 41 Ill. App. 28; *Peed v. Mc-*

tive of the promisor such as a brother,²³ grandson,²⁴ nephew,²⁵ or son-in-law.²⁶ And this is true, in general, no matter whether the arrest is lawful or unlawful or the one threatened therewith is guilty or innocent.²⁷ When the threats are communicated to a third party with the intention that he shall carry them to the promisor and he does in fact so carry them and the promisor is coerced thereby, duress exists, if sufficient to overcome the will of the promisor.²⁸

§ 149. **Family relations.**—In case the parties to a contract are members of the same family and one of such parties is predominant, either because of age, force of character, or other cir-

Kee, 42 Iowa 689, 20 Am. Rep. 631; Seymour v. Prescott, 69 Maine 376; Bryant v. Peck & Co., 154 Mass. 460, 28 N. E. 678; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Weiser v. Welch, 112 Mich. 134, 70 N. W. 438; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Beindorff v. Kaufman, 41 Nebr. 824, 60 N. W. 101; Ball v. Ward (N. J. Eq.), 74 Atl. 158; Schroener v. Lissauer, 107 N. Y. 111, 13 N. E. 741, revg. 36 Hun (N. Y.) 100; Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; National Bank v. Cox, 47 App. Div. (N. Y.) 53, 62 N. Y. S. 314; Roll v. Raguet, 4 Ohio 400, 22 Am. Dec. 759; Western Avenue Building Assn. v. Walters, 7 Ohio C. C. 202; Avery v. Layton, 119 Pa. St. 604, 13 Atl. 528; Swope v. Jefferson Fire Ins. Co., 93 Pa. St. 251; National Bank v. Kirk, 90 Pa. St. 49; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Coffman v. Lookout Bank, 5 Lea (Tenn.) 232, 40 Am. Rep. 31; McCormick Harvesting Machine Co. v. Hamilton, 73 Wis. 486, 41 N. W. 727; Schultz v. Culbertson, 49 Wis. 122, 4 N. W. 1070; Catlin v. Henton, 9 Wis. 476; Price v. Bank of Poynette, 144 Wis. 190, 128 N. W. 895 (father and other members of the family threatened). See, however, Gregor v. Hyde, 62 Fed. 107, 10 C. C. A. 290.

²³ Henry v. State Bank, 131 Iowa 97, 107 N. W. 1034; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946.

²⁴ Bradley v. Irish, 42 Ill. App. 85.

²⁵ Town of Sharon v. Gager, 46 Conn. 189.

²⁶ Bentley v. Robson, 117 Mich. 691, 76 N. W. 146; Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. 505; Nebraska Mut. Bond & C. Assn. v. Klee, 70 Nebr. 383, 97 N. W. 476. But where the contract is entered into deliberately and after considerable negotiation for a compromise and payment is made with the understanding that it is to be an advancement to the daughter no duress is shown. Loud v. Hamilton (Tenn. Ch. App.), 51 S. W. 140, 48 L. R. A. 400.

²⁷ Burton v. McMillan, 52 Fla. 469, 42 So. 849, 120 Am. St. 220; Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. 153; Thompson v. Niggley, 53 Kans. 664, 35 Pac. 290, 26 L. R. A. 803; Williamson-Halsell Frazier Co. v. Ackerman, 77 Kans. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; Heaton v. Norton County State Bank, 59 Kans. 281, 52 Pac. 876, same case, 5 Kans. App. 498, 47 Pac. 576; Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912; Beindorff v. Kaufman, 41 Nebr. 824, 60 N. W. 101; Ball v. Ward (N. J. Ch.), 74 Atl. 158; Gorringer v. Read, 23 Utah 120, 63 Pac. 902, 90 Am. St. 692. See, however, Gregor v. Hyde, 62 Fed. 107, 10 C. C. A. 290; Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. 153. Whether or not duress exists, depends on the facts and circumstances of each case. Jaeger v. Koenig, 30 Misc. (N. Y.) 580, 62 N. Y. S. 803.

²⁸ Giddings v. Iowa & C. Bank, 104 Iowa 676, 74 N. W. 21; State Bank v. Hutchinson, 62 Kans. 9, 61 Pac. 443.

cumstances, and obtains an advantage thereby, a presumption arises that the dominant party exercised an undue influence over the other in order to obtain the benefits received under the contract, and the burden is cast upon him to show that the transaction was fair in its terms and was the free-will act of the other. This principle has been applied in the cases where a child conveys property or bestows some other benefit on his parents.²⁹ The term parent in the sense in which it is used here extends to any person who stands in loco parentis.³⁰ This does not mean that courts of equity will prevent acts of even bounty between parent and child or person standing in loco parentis, but such courts are jealous in seeing that the child is placed in a position which will enable him to form a judgment dictated by his own free will independent of control.³¹

On the other hand, should a child take advantage of its parent, or one standing in loco parentis, and by reason of such relation obtain a conveyance of the parent's property to himself upon a promise upon his part to care for and support the parent in his old age, and, after the conveyance is made repudiate his part of the agreement to furnish the parent maintenance and support³² or otherwise abuse the relation which he sustains toward the parent and thereby obtains an unjust advan-

²⁹ *Powell v. Powell* (1900), 1 Ch. 243; *Noble v. Moses*, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175; *White v. Ross*, 160 Ill. 56, 43 N. E. 336; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Ferns v. Chapman*, 211 Ill. 597, 71 N. E. 1106; *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. 64; *Couchman's Admr. v. Couchman*, 98 Ky. 109, 32 S. W. 283; *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Miller v. Simonds*, 72 Mo. 669; *Summers v. Coleman*, 80 Mo. 488; *Bergen v. Udall*, 31 Barb. (N. Y.) 9; *Rider v. Kelso*, 53 Iowa 367, 5 N. W. 509; *Wood v. Rabe*, 96 N. Y. 414; *In re Miskey's Appeal*, 107 Pa. St. 611; *In re Coleman's Estate*, 193 Pa. St. 605, 44 Atl. 1085; *Taylor v. Taylor*, 8 How. (U. S.) 183; *Davis v. Strange's Exr.*, 86 Va. 793, 11 S. E. 406, 8 L. R. A. 261.

³⁰ *Archer v. Hudson*, 7 Beav. 551;

Maitland v. Irving, 15 Sim. 437; *Kempson v. Ashbee*, L. R. 10 Ch. App. Cas. 15; *Gillespie v. Holland*, 40 Ark. 28, 48 Am. Rep. 1; *Brown v. Burbank*, 64 Cal. 99, 27 Pac. 940; *Lehmann v. Rothbarth*, 111 Ill. 185; *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609; *Woods v. Roberts*, 185 Ill. 489, 57 N. E. 426; *Tucke v. Buchholz*, 43 Iowa 415; *Bradshaw v. Yates*, 67 Mo. 221; *Berkemeyer v. Kellerman*, 32 Ohio St. 239, 30 Am. Rep. 577; *In re Worrall's Appeal*, 110 Pa. St. 349, 1 Atl. 380; *In re Miskey's Appeal*, 107 Pa. St. 611; *Jenkins v. Pye*, 12 Pet. (U. S.) 241, 9 L. ed. 1070.

³¹ *Archer v. Hudson*, 7 Beav. 551; *Jenkins v. Pye*, 12 Pet. (U. S.) 241, 9 L. ed. 1070.

³² *Williams v. Langwill*, 241 Ill. 441, 89 N. E. 642, 25 L. R. A. (N. S.) 932n; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997.

tage,³³ equity will set aside the conveyance and restore the parent his property, or avoid a contract thus obtained. In transactions between parent and child, however, whereby the child derives a benefit, undue influence is not inferred from their mere relationship. The parent is presumed to be the dominant party, consequently undue influence on the part of the child must be proved.³⁴

The same principle governs dealings between husband and wife. The husband in general being deemed the dominant party.³⁵ However, this presumption is not strong enough to cause a contract between husband and wife to be set aside when there is no evidence other than the existence of the relation and a fair contract tending to establish undue influence.³⁶ The rule that contracts between husband and wife which result in a benefit to the husband are presumed to be procured through undue influence on the part of the husband is statutory in some jurisdictions.³⁷ These statutes have in the main broadened the rule so as to make it applicable to contracts by which the wife secures advantage.³⁸

Dealings between sisters,³⁹ brothers,⁴⁰ brother and sister,⁴¹

³³ *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Rickman v. Meier*, 213 Ill. 507, 72 N. E. 1121; *Fitch v. Reiser*, 79 Iowa 34, 44 N. W. 214; *Paddock v. Pulsifer*, 43 Kans. 718, 23 Pac. 1049; *Highbergher v. Stiffer*, 21 Md. 338, 83 Am. Dec. 593; *Bauer v. Bauer*, 82 Md. 241, 33 Atl. 643; *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843; *Graham v. Burch*, 44 Minn. 33, 46 N. W. 148; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Brummond v. Krause*, 8 N. Dak. 573, 80 N. W. 686.

³⁴ *McLeod v. McLeod*, 145 Ala. 269, 40 So. 147, 117 Am. St. 41; *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *Kennedy v. Kennedy*, 194 Ill. 346, 62 N. E. 797; *Slayback v. Witt*, 151 Ind. 376, 50 N. E. 389; *Mallow v. Walker*, 115 Iowa 238, 88 N. W. 452, 91 Am. St. 158; *Lynch v. Doran*, 95 Mich. 395, 54 N. W. 882; *Hatcher v. Hatcher*, 139 Mo. 614, 39 S. W. 479; *Wessell v. Rathjohn*, 89 N. Car. 377; *Clark v. Clark*, 174 Pa. St. 309, 34 Atl. 610; *Carney v. Carney*, 196 Pa. St. 34, 46 Atl. 264; *Saufley v. Jackson*, 16 Tex. 579; *Millican v. Milli-*

can, 24 Tex. 426; *Towson v. Moore*, 173 U. S. 17, 19 Sup. Ct. 332.

³⁵ *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907. See also, *Egger v. Egger*, 225 Mo. 116, 135 Am. St. 566, 123 S. W. 928.

³⁶ *Jones v. Gorham*, 90 Ky. 622, 12 Ky. L. 568, 14 S. W. 599, 10 L. R. A. 223, 29 Am. St. 423. In the above case the parties entered into an agreement the effect of which was to give the survivor all the property of the other at his or her death. The wife subsequently died and it was sought to set aside the agreement for undue influence.

³⁷ *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723.

³⁸ *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957. See, further on this subject, post, § 151, Husband and Wife.

³⁹ *Harvey v. Mount*, 8 Beav. 439; *Watkins v. Brant*, 46 Wis. 419, 1 N. W. 82.

⁴⁰ *Hill v. Miller*, 50 Kans. 659, 32 Pac. 354; *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257.

⁴¹ *Million v. Taylor*, 38 Ark. 428; *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *Bowen v. Kutzner*, 167 Fed. 281; *Smith v. Cuddy*, 96 Mich. 562, 56 N.

uncle and nephew,⁴² uncle and niece,⁴³ or grandparents and grandchild⁴⁴ may be set aside if it appears from the circumstances of each particular case that one of the parties exercised a predominant influence in the family and used the power thus afforded to obtain the contract. As between the relatives last mentioned, however, undue influence is not presumed merely from the relationship existing between the parties.⁴⁵ If it appears that in dealings between parties sustaining a family relation, the servient party was the moving spirit in the transaction and that he entered into the agreement voluntarily, deliberately, and advisably, knowing its nature and effects, and that his consent was not obtained by reason of the power and influence to which the relation between the parties might be supposed to give rise, undue influence cannot be said to exist.⁴⁶

§ 150. **Guardian and ward.**—The relation of guardian and ward is one of trust and confidence, and transactions between them whereby the guardian derives a benefit are generally presumed to have been induced by undue influence.⁴⁷ This may be

W. 89; *Thornton v. Ogden*, 32 N. J. Eq. 723; *Jones v. Jones*, 120 N. Y. 589, 24 N. E. 1016; *Sears v. Shafer*, 6 N. Y. 268.

⁴² *Chambers v. Chambers*, 139 Ind. 111, 38 N. E. 334; *Hall v. Perkins*, 3 Wend. (N. Y.) 626.

⁴³ *Tribau v. Tribau*, 96 Maine 305, 52 Atl. 795.

⁴⁴ *Todd v. Grove*, 33 Md. 188; *Ranken v. Patton*, 65 Mo. 378; *McClure v. Lewis*, 72 Mo. 314.

⁴⁵ *Albrecht v. Hunecke*, 196 Ill. 127, 63 N. E. 616; *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257; *Hamilton v. Armstrong*, 120 Mo. 597, 25 S. W. 545; *Lodge v. Hulings*, 63 N. J. Eq. 159, 51 Atl. 1015; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Doheny v. Lacy*, 168 N. Y. 213, 61 N. E. 255; *Doran v. McConlogue*, 150 Pa. St. 98, 24 Atl. 357; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517. In the case of *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348, it is held that the relation of aunt and nephew, master and servant, and patient and nurse does not raise a presumption of undue influence. In this connection, see chapter on Disclosure.

⁴⁶ *Williams v. Langwill*, 241 Ill. 441, 89 N. E. 642, 25 L. R. A. (N. S.) 932n; *Du Bose v. Kell*, 72 S. Car 208, 51 S. E. 692. See also, *Andrews v. Connolly*, 145 Fed. 43. Where one brother, a party to a family settlement, reluctantly signed the agreement at the instance of the others, and later accepted large advances under such contract and subsequently sought to avoid the contract for duress, he was held bound. The court held he would not be permitted to lie in wait until time and change make his interest plain and then make his choice.

⁴⁷ *Davies v. Davies*, 4 Giff. 417; *Everitt v. Everitt*, 7 Ch. D. 428; *Smith v. Kay*, 7 H. L. Cases 50; *Hoghton v. Hoghton*, 15 Beav. 278; *Malone v. Kelley*, 54 Ala. 532; *Noble v. Moses*, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175; *Wiley v. Tindal*, 5 Del. Ch. 194; *Ralston v. Turpin*, 25 Fed. 7; *Gaither v. Gaither*, 20 Ga. 709; *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529; *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. 587; *Albrecht v. Hunecke*, 196 Ill. 127, 63 N. E. 616; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571;

true even after the ward has attained legal capacity.⁴⁸ Where a ward a few days after attaining her majority and before her guardian had made his final report conveys her land to the guardian's wife, who is her elder sister and with whom she is living, the burden is on the guardian to show good faith and the absence of undue influence.⁴⁹ A presumption of undue influence has been held to attach to various transactions between guardian

Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593; *McConkey v. Cockey*, 69 Md. 286, 14 Atl. 465; *Jacox v. Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Caspari v. New Jerusalem First German Church*, 12 Mo. App. 293; *Matter of Sparks*, 63 N. J. Eq. 242; *Smith v. Boyd*, 61 N. J. Eq. 175, 47 Atl. 816; *Fish v. Miller*, 1 Hoffm. Ch. (N. Y.) 267; *Ross v. Ross*, 6 Hun (N. Y.) 80; *McClellan v. Grant*, 83 App. Div. (N. Y.) 599, 82 N. Y. S. 208; *In re Holman's Will*, 42 Ore. 345, 70 Pac. 908; *Say v. Barnes*, 4 S. & R. (Pa.) 112, 8 Am. Dec. 679; *Wade v. Pulsifer*, 54 Vt. 45.

⁴⁸ *Earhart v. Holmes*, 97 Iowa 649, 66 N. W. 898. In the above case it appears that the property had been offered by the ward to a third person. The guardian paid one-third more than such third person offered. The guardian was also the uncle of the ward. *Tucke v. Buchholz*, 43 Iowa 415; *Smith v. Boyd*, 61 N. J. Eq. 175, 47 Atl. 816; *McRae v. Malloy*, 93 N. Car. 154. In the two cases last cited it is held that this presumption may be sufficient to establish undue influence if it appears that the ward acted without independent advice.

⁴⁹ "Courts will watch settlements of guardians with their wards, or any act or transaction between them affecting the estate of the ward, with great jealousy. From the confidential relation between the parties it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them

prejudicially affecting the interests of the ward will be held to be constructively fraudulent. *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529. The doctrine is thus stated in 1 Story on Equity Jur., § 317: 'Where the guardianship has, in fact, ceased by the majority of the ward, the courts "will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian; for, in all such cases, the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attaching to the situation have not ceased; as if the accounts between the parties have not been fully settled, or if the estate still remains, in some sort, under the control of the guardian.'" *McParland v. Larkins*, 155 Ill. 84, 39 N. E. 609. See also, *Willey v. Tindal*, 5 Del. Ch. 194; *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. 587; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314. Even if there has been no legal steps taken to create the relation of guardian and ward, yet if such relation practically exists, and advantage is taken of such relation undue influence exists. *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843. In the foregoing case the one acting as guardian was the son of his aged ward.

and ward such as gifts,⁵⁰ settlements,⁵¹ releases,⁵² sales,⁵³ leases,⁵⁴ receipts,⁵⁵ or other contracts.⁵⁶ By the weight of authority the presumption of undue influence is only *prima facie*, and may be rebutted.⁵⁷

§ 151. **Husband and wife.**—Contracts between parties sustaining a marital relation one to the other and which result in a benefit to the husband usually create a presumption of undue influence, the husband being deemed the dominant party.⁵⁸ The wife may, however, be shown to have acquired a dominant influence over the husband, in which case the burden is upon her to prove the fairness of the agreement.⁵⁹ Undue influence upon

⁵⁰ *Hylton v. Hylton*, 2 Ves. 547; *Hatch v. Hatch*, 9 Ves. Jr. 292; *Andrews v. Jones*, 10 Ala. 400; *Gaither v. Gaither*, 20 Ga. 709; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Fish v. Miller*, 1 Hoffm. Ch. (N. Y.) 267; *Say v. Barnes*, 4 S. & R. (Pa.) 112, 8 Am. Dec. 679; *Wade v. Pulsifer*, 54 Vt. 45; *Waller v. Armistead*, 2 Leigh (Va.) 11, 21 Am. Dec. 594.

⁵¹ *Gregory v. Orr*, 61 Miss. 307; *Matter of Van Horn*, 7 Paige (N. Y.) 46; *Elliott v. Elliott*, 5 Binn. (Pa.) 1; *Fay v. Barnes*, 4 S. & R. (Pa.) 112, 8 Am. Dec. 679; *Hawkin's Appeal*, 32 Pa. St. 263.

⁵² *Hylton v. Hylton*, 2 Ves. 547; *Ferguson v. Lowery*, 54 Ala. 510, 25 Am. Rep. 718; *Hall v. Cone*, 5 Day (Conn.) 543; *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529; *McConkey v. Cockey*, 69 Md. 286, 14 Atl. 465; *Fish v. Miller*, Hoffm. Ch. (N. Y.) 267; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530; *Wills' Appeal*, 22 Pa. St. 325; *Eberts v. Eberts*, 55 Pa. St. 110; *Cowans' Appeal*, 74 Pa. St. 329; *Waller v. Armistead*, 2 Leigh (Va.) 11, 21 Am. Dec. 594. See, however, *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 242.

⁵³ *Sherry v. Sansberry*, 3 Ind. 320.

⁵⁴ *Dawson v. Massey*, 1 Ball & B. 219; *Aylward v. Kearney*, 2 Ball & B. 463.

⁵⁵ *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. 587; *Say v. Barnes*, 4 S. & R. (Pa.) 112, 8 Am. Dec. 679; *Witman's Appeal*, 28 Pa. St. 376.

⁵⁶ *Andrews v. Jones*, 10 Ala. 400; *Ralston v. Turpin*, 25 Fed. 7; *Holman's Will*, 42 Ore. 345, 70 Pac. 908.

⁵⁷ *Higberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Wade v. Pulsifer*, 54 Vt. 45. In some jurisdictions, however, the presumption is so strong that it is difficult to overcome it. *Wiley v. Tindal*, 5 Del. Ch. 194.

⁵⁸ *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; *Lewis v. McGrath*, 191 Ill. 401, 61 N. E. 135; *Golding v. Golding*, 82 Ky. 51, 5 Ky. L. 806; *Stiles v. Stiles*, 14 Mich. 72; *Witbeck v. Witbeck*, 25 Mich. 439; *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429, 22 S. W. 786; *Stenger Assn. v. Stenger*, 54 Nebr. 427, 74 N. W. 846; *Hovorka v. Havlik*, 68 Nebr. 14, 93 N. W. 990, 110 Am. St. 387; *Farmer v. Farmer*, 39 N. J. Eq. 211; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907; *Boyd v. De La Montagne*, 73 N. Y. 498, 29 Am. Rep. 197; *Aldridge v. Aldridge*, 120 N. W. 614, 24 N. E. 1022; *McRae v. Battle*, 69 N. Car. 98; *Darlington's Appeal*, 86 Pa. 512, 27 Am. Rep. 726; *Way v. Union Cent. Life Ins. Co.*, 61 S. Car. 501, 39 S. E. 742.

⁵⁹ *Shipman v. Furniss*, 69 Ala. 555; *Meldrum v. Meldrum*, 115 Colo. 478, 24 Pac. 1083; *Rockafellow v. Newcomb*, 57 Ill. 186; *Leighton v. Orr*, 44 Iowa 679; *Hanna v. Wilcox*, 53 Iowa 547, 5 N. W. 717; *Turner v. Turner*,

the part of the wife, however, is not presumed from the mere marital relation.⁶⁰

§ 152. **Principal and agent.**—An agent sustains a confidential relation toward his principal.⁶¹ Consequently, contracts between principal and agent connected with the agency, which are advantageous to the agent, are prima facie presumed to have been procured through undue influence.⁶² However, if the transaction relates to a subject-matter outside the scope of, and unconnected with, the agency, undue influence is not presumed.⁶³

§ 153. **Attorney and client.**—Contracts between attorney and client entered into during the continuance of such relation are carefully scrutinized in equity. In case the attorney derives a benefit therefrom a presumption of undue influence and undue advantage exists against him which requires him to assume the burden of proving the fairness and justness of the transaction.⁶⁴

44 Mo. 535; Haydock v. Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385; Disch v. Timm, 101 Wis. 179, 77 N. W. 196.
⁶⁰ Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Ford v. Ford, 193 Pa. 530, 44 Atl. 561. The foregoing principle usually applies to persons living together as man and wife. Coulson v. Allison, 2 DeG., F. & J. 521; Shipman v. Furniss, 69 Ala. 555; Hanna v. Wilcox, 53 Iowa 547, 5 N. W. 717; Leighton v. Orr, 44 Iowa 679. See, however, Farmer v. Farmer, 1 H. L. Cases 724. See also, ante, § 149, Family Relations.

⁶¹ Dunne v. English, L. R. 18 Eq. 524; Waddell v. Lanier, 62 Ala. 347; Burke v. Taylor, 94 Ala. 530, 10 So. 129; De Rubidoex v. Parks, 48 Cal. 215; Norris v. Tayloe, 49 Ill. 17, 95 Am. Dec. 568; Uhlich v. Muhlke, 61 Ill. 499; Prince v. Dupuy, 163 Ill. 417, 45 N. E. 298; Rochester v. Levering, 104 Ind. 562, 4 N. E. 203; Green v. Peeso, 92 Iowa 261, 60 N. W. 531; Fisher v. Lee, 94 Iowa 611, 63 N. W. 442; Todd v. Grove, 33 Md. 188; Kerby v. Kerby, 57 Md. 345; Brown v. Mercantile & Trust Co., 87 Md. 377, 40 Atl. 256; Thorn v. Thorn, 51 Mich. 167, 16 N. W. 324; Donnell v. Cunningham, 58 Minn. 376, 59 N. W.

1052; Yosti v. Laughran, 49 Mo. 594; Oliver v. Lansing, 48 Nebr. 338, 67 N. W. 195; Condit v. Blackwell, 22 N. J. Eq. 481; LeGendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621; Mott v. Mott, 49 N. J. Eq. 192, 22 Atl. 997; Comstock v. Comstock, 57 Barb. (N. Y.) 453; Savage v. Savage, 12 Ore. 459, 8 Pac. 754; Shute v. Johnson, 25 Ore. 59, 34 Pac. 965; Darlington's Estate, 147 Pa. 624, 23 Atl. 1046, 30 Am. St. 776; Ralston v. Turpin, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. 420; Cook v. Berlin Woolen Mill Co., 43 Wis. 433.

⁶² Burke v. Taylor, 94 Ala. 530, 10 So. 129; Darlington's Estate, 147 Pa. St. 624, 30 Am. St. 776, 23 Atl. 1046; Ralston v. Turpin, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. 420. See cases above cited in note 61 of this paragraph.

⁶³ Brown v. Mercantile Trust & Deposit Co., 87 Md. 377, 40 Atl. 256; Dehoney v. Lacy, 168 N. Y. 213, 61 N. E. 255; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

⁶⁴ Gibson v. Jeyes, 6 Ves. Jr. 266; Savery v. King, 5 H. L. Cas. 627; Dickinson v. Bradford, 59 Ala. 581, 31 Am. Rep. 23; White v. Tolliver, 110 Ala. 300, 20 So. 97; Kisting v. Shaw, 33 Cal. 425, 91 Am. Dec. 644;

The attorney is bound to show that his client was fully informed of his rights and interests in the subject-matter of the transaction and the nature and effect thereof. He must, it is said, be able to show that the client was in such a position as would enable him to deal at arm's length with his attorney.⁶⁵ The client may be in such circumstances that he cannot exercise resistance against unjust exactment. Thus, a note and mortgage procured while the client's sons were in jail on a charge of murder when public excitement was high and the parents were laboring under great mental stress has been declared unenforceable for the full amount, although a quantum meruit recovery was permitted in the case referred to.⁶⁶

§ 154. **Physician and patient.**—The physician is inhibited from taking advantage of the confidence reposed by his patient, growing out of such relation.⁶⁷ The presumption against the physician is given added strength if the patient is in the custody of the physician.⁶⁸ It has also been held that in case the physi-

Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Mills v. Mills, 26 Conn. 213; Jennings v. McConnell, 17 Ill. 148; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. 401; Ross v. Payson, 160 Ill. 349, 43 N. E. 399; Willin v. Burdette, 172 Ill. 117, 49 N. E. 1000; Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299; Shirk v. Neible, 156 Ind. 66, 59 N. E. 281; Polson v. Young, 37 Iowa 196; Ryan v. Ashton, 42 Iowa 365; Carter v. West, 93 Ky. 211, 14 Ky. L. 191, 19 S. W. 592; Dunn v. Record, 63 Maine 17; Burnham v. Heselton, 82 Maine 495, 20 Atl. 80, 9 L. R. A. 90; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564; Gray v. Emmons, 7 Mich. 533; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215; Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Porter v. Bergen, 54 N. J. Eq. 405, 34 Atl. 1067; Howell v. Ransom, 11 Paige (N. Y.) 538; Whitehead v. Kennedy, 69 N. Y. 462; Place v. Hayward, 117 N. Y. 487, 23 N. E. 25; Greenfield's Estate, 14 Pa. St. 489; Wistar's Appeal, 54 Pa. St. 60; Unruh v. Lukens, 166 Pa. St. 324, 31

Atl. 110; Young v. Murphy, 120 Wis. 49, 97 N. W. 496.

⁶⁵ Kisling v. Shaw, 133 Cal. 425, 91 Am. Dec. 644; Willin v. Burdette, 172 Ill. 117, 49 N. E. 1000; Yeamans v. James, 27 Kans. 195; Whipple v. Barton, 63 N. H. 613.

⁶⁶ Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. 150n. See also, French v. Cunningham, 149 Ind. 632, 49 N. E. 797, and authorities there cited.

⁶⁷ Dent v. Bennett, 4 Mylne & Cr. 269; Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808; Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479n. The above case is one of gift. Cadwallader v. West, 48 Mo. 483; Bogie v. Nolan, 96 Mo. 85, 9 S. W. 14; Unruh v. Lukens, 166 Pa. St. 324, 31 Atl. 110. In the above case the influence of physician and attorney were combined. The case of Augerite's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731, apparently conflicts the above case. Peterson v. Budge (Utah), 102 Pac. 211.

⁶⁸ Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808. The same principles which govern relations between phy-

cian exercises his influence to obtain a contract advantageous to a third party for whom the physician acts as agent such agreement will be set aside at the instance of the patient.⁶⁹ To render an agreement between physician and patient valid, however, so far as this question is concerned, it is only necessary to show that the patient had competent and disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise.⁷⁰

§ 155. Religious advisers.—By the weight of authority transactions between a pastor and his parishioner by which the religious adviser obtains a benefit, are presumed to be due to undue influence. This principle has been applied to both catholics and protestants, and the particular church or denomination seems to make no difference.⁷¹

§ 156. Other confidential relations.—Closely allied to the relation of pastor and parishioner is the relation of spiritualistic teacher and his followers. When the relation of spiritualistic medium and follower is established between parties to a transaction advantageous to the medium, and it is shown that the me-

sician and patient govern those between nurse and patient. *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087. See, however, *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348.

⁶⁹ *Viallet v. Consol. &c. Power Co.*, 30 Utah 260, 84 Pac. 496, 5 L. R. A. (N. S.) 663. In the above case the physician procured a release from liability for personal injuries sustained by the patient at the hands of the above company. In this connection see, however, *Penn Mutual Life Ins. Co. v. Union Trust Co.*, 83 Fed. 891. In this case the court said: "An act that is the result of honest argument and persuasion or of such influence as one may properly exercise over another does not constitute undue influence." In this case it appears that the physician merely advised his patient as to the assignment of the life insurance policy. The physician himself derived no benefit whatever.

⁷⁰ *Zeigler v. Illinois Trust & Sav. Bank*, 245 Ill. 180, 91 N. E. 1041. See also, *Kellogg v. Peddicord*, 181 Ill. 22, 54 N. E. 623 (conveyance to superintendent of the sanatorium).

⁷¹ *Huguenin v. Basley*, 14 Ves. Jr. 273; *Allcard v. Skinner*, 36 Ch. Div. 145; *Morley v. Loughman* (1893), 1 Ch. 736; *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 56; *Good v. Zook*, 116 Iowa 582, 88 N. W. 376; *Finegan v. Theisen*, 92 Mich. 173, 52 N. W. 619; *Ford v. Hennessy*, 70 Mo. 580; *Caspari v. First German Church*, 82 Mo. 649; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. 355; *Marx v. McGlynn*, 88 N. Y. 357; *McClellan v. Grant*, 83 App. Div. (N. Y.) 599, 82 N. Y. S. 208. A priest or pastor is not, however, barred from accepting a gift from his parishioner if it is freely made. *Greenfield's Estate*, 24 Pa. St. 232.

dium has great control over such adherent, a presumption of undue influence arises. Consequently the medium has the burden of showing that there was no undue influence exercised.⁷² As has been pointed out in a preceding section, a relation of trust and confidence may exist even though the parties do not sustain toward each other a technical relation of that character.⁷³ In all cases where the parties are required to exercise the greatest of good faith in their dealings with each other, contracts advantageous to the dominant party will usually be presumed to have been obtained through undue influence.⁷⁴ The law considers that a confidential relation exists in every case in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; they may be moral, social, domestic and merely personal. The existence of such a relation creates a presumption of undue influence which imposes upon the one receiving the benefits the burden of proving an absence of undue influence by showing that the party acted upon confidence, independent advice of another, or such facts as will satisfy the courts that the dealing was at arm's length, or that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties or, as some of the authorities say, that it was beneficial to the other party.⁷⁵

⁷² *Lyon v. Home*, L. R. 6 Eq. 655; *Connor v. Stanley*, 72 Cal. 556, 14 Pac. 306, 1 Am. St. 84; *Leighton v. Orr*, 44 Iowa 679. See also, *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. 211. The case last cited relates to a will. The law relative to relations between medium and spiritualist has been largely developed in the law of wills and the reader is referred to books on that subject for further discussion.

⁷³ Ante, ch. 4. See also, *Simonton v. Bacon*, 49 Miss. 582; *Stepp v. Frampton*, 179 Pa. St. 284, 36 Atl. 177.

⁷⁴ *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015; *Holland v. John*, 60 N. J. Eq. 435, 46 Atl. 172. See ante, Ch. 6, Failure to Disclose.

⁷⁵ *Smith v. Kay*, 7 H. L. Cas. 750; *Tate v. Williamson*, L. R. 2 Ch. 55; *Morley v. Loughman* (1893), 1 Ch.

736; *Ryan v. Price*, 106 Ala. 584, 17 So. 734; *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. 1022; *Potter's Appeal*, 56 Conn. 1, 12 Atl. 513, 7 Am. St. 272; *Hensan v. Cooksey*, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. 345; *Casey v. Casey*, 14 Ill. 112; *Conant v. Riseborough*, 139 Ill. 383, 28 N. E. 789; *Irwin v. Sample*, 213 Ill. 160, 72 N. E. 687; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Forrestel v. Forrestel*, 110 Iowa 614, 81 N. W. 797; *Zimmerman v. Bitner*, 79 Md. 115, 28 Atl. 820; *Hall v. Knappenberger*, 97 Mo. 509, 11 S. W. 239, 10 Am. St. 337; *Wright v. Smith*, 23 N. J. Eq. 106; *McKee v. Griggs*, 51 N. J. Eq. 178, 26 Atl. 158; *Sears v. Shafer*, 6 N. Y. 268; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. 357; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 50 N. E. 963; *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638; *Rankin v. Porter*, 7

As has been intimated in one of the preceding sections,⁷⁶ contracts may be set aside for undue influence even when the agreement was procured after the technical relation has been terminated.⁷⁷ However, as a general rule, no presumption of undue influence arises when the relation of trust and confidence has been dissolved for a considerable period of time.⁷⁸ Thus it has been held that no such presumption arises in a contract between physician and patient where it appears that such relation has been terminated two months before the agreement was entered into and was not resumed until four months after it had been consummated.⁷⁹ Ordinarily no presumption of undue influence arises in dealings between master and servant, or landlord and boarder.⁸⁰ Such relations are not considered as confidential. Consequently it has been held that a mere allegation to the effect that the employe was at a disadvantage in dealing with the employer does not amount to undue influence.⁸¹

§ 157. Mental weakness.—The contract of a person mentally weak, on which account he is liable to imposition, will be set aside in courts of equity if the circumstances justify the conclusion that such party has not exercised a deliberate judgment, but has been imposed upon or overcome by undue influence.⁸² But while courts of equity will jealously scrutinize such

Watts (Pa.) 387; Stepp v. Frampton, 179 Pa. St. 284, 36 Atl. 177; Longenecker v. Zion &c. Church, 200 Pa. 567, 50 Atl. 244; Smith v. Smith, 60 Wis. 329, 19 N. W. 47; Davis v. Dean, 66 Wis. 100, 26 N. W. 737.

⁷⁶ See ante, § 150, Guardian and Ward.

⁷⁷ Archer v. Hudson, 7 Beav. 551; Rhodes v. Bate, L. R. 1 Ch. 252; Moxon v. Payne, L. R. 8 Ch. 881; Mitchell v. Homfray, 8 Q. B. Div. 587; Allcard v. Skinner, 36 Ch. Div. 145; Noble v. Moses, 81 Ala. 530, 1 So. 217; Zeigler v. Hughes, 55 Ill. 288; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918; Miller v. Simonds, 72 Mo. 669; Mason v. Ring, 3 Abb. Dec. (N. Y.) 210, 2 Abb. Prac. (N. S.) (N. Y.) 322; Hawkin's Appeal, 32 Pa. St. 263; Coffee v. Ruffin, 4 Coldw. (Tenn.) 487. And see Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703; Taylor v. Taylor, 8 How. (U. S.) 183.

⁷⁸ Banner v. Rosser, 96 Va. 238, 31 S. E. 67. In the above case the relation had been dissolved for about twenty months.

⁷⁹ Tichy v. Simicek (Nebr.), 95 N. W. 629.

⁸⁰ Doran v. McConlogue, 150 Pa. St. 98, 24 Atl. 357; Bade v. Feay, 63 W. Va. 166, 61 S. E. 348.

⁸¹ Vickers v. Chicago &c. R. Co., 71 Fed. 139. See also, Spitz v. Baltimore &c. R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. 378n. It has also been held that failure to apply for a patent on an invention which the employe alleges he made because he feared he would lose his position if he made such application does not show duress. Barr Car Co. v. Chicago &c. R. Co., 110 Fed. 972, 49 C. C. A. 194.

⁸² Smith v. Kay, 7 H. L. Cas. 750; Moore v. Moore, 56 Cal. 89; Moore v. Moore, 81 Cal. 195, 22 Pac. 589; Hick v. Thomas, 90 Cal. 289, 27 Pac.

contracts, yet mental distress or weakness of a nature insufficient to avoid the presumption of legal capacity,⁸³ does not alone establish undue influence. So long as legal incapacity does not exist mere mental weakness is not alone sufficient to justify a court in setting aside a contract or conveyance entered into with such person, there being no other circumstances indicative of duress or

208; *Klose v. Hillenbrand*, 88 Cal. 473, 26 Pac. 352; *Taylor v. Atwood*, 47 Conn. 498; *Hart v. Hart*, 44 Conn. 327; *Sands v. Sands*, 112 Ill. 225; *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015; *Ikerd v. Beavers*, 106 Ind. 483, 7 N. E. 326; *Ashmead v. Reynolds*, 134 Ind. 139, 33 N. E. 763, 39 Am. St. 328; *Yount v. Yount*, 144 Ind. 133, 43 N. E. 136; *Harris v. Wamsley*, 41 Iowa 671; *Clough v. Adams*, 71 Iowa 17, 32 N. W. 10; *Hill v. Miller*, 50 Kans. 659, 32 Pac. 354; *Smith v. Snowden*, 96 Ky. 32, 27 S. W. 855; *Cherbonnier v. Evitts*, 56 Md. 276; *Frush v. Green*, 86 Md. 494, 39 Atl. 863; *Seeley v. Price*, 14 Mich. 541; *Duncombe v. Richards*, 46 Mich. 166, 9 N. W. 149; *Smith v. Smith*, 90 Mich. 97, 51 N. W. 361; *Graham v. Burch*, 44 Minn. 33, 46 N. W. 148; *Dickson v. Kempinsky*, 96 Mo. 252, 9 S. W. 618; *Martin v. Baker*, 135 Mo. 495, 36 S. W. 369; *James v. Groff*, 157 Mo. 402, 57 S. W. 1081; *Bennett v. Bennett*, 65 Nebr. 432, 91 N. W. 409; *Meyer v. Fishburn*, 65 Nebr. 626, 91 N. W. 534; *Roberts v. Barker*, 63 N. H. 332; *White v. White*, 60 N. J. Eq. 104, 45 Atl. 767; *Thorp v. Smith*, 63 N. J. Eq. 70, 51 Atl. 437; *Rider v. Miller*, 86 N. Y. 507; *Green v. Roworth*, 113 N. Y. 462, 21 N. E. 165; *Tracey v. Sackett*, 1 Ohio St. 54; *Hasel v. Beilstein*, 179 Pa. St. 560, 36 Atl. 336; *Anthony v. Hutchins*, 10 R. I. 165; *Allore v. Jewell*, 94 U. S. 506; *Griffith v. Godey*, 113 U. S. 89, 28 L. ed. 934, 5 Sup. Ct. 383; *King v. Cummings*, 60 Vt. 502, 11 Atl. 727; *Fishburne v. Ferguson's Heirs*, 84 Va. 87, 4 S. E. 575; *Giles v. Hodge*, 74 Wis. 360, 43 N. W. 163; *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75. In the case of *Sprinkle v. Wellborn*, 140 N. Car. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174n, 111 Am. St. 827, it is said: "Whether there is any difference in moral quality, between the

act of obtaining a deed of land from a woman known to be totally bereft of reason and the act of procuring one from a woman merely of weak understanding, who is unable to guard herself against impositions or to resist importunity, it does not lie in our province to decide; but in law, and in so far as the validity of such transactions may be involved, we know there is not and should not be any difference, and that either is sufficient to induce a court of equity to rescind the contract, and cancel the deed, or to require the vendee to give up what he has unfairly and unjustly received, with proper deductions for any sums paid out by him, if the specific remedy of rescission and cancellation cannot equitably be administered."

⁸³ *Rogers v. Higgins*, 57 Ill. 244; *Wilson v. Brown* (Tenn. Ch. App.), 35 S. W. 1098; *Meyer v. Fishburn*, 65 Nebr. 626, 91 N. W. 534. In the above case the court said: "We recognize as a general rule that a court of equity cannot undertake to inquire into and measure the size of men's capacity and understanding, there being no such thing as an equitable incapacity but there is a legal capacity. But, whatever weight this rule may be entitled to and whatever its application, it is obvious that mental weakness, although not sufficient to show an absolute disqualification, is a very important circumstance in determining whether a contract has been obtained through fraud, imposition or undue influence, and when the contract is of such a nature as to justify the conclusion that a party has been imposed upon by cunning, artifice or undue influence, a court of equity will not hesitate to set the contract aside." See also, *Foote v. De Poy*, 126 Iowa 366, 102 N. W. 112, 106 Am. St. 365, 68 L. R. A. 302.

undue influence.⁸⁴ But if inequitable circumstances are shown the contract may be set aside in a proper case.⁸⁵

✓ **§ 158. Inadequacy of consideration.**—In general, mere inadequacy of consideration uncombined with other circumstances does not afford sufficient ground for the rescission of a contract, or the cancellation of a written instrument.⁸⁶ A contract will be set aside for inadequacy of consideration only when the consideration is so grossly inadequate as to shock the conscience, and then a court of equity interferes because under such circumstances it constitutes satisfactory evidence of fraud or undue influence.⁸⁷ But this does not mean that inadequacy of considera-

⁸⁴ *Sawyer v. White*, 122 Fed. 223; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Colyer v. Hyden*, 94 Ky. 180, 21 S. W. 868, 15 Ky. L. 101; *Duncan v. Mason*, 14 Ky. L. 318, 20 S. W. 252; *Stewart v. Curtis*, 85 Mich. 496, 48 N. W. 872; *Davis v. Phillips*, 85 Mich. 198, 48 N. W. 513; *Arnold v. Whitcomb*, 83 Mich. 19, 46 N. W. 1029; *Tichy v. Simicek* (Nebr.), 95 N. W. 629; *King v. Humphreys*, 138 Pa. St. 310, 22 Atl. 19; *Stringfellow v. Hanson*, 25 Utah 480, 71 Pac. 1052. "Old age, sickness, abatement of mental vigor and impairment of memory does not * * * rebut the legal presumption of mental competency to transact business." *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348.

⁸⁵ *Foote v. Depoy*, 126 Iowa 366, 102 N. W. 112, 106 Am. St. 365, 68 L. R. A. 302; *Austin v. Bridges*, 21 Ky. L. 694, 52 S. W. 966. See also, cases cited in note 82 of this section. "We agree that if he was an imbecile, they could not bargain with him, and if he was simply weak and exclusively in their care, all bargains would be closely criticized, and the utmost fairness insisted on. In dealing with him they would have been exposed to serious suspicions, but there was no legal impediment so long as he retained legal capacity." *Mason v. Dunbar*, 43 Mich. 407, 5 N. W. 432, 38 Am. Rep. 201. As to weakness of mind connected with inadequacy of consideration, see post, § 158, *Inadequacy of Consideration*.

⁸⁶ *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Hemstreet v. Wheeler*,

100 Iowa 282, 69 N. W. 518 (property worth six thousand dollars was conveyed to a daughter for three thousand dollars and a contract for support of both parents for life); *Lewis v. Arbuckle*, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125, 12 Am. Dec. 362; *Davidson v. Little*, 22 Pa. St. 245, 60 Am. Dec. 81; *Johnson v. Franklin*, 58 S. Car. 394, 36 S. E. 664; *Briscoe v. Bronaugh*, 1 Tex. 326, 46 Am. Dec. 108; *White v. Johnson*, 4 Wash. 113, 29 Pac. 932; *Cooper v. Reilly*, 90 Wis. 427, 63 N. W. 885. See post, ch. 9, *Consideration*. The case of *Davidson v. Little*, 22 Pa. St. 245, 60 Am. Dec. 81, contains an obiter statement to the effect that inadequacy of consideration may be grounds for rescinding an executory contract but not for canceling an executed conveyance.

⁸⁷ *Macoupin County v. People*, 58 Ill. 191; *Madison County v. People*, 58 Ill. 456; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Mathews v. Reinhardt*, 149 Ill. 635, 37 N. E. 85; *Morriso v. Philliber*, 30 Mo. 145; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Dunn v. Chambers*, 4 Barb. (N. Y.) 376; *Hough v. Hunt*, 2 Ohio 495, 15 Am. Dec. 569; *Brown v. Hall*, 14 R. I. 249, 51 Am. Rep. 375; *Stephens v. Ozbourn*, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. 957; *Eyre v. Potter*, 15 How. (U. S.) 42, 14 L. ed. 592; *Randolph v. Quidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655; *Jones v. Degge*, 84 Va. 685, 5 S. E. 799. See

tion is not an important factor in determining the validity of a contract. It, in connection with other circumstances, may well be evidence of fraud or undue influence.⁸⁸ Consequently, if the party who receives the inadequate consideration is found to sustain a confidential relation to the other party, or is a person of weak mentality, or in great distress of mind at the time the contract is executed, or there are other inequitable circumstances, equity may avoid the agreement. The existence of a confidential relation combined with inadequacy of consideration greatly strengthens the presumption of undue influence which arises when contracts are entered into between persons who sustain a confidential relation to each other.⁸⁹ Thus, where one sustains a relation of daughter-in-law and nurse to an enfeebled, sick, and at times delirious, old lady and while this relation existed a deed was secretly given to the daughter-in-law, such deed has been set aside for undue influence, the court saying: "In such case, if error is committed it is better to err in favor of restoring the property of a feeble old woman to her dominion and control than to err in upholding a deed given under such circumstances

post, Ch. 9, Consideration. In some jurisdictions specific performance will be denied unless the consideration is adequate. *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689 (statutory); *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190. See also, *Esperit v. Wilson*, 190 Ill. 629, 60 N. E. 923; *Powers v. Hale*, 25 N. H. 145; *Eastman v. Plumer*, 46 N. H. 464; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; *Knobb v. Lindsay*, 5 Ohio 468; *Clitherall v. Ogilvie*, 1 Des. (S. Car.) 250; *Gasque v. Small*, 2 Strobb. Eq. (S. Car.) 72. The weight of authority is otherwise. *Collier v. Brown*, 1 Cox. 428; *January v. Martin*, 1 Bibb (Ky.) 586; *Wollums v. Horsley*, 14 Ky. L. 642, 20 S. W. 781; *Shepherd v. Bevin*, 9 Gill (Md.) 32; *Young v. Frost*, 5 Gill (Md.) 287; *Western R. Corp. v. Babcock*, 6 Metc. (Mass.) 346; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Harrison v. Town & Dixon*, 17 Mo. 237; *Ready v. Noakes*, 29 N. J. Eq. 497; *Shaddle v. Disborough*, 30 N. J. Eq. 370; *Viele v. Railroad Co.*, 21 Barb. (N.

Y.) 381; *Losee v. Morey*, 57 Barb. (N. Y.) 561; *Seymour v. Delancey*, 3 Cow. (N. Y.) 445, revd. 6 Johns. Ch. (N. Y.) 222; *White v. Thompson*, 1 Dev. & Bat. Eq. (N. Car.) 493; *Fripp v. Fripp*, *Rice's Eq.* (S. Car.) 84; *Sarter v. Gordon*, 2 Hill Ch. (S. Car.) 121; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 146; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. ed. 120; *Garnett v. Macon*, 2 Brock. (U. S.) 185, Fed. Cas. No. 5245; *Hale v. Wilkinson*, 21 Grat. (Va.) 75; *Talley v. Robinson's Assignee*, 22 Grat. (Va.) 888; *White v. McGannon*, 29 Grat. (Va.) 511.

⁸⁸ *Lewis v. Arbuckle*, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; *Stephens v. Ozbourne*, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. 957; *Talbott v. Manard*, 106 Tenn. 60, 59 S. W. 340; *Mann v. Russey*, 101 Tenn. 596, 49 S. W. 835.

⁸⁹ *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *Holland v. John*, 60 N. J. Eq. 435, 46 Atl. 172; *Doyle v. Welch*, 100 Wis. 24, 75 N. W. 400.

as to cast suspicion upon it."⁹⁰ Conveyances between husband and wife,⁹¹ pastor and parishioner,⁹² guardian and ward,⁹³ uncle and niece,⁹⁴ child and parent,⁹⁵ have been set aside in instances where it appeared that the consideration was inadequate.

The foregoing principles are also applicable in cases where no technical fiduciary relations exist, but confidence is in fact reposed.⁹⁶ In case property is obtained at an inadequate price from a person of weak mind, when not protected by independent advice or other circumstances, it may be sufficient to show undue influence.⁹⁷ Inadequacy of consideration taken in connection with oppressive circumstances insufficient in themselves to amount to duress may, when considered together, amount to undue influence.⁹⁸ Thus it has been so held when one of the parties to a contract was in great mental distress at the time the agreement was entered into, such as domestic troubles, or sorrow caused by the death of a husband⁹⁹ or the death of a son, together with old age and financial difficulties.¹

The financial difficulties of one may also be taken advantage of in such a way as to avoid the agreement induced thereby, when connected with inadequate consideration. However, in practically all of the cases so holding, the dominant

⁹⁰ *Payne v. Payne*, 12 Cal. App. 251, 107 Pac. 148.

⁹¹ *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723.

⁹² *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. 355.

⁹³ *Tucke v. Buchholz*, 43 Iowa 415.

⁹⁴ *Tribou v. Tribou*, 96 Maine 305, 52 Atl. 795.

⁹⁵ *Muzzy v. Tompkinson*, 2 Wash. 616, 27 Pac. 456, 28 Pac. 652.

⁹⁶ *Odeil v. Moss*, 130 Cal. 352, 62 Pac. 555; *Cowen v. Adams*, 78 Fed. 536, 24 C. C. A. 198 (surrender of legal right by legatee to executor); *Lanfair v. Thompson*, 112 Ga. 487, 37 S. E. 717; *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843. In the two preceding cases conveyances were made by parent to child. *Armstrong v. Logan*, 115 Mo. 465, 22 S. W. 384; *Lamb v. Lamb* (N. J. Eq.), 23 Atl. 1009 (conveyance from step-mother to step-son); *Darlington's Estate*, 147 Pa. St. 624, 30 Am. St. 776, 23 Atl.

1046 (note given by uncle to nephew); *Watkins v. Brant*, 46 Wis. 419, 1 N. W. 82 (conveyance by brother to sister).

⁹⁷ *Turner v. Collins*, L. R. 7 Ch. App. Cas. 329; *Gandy v. McCauley*, L. R. 31 Ch. Div. 1; *Wilkie v. Sassen* (Iowa), 99 N. W. 124; *Brugier v. Pepin*, 106 Iowa 432, 76 N. W. 808; *Smith v. Cuddy*, 96 Mich. 562, 56 N. W. 89; *Allore v. Jewel*, 94 U. S. 506.

⁹⁸ *McLean v. Equitable Life & Co.*, 100 Ind. 127, 50 Am. Rep. 779; *Brugier v. Pepin*, 106 Iowa 432, 76 N. W. 808; *Musick v. Fisher*, 96 Ky. 15, 16 Ky. L. 277, 27 S. W. 812; *Hough v. Hunt*, 2 Ohio 495, 15 Am. Dec. 569.

⁹⁹ *Brugier v. Pepin*, 106 Iowa 432, 76 N. W. 808.

¹ *McLean v. Equitable Life & Co.*, 100 Ind. 127, 50 Am. Rep. 779. See also, *Kellogg v. Kellogg*, 21 Colo. 181, 40 Pac. 358; *Stewart v. Stewart*, 7 J. J. Marsh. (Ky.) 183, 23 Am. Dec. 396.

party, knowing the needs of the other, had taken advantage of the opportunity thus afforded to drive an unconscionable bargain and had made demands he had no legal right to make, or had refused the performance of acts he was under a legal obligation to perform.² It must not be understood from the foregoing that courts of equity will relieve against every hard bargain. In the absence of any confidential relation or mental weakness a hard bargain entered into by one who is in financial difficulties brought on by himself will not ordinarily be relieved against. Especially is this true when a borrower applies to the lender for help and agrees to secure him with all his available assets and he gives him help, thereby taking a great risk for the chance of a big profit.³ The mere fact that a contract is improvident and is made without professional advice or consultation with friends, even when coupled with somewhat inadequate consideration, is not sufficient in equity to cause a contract to be set aside when both parties were able to judge for themselves, were on an equal footing and there were no oppressive circumstances.⁴

§ 159. Unconscionable contracts.—An unconscionable contract is usually defined as one “such as no man in his senses and not under a delusion would make on the one hand, and such as no honest and fair man would accept on the other.”⁵ And by the general rule inadequacy of consideration will not render a contract unconscionable unless there exists “an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it,”⁶ but, as is sometimes stated, “where the

² Stewart v. Stewart, 7 J. J. Marsh. (Ky.) 183, 23 Am. Dec. 396; Rothenbarger v. Rothenbarger, 111 Mo. 1, 19 S. W. 932; Hough v. Hunt, 2 Ohio 495, 15 Am. Dec. 569, and note. See also, Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50; Cobb v. Day, 106 Mo. 278, 17 S. W. 323; Flummerfelt's Exrs. v. Flummerfelt, 51 N. J. Eq. 432, 26 Atl. 857.

³ Colonial Trust Co. v. Hoffstot, 219 Pa. 497, 69 Atl. 52. See also, Moffat v. Winslow, 7 Paige (N. Y.) 124.

⁴ Harrison v. Guest, 6 DeG., M. & G. 424, 8 H. L. Cas. 481; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448;

Dunn v. Chambers, 4 Barb. (N. Y.) 376; Green v. Thompson, 37 N. Car. 365. See also, Joslin v. Cowee, 56 N. Y. 626.

⁵ Chesterfield v. Janssen, 2 Ves. Sr. 125; King v. Cohorn, 6 Yerg. (Tenn.) 75, 27 Am. Dec. 455; Hume v. United States, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. 134; Howells v. Pacific States &c. Building Co., 21 Utah 45, 60 Pac. 1025, 81 Am. St. 659.

⁶ Gwynne v. Heaton, 1 Brown Ch. 1; Stephens v. Ozbourne, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. 957. See also, Howard v. Edgell, 17 Vt. 9.

inadequacy of the price is so great that the mind revolts at it the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract."⁷ Whether a contract is rendered unconscionable because of an inadequate consideration depends upon the circumstances of each particular case as viewed in the light of the general principle announced.⁸

§ 160. Contracts with expectant heirs, and the like.—Unjust contracts of this character are termed "catching bargains" and are defined as the purchase by means of an unconscionable agreement of an expected estate or interest from an expectant heir, a reversioner or remainderman, or from any one who has the hope of succession to the property or estate of an ancestor or relative.⁹ Against such contracts equity affords relief. Owing to social conditions more or less peculiar to England the law on this branch of the subject has been largely developed in that country. The rules governing contracts of the above character seem to be given a somewhat less strict application in the United States than in England. Under the theory that expectant heirs, reversioners, and the like, in a real or imagined need of money, are exposed to the demand of another and are peculiarly liable to imposition, equity has established rules for their protection.¹⁰

⁷ *Hough v. Hunt*, 2 Ohio 495, 15 Am. Dec. 569. See also, *McKinney v. Pinckard*, 2 Leigh (Va.) 149, 21 Am. Dec. 601.

⁸ See further on this subject in the chapter on Consideration, post, § 209, Sufficiency or Adequacy of Consideration.

⁹ 6 Cyc. 702; 5 Am. & Eng. Ency. Law 764; Black's L. Dict. 178. But see as to the rule being less stringent in case of a reversion, remainder or fixed legacy, *Cribbins v. Markwood*, 13 Grat. (Va.) 495, 498; *Parmelee v. Cameron*, 41 N. Y. 392; *Whelan v. Phillips*, 151 Pa. St. 312, 322, 25 Atl. 44.

¹⁰ *King v. Hamlet*, 2 Myl. & K. 456; *Peacock v. Evans*, 16 Ves. Jr. 512; *Aylesford v. Morris*, L. R. 8 Ch. 484; *O'Rorke v. Bolingbroke*, 2 App. Cas. 814; *Fry v. Lane*, 40 Ch. D. 312; *Jenkins v. Pye*, 12 Pet. (U. S.) 240; *Parsons v. Ely*, 45 Ill. 232; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956;

McClure v. Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477; *Clendenning v. Wyatt*, 54 Kans. 523, 38 Pac. 792; *Lowry v. Spear*, 7 Bush (Ky.) 451; *Boynton v. Hubbard*, 7 Mass. 112; *Fitch v. Fitch*, 8 Pick. (Mass.) 480; *Mastin v. Marlow*, 65 N. Car. 695; *In re Kuhn's Estate*, 163 Pa. 438, 30 Atl. 215. In the case of *Curtis v. Curtis*, 40 Maine 24, 63 Am. Dec. 651, it is said: "There are two reasons why sales of expected estates by their heirs should be discountenanced. One, that it opens the door to taking undue advantage of an heir in distress and necessitative circumstances; the other is founded upon public policy in order to prevent an heir from shaking off his father's authority and feeding his extravagance by disposing of the family estate." Some cases lay down the rule that where an ancestor has no knowledge of the contract he may permit his property to go under the law of descent, believing the heir will re-

Such contracts are regarded by the law with disfavor and are presumed to be founded on fraud or oppression, so much so that one who attempts the enforcement of such a contract must generally allege and prove that there was neither fraud nor oppression before he is entitled to any consideration.¹¹ But if it is proved that they are fair and just and that no undue advantage was taken of the heir they may be enforced in equity.¹²

In England by the weight of authority it is held that even in the absence of fraud or undue influence mere inadequacy of consideration is a sufficient ground for setting aside the contract whereby expectant heirs seek to convey their prospective inheritance.¹³ In the United States, however, mere inadequacy of price, not too flagrant nor gross, is considered only as evidence of fraud or undue influence that is not of itself sufficient to avoid the agreement.¹⁴

As has already been indicated, it is held in some jurisdictions

ceive the benefit, but in truth it goes to an entire stranger, if the contract of such heir is enforced. This is deemed equivalent to a fraud upon the ancestor. *King v. Hamlet*, 2 Myl. & K. 456; *Cole v. Gibbons*, 3 P. Wms. 290; *Chesterfield v. Janssen*, 2 Ves. Sr. 158; *McClure v. Raben*, 133 Ind. 557, 33 N. E. 275, 36 Am. St. 558.

¹¹*Bromley v. Smith*, 26 Beav. 644; *Hannah v. Hodson*, 30 Beav. 19; *McClure v. Raben*, 133 Ind. 557, 33 N. E. 275, 36 Am. St. 558; *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. 819; *Nimmo v. Davis*, 7 Tex. 26; *Cribbins v. Markwood*, 13 Grat. (Va.) 495, 67 Am. Dec. 775.

¹²*Chambers v. Chambers*, 139 Ind. 111, 38 N. E. 334; *Clendening v. Wyatt*, 54 Kans. 523, 33 L. R. A. 278; *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. 819. If unconscionable it will not be given effect. *Butler v. Duncan*, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711.

¹³*O'Rorke v. Bolingbroke*, L. R. 2 App. Cas. 814; *St. Albyn v. Harding*, 27 Beav. 11; *Evans v. Llewellyn*, 1 Cox 333; *Jones v. Ricketts*, 31 Beav. 130; *Shelly v. Nash*, 3 Madd. 232; *Gowland v. De Faria*, 17 Ves. Jr. 20; *Davies v. Cooper*, 5 Myl. & C. 270; *Bawtree v. Watson*, 3 Myl. & K. 339; *Emmet v. Tottenham*, 10 Jur. (N. S.) 1090. "Anything that can be substan-

tially considered as inadequacy is a ground for setting aside the contract." *Peacock v. Evans*, 16 Ves. Jr. 512. In *Edwards v. Burt*, 15 Eng. L. & Eq. 434, it is said: "It is, however, unnecessary now to canvass or discuss the principles on this subject, for the rule on it was finally and distinctly established by the house of lords in the case of *Lord Adlbrough v. Tyre*, and that case, following several of the previous authorities, clearly establishes that the purchaser of a reversionary interest, or, at all events, the purchaser of such an interest from an expectant heir, or from a person standing in the situation of an expectant heir, * * * is bound, if the transaction is impeached within a reasonable time, to satisfy the court that he gave the fair market value for what he purchased." There are, however, earlier cases to the contrary. *Murray v. Palmer*, 2 Sch. & Lef. 474; *Nicholls v. Gould*, 2 Ves. Sr. 422; *Verner v. Winstanley*, 2 Sch. & Lef. 393; *MacGhee v. Morgan*, 2 Sch. & Lef. 395.

¹⁴*Parsons v. Ely*, 45 Ill. 232; *Varick v. Edwards*, Hoffm. Ch. (N. Y.) 382. See also, *Dunn v. Chambers*, 4 Barb. (N. Y.) 376; *Mastin v. Marlow*, 65 N. Car. 695; *McDonald v. McDonald*, 58 N. Car. 211, 75 Am. Dec. 434;

that a contract disposing of a reversionary interest, when unknown to the ancestor, is a fraud upon him, and as a consequence it is held that if the contract is unknown to such ancestor and he does not assent thereto, it is voidable for that reason.¹⁵ Other authorities hold that even though the ancestor did not and could not assent to the assignment by the heir of his expectancy this alone is not fatal to the contract, and it will be sustained if otherwise fair and free from objectionable circumstances.¹⁶ This would seem to be the more logical holding, since the primary purpose of the rule is to protect improvident and necessitant heirs from being despoiled by those who seek to prey upon them.¹⁷ If the doctrine of ancestral assent is followed to its logical conclusion it would lead to a total disregard of the welfare of the heir, and this result has been accomplished by a strict adherence to the rule.¹⁸ The rule that the assent of the ancestor is necessary to give validity to the contract is erroneous for the further reason that it is assumed that such contract may be ratified by the expectant heir after the special circumstances have ceased to oper-

Davidson v. Little, 22 Pa. St. 245, 60 Am. Dec. 81; In re Power's Appeal, 63 Pa. St. 443; Whelen v. Phillips, 151 Pa. St. 312, 25 Atl. 44; Butler v. Haskell, 4 Desaus. (S. Car.) 651; M'Kinney v. Pinckard, 2 Leigh (Va.) 149, 21 Am. Dec. 601; Mayo v. Carlington, 19 Gratt. (Va.) 74; Cribbins v. Markroad, 13 Grat. (Va.) 495, 67 Am. Dec. 775. Before inadequacy of consideration will avoid such an agreement it must be so flagrant as to give rise to a presumption of fraud. Dunn v. Chambers, 4 Barb. (N. Y.) 376; Brown v. Hall, 14 R. I. 249, 51 Am. Rep. 375. See, however, Chambers v. Chambers, 139 Ind. 111, 38 N. E. 334; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513.

¹⁵ In the case of King v. Hamlet, 2 Myl. & K. 456, it is said: "The extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father or other person standing in loco parentis—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even

although such parent or other person took no active part in negotiation provided the transaction was not opposed by him, and so carried through in spite of him. * * * Still more fatal to his claim of relief will it be, if the father, or person in loco parentis shall be found to have concurred in this adoption of the repudiated contract." McClure v. Raben, 133 Ind. 507, 33 N. E. 275, 36 Am. St. 558. By the English decisions it would seem that the ancestor must actually sanction or join in the transaction in order to render it unassailable. Aylesford v. Morris, 8 L. R. Ch. 484; Talbot v. Stainforth, 1 J. & H. 484, 31 L. J. (N. S.) Ch. 197; O'Rorke v. Bolingbroke, L. R. 2 App. Cas. 814. See also, Miller v. Cook, L. R. 10 Eq. 641; Savery v. King, 5 H. L. Cas. 627.

¹⁶ Mastin v. Marlow, 65 N. Car. 695; Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. 819; Searcy v. Gwaltney Bros., 36 Tex. Civ. App. 158, 81 S. W. 576.

¹⁷ See ante, note 12.

¹⁸ See Williams v. Williams, L. R. 2 Ch. 294; Jenkins v. Pye, 12 Pet. (U. S.) 241, 9 L. ed. 1070.

ate. If the heir may ratify such contract it would seem that fraud on the ancestor is not entitled to much consideration.¹⁹

It is doubtless true that if the vendor and purchaser of an expectant interest before the consummation of the sale procure a well-considered and impartial estimate of what the property would be likely to bring on sale from a third person and act upon that opinion, the presumption of undue influence will be rebutted.²⁰ A sale of an expectancy at auction has been upheld.²¹ Such a sale has also been upheld where there were many attempts to sell at a specified price and a purchaser was finally found who was willing to pay that price.²² The foregoing principles relative to the sale of expectancies have been held to apply to contracts for the sale,²³ or mortgage,²⁴ of such expectancy, and to contracts calling for the payment of a specified sum of money on the death of the person, upon whose death the vesting of the expectancy is contingent.²⁵ They do not apply to a contract disposing of an interest already vested or fixed.²⁶

§ 161. **Ratification.**—A contract procured through duress or undue influence may be ratified by the oppressed party if he so chooses after the coercive influence has been removed. Not only this, but he will be held to have ratified the agreement if he does not repudiate it within a reasonable time after the removal of such influences.²⁷ The law imposes upon the servient

¹⁹ Page on Contracts, Vol. 1, page 360, § 238, citing *Cole v. Gibbons*, 3 P. Wms. 290.

²⁰ *Edwards v. Burt*, 2 DeG., M. & G. 55. See also, *Perfect v. Lane*, 3 DeG., F. & J. 369; *Miller v. Cook*, L. R. 10 Eq. 641; *Tynte v. Hodge*, 2 Hem. & M. 287.

²¹ *Shelly v. Nash*, 3 Madd. 232. See, however, *Fox v. Wright*, 6 Madd. 111.

²² *Moct v. Atwood*, 5 Ves. Jr. 845.

²³ *Foster v. Roberts*, 29 Beav. 467; *Chambers v. Chambers*, 139 Ind. 111, 38 N. E. 334.

²⁴ *Beynon v. Cook*, L. R. 10 Ch. 389; *Butler v. Duncan*, 47 Mich. 94, 10 N. E. 123, 41 Am. Rep. 711.

²⁵ *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 1 Atk. 352.

²⁶ *Parmelee v. Cameron*, 41 N. Y. 392; *Davidson v. Little*, 22 Pa. 245, 60

Am. Dec. 81; *Whelen v. Phillips*, 151 Pa. St. 312, 25 Atl. 44; *Cribbins v. Markwood*, 13 Gratt. (Va.) 495, 67 Am. Dec. 775; *Mayo v. Carrington*, 19 Gratt. (Va.) 74.

²⁷ Cases holding that a contract procured through undue influence may be ratified. *More v. More*, 133 Cal. 489, 65 Pac. 1044; *Albrecht v. Hunecke*, 196 Ill. 127, 63 N. E. 616; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Sanderson v. Adams*, 133 Mich. 359, 94 N. W. 1063; *Keller v. Lamb*, 202 Pa. St. 412, 51 Atl. 982; *Talbott v. Manard*, 106 Tenn. 60, 59 S. W. 340; *Ellis v. Ellis*, 5 Tex. Civ. App. 46, 23 S. W. 996. The following cases are cases holding that a contract procured through duress may be ratified. *Gillespie v. Simpson* (Ark.), 18 S. W. 1050; *Craig v. Ginn*, 3 Pennw. (Del.) 117, 48 Atl. 192, 53 L. R. A. 715, 94

party the duty to exercise the option of either being bound by the agreement or to repudiate it with all convenient speed after the duress or undue influence has been removed.²⁸ Consequently, if one under duress enters into marriage with another and he afterward has ample opportunity to protest against the consummation of the marriage and did not do so, he cannot have it annulled for duress, but instead will be held to have consented.²⁹ One will not be held, however, to have ratified a contract so induced from conduct while still under the influence exerted by the dominant party.³⁰ Thus, payments on notes made under the same influence that procured the contract will not amount to a ratification.³¹ When affirmative acts are relied upon as constituting a confirmation they must be such as to indicate an intention to condone the wrong and a purpose to abide by the contract.³² Contracts by which an expectant heir disposes of the prospective estate may be ratified.³³

§ 162. *In pari delicto*, principle of, when not applicable to contracts procured through undue influence.—It is well set-

Am. St. 77; *Ferrari v. Board of Health*, 24 Fla. 390, 5 So. 1; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684; *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Carver v. United States*, 111 U. S. 609, 28 L. ed. 450, 4 Sup. Ct. 561, 19 Ct. Cl. (U. S.) 714.

²⁸ *Andrews v. Connolly*, 145 Fed. 43.

²⁹ *Linebaugh v. Linebaugh*, 137 Cal. 26, 69 Pac. 616; *Boutterrie v. Demarist*, 126 La. 278, 27 L. R. A. (N. S.) 805, 52 So. 492; *Marsh v. Whittington*, 88 Miss. 400, 40 So. 326; *Hampstead v. Plaistow*, 49 N. H. 84; *Richards v. Richards*, 19 Pa. Co. Ct. 322; *Merrell v. Moore*, 47 Tex. Civ. App. 200, 104 S. W. 514. See, however, *Avakian v. Avakian*, 69 N. J. Eq. 89, 60 Atl. 521; *Quealy v. Waldron* (La.), 27 L. R. A. (N. S.) 803, 52 So. 479.

³⁰ *St. Louis & C. R. Co. v. Gorman*, 79 Kans. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637; *Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191; *Quealy v. Waldron*, 126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803; *Rau v. Von Zedlitz*, 132 Mass. 164; *Bentley v. Robson*,

117 Mich. 691, 76 N. W. 146; *Buck v. First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. 505; *Avakian v. Avakian*, 69 N. J. Eq. 89, 60 Atl. 521.

³¹ *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398. However, partial payments made on a contract after duress has been removed are an affirmation of it. *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029.

³² *St. Louis & C. R. Co. v. Gorman*, 79 Kans. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637. It has been held that the fact that the wife cohabited with her husband subsequent to a conveyance, under duress, of real estate to her husband, may be evidence of a ratification of the conveyance made under duress but was not necessarily conclusive. *Hoag v. Hoag*, 210 Mass. 94, 96 N. E. 49, 36 L. R. A. (N. S.) 329.

³³ *Kay v. Smith*, 21 Beav. 522; *Cole v. Gibbons*, 3 P. Wms. 290; *Dunham v. Bentley*, 103 Iowa 136, 72 N. W. 437; *Curtis v. Curtis*, 40 Maine 24, 63

led that under ordinary circumstances one who voluntarily enters into an illegal contract will be denied relief therefrom. The foregoing principle does not apply, however, where it appears that some fraud, duress, oppression or undue influence is practiced by one party upon the other so that it appears that the guilt of the latter is subordinate to that of the former.³⁴ Consequently it has been held that the maxim "in pari delicto" does not apply to a case where a married woman sued to set aside a deed of her separate property made by her under express or implied threats of the prosecution of her husband and to save him from prosecution, whether the threatened prosecution was lawful or unlawful, and when she was sick and nervous, and when she does not appear to have abundant opportunity for consideration and consultation with disinterested advisers.³⁵ This has also been held true of a payment of money made to a judge at his suggestion and without knowledge on the part of the other of the illegality of such contract.³⁶

Am. Dec. 651. See also, *Gowland v. De Faria*, 17 Ves. Jr. 20; *Purcell v. M'Namara*, 14 Ves. Jr. 91.

³⁴ *Colby v. Title Ins. & Co.*, 160 Cal. 632, 117 Pac. 913, 35 L. R. A. (N. S.) 813 (reviewing the authorities); *Baehr v. Wolf*, 59 Ill. 470; *Davidson v. Carter*, 55 Iowa 117, 7 N. W. 466; *Roman v. Mali*, 42 Md. 513; *Kitchen v. Greenabaum*, 61 Mo. 110.

³⁵ *Burton v. McMillan*, 52 Fla. 469, 42 So. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. 220, 11 Am. & Eng. Ann. Cases 380. See also, *Woodham v.*

Allen, 130 Cal. 194, 62 Pac. 398; *Colby v. Title Ins. & Co.*, 160 Cal. 632, 117 Pac. 913, 35 L. R. A. (N. S.) 813 (mother conveying land to save daughter from criminal prosecution); *Gray v. Freeman*, 37 Tex. Civ. App. 556, 86 S. W. 1105. In such instance the parties may be "in delicto" but not in "in pari delicto." *Gorringe v. Reed*, 23 Utah 120, 63 Pac. 902, 90 Am. St. 692.

³⁶ *Evans v. Funk*, 151 Ill. 650, 38 N. E. 230, affg. 38 Ill. App. 441.

CHAPTER VIII.

CERTAINTY.

§ 170. General rule.

171. That is certain which can be made certain.
172. Illustration of the maxim, "*id certum est quod certum reddi potest*."
173. Other illustrative cases.
174. Reference to plans and specifications.
175. Agreement to make future contract.
176. Uncertainty as to time.
177. Uncertainty as to place.
178. Uncertainty as to subject-matter.

§ 179. Uncertainty as to description.

180. Uncertainty as to amount.
181. Uncertainty as to price.
182. Uncertainty as to what is to be done.
183. Miscellaneous instances of uncertainty.
184. Miscellaneous instances of contract held sufficiently certain.
185. Effect of using terms "more or less", "about" and the like.
186. "Say" and "say about" and the like.

§ 170. **General rule.**—Parties and a subject-matter are two essential elements of every legal contract. Consequently, it follows as an elementary proposition that in order to constitute a valid oral agreement the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty who is to be bound¹ and what is meant. If the agreement is so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void. Neither the court nor the jury can make an agreement for the parties.² Such a con-

¹ Winslow v. Winslow, 52 Ind. 8 (failed to show who promisor was); Ross v. Burse, 17 Colo. 24 (failed to show who promisee was). See also, Watkins v. Turner, 34 Ark. 663; Clark v. Great Northern R. Co., 81 Fed. 282; Stanton v. Miller, 58 N. Y. 192; Marshall v. White's Creek Tpk. Co., 7 Cold. (Tenn.) 252. The parties need not be expressly named, but it must be made to appear who they are. Webster v. Ela, 5 N. H. 540. Where one of the parties to a contract was designated as "Phillips & Bro.," it was held to sufficiently identify the

respondents so as to bind them, especially since it was alleged in the bill and admitted by the demurrer that they are the parties intended. Phillips v. Cornelius (Miss.), 28 So. 871. See also, Scanlan v. Alexander, 71 Minn. 351, 74 N. W. 146.

² McFarlane v. York, 90 Ark. 89, 117 S. W. 773; Sherman v. Kitsmiller, 17 Serg. & R. (Pa.) 45. "If the agreement is so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an

tract cannot be enforced in equity,³ as by a suit for specific per-

agreement for the parties. Such a contract can neither be enforced in equity nor be sued upon at law. It is hardly necessary to cite any of the numerous authorities that sustain this plain legal proposition." *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371; *Price v. Stipek* (Mont.), 104 Pac. 195. "It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite." *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288n. "If the contract in any case is so indefinite as to make it impossible for the court to decide just what it means, and fix exactly the legal liability of the parties, it cannot result in an enforceable contract." *Gaines v. Vandecar* (Ore.), 115 Pac. 721, rehearing denied 115 Pac. 1122.

³ *Lloyd v. Collett*, 4 Bro. C. C. 469; *Harnett v. Yeilding*, 2 Sch. & Lef. 549; *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G. 119; *Tatham v. Platt*, 9 Hare 660; *Franks v. Martin*, 1 Eden 309; *South Wales R. Co. v. Wythes*, 5 De G. M. & G. 880; *Taylor v. Portington*, 7 De G. M. & G. 328; *Cooper v. Hood*, 26 Beav. 293; *Bromley v. Jefferies*, 2 Vern. 415; *Blagden v. Bradbear*, 12 Ves. Jr. 466; *De Sollar v. Hanscome*, 158 U. S. 216, 39 L. ed. 956, 14 Sup. Ct. 816; *Preston v. Preston*, 95 U. S. 200, 24 L. ed. 494; *Colson v. Thompson*, 2 Wheat. (U. S.) 336, 4 L. ed. 253; *Carr v. Duval*, 14 Pet. (U. S.) 77, 10 L. ed. 361; *Kendall v. Almy*, 2 Sumn. (U. S.) 278, Fed. Cas. No. 7690; *Bowen v. Waters*, 2 Paine (U. S.) 1, Fed. Cas. No. 1725; *Strang v. Richmond &c. R. Co.*, 93 Fed. 71; *Minnesota Tribune Co. v. Associated Press*, 83 Fed. 350, 27 C. C. A. 542; *Walcott v. Watson*, 53 Fed. 429; *Zeringue v. Texas &c. R. Co.*, 34 Fed. 239; *Walton v. Coulson*, 1 McLean (U. S.) 120. See also, *Howison v. Jackson*, 124 Ala. 187, 27 So. 494; *Angel v. Simpson*, 85 Ala. 53, 3 So. 758; *Iron Age Pub. Co. v.*

Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. 758; *Carlisle v. Carlisle*, 77 Ala. 339; *Shelburne v. Letsinger*, 52 Ala. 96; *Pike v. Pettus*, 71 Ala. 98; *Williams v. Barnes*, 28 Ala. 613; *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Sutton v. Myrick*, 39 Ark. 424; *Jordan v. Deaton*, 23 Ark. 704; *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 828; *Maggee v. McManus*, 70 Cal. 553, 12 Pac. 451; *Forrester v. Flores*, 64 Cal. 24, 28 Pac. 107; *Los Angeles Immigration &c. Assn. v. Phillips*, 56 Cal. 539; *Agard v. Valencia*, 39 Cal. 292; *Minturn v. Baylis*, 33 Cal. 129; *Blum v. Robertson*, 24 Cal. 127; *Morrison v. Rossignol*, 5 Cal. 64; *Morris v. Peckham*, 51 Conn. 128; *Dodd v. Seymour*, 21 Conn. 476; *Hollenbeck v. Prior*, 5 Dak. 298, 40 N. W. 347; *Diamond State Iron Co. v. Todd*, 8 Houst. (Del.) 372, 6 Del. Ch. 163, 14 Atl. 27; *Carlisle v. Fleming*, 1 Har. (Del.) 421; *Repetti v. Maisak*, 6 Mackey (D. C.) 366; *Armes v. Bigelow*, 3 MacArthur (D. C.) 442; *Beall v. Clark*, 71 Ga. 818; *Shropshire v. Brown*, 45 Ga. 175; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Miller v. Cotten*, 5 Ga. 341; *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589; *Clark v. Clark*, 122 Ill. 388, 13 N. E. 553; *Bowman v. Cunningham*, 78 Ill. 48; *Allen v. Webb*, 64 Ill. 342; *Fitzpatrick v. Beatty*, 1 Gil. (Ill.) 454; *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 409; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Marshall v. Peck*, 91 Ill. 187; *Gosse v. Jones*, 73 Ill. 508; *Cutsinger v. Ballard*, 115 Ind. 93, 17 N. E. 206; *Newman v. Perrill*, 73 Ind. 153; *Gigos v. Cochran*, 54 Ind. 593; *Miller v. Campbell*, 52 Ind. 125; *Baldwin v. Kerlin*, 46 Ind. 426; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 115; *Jewett v. Perrette*, 127 Ind. 97, 26 N. E. 685 (holding that a stipulation for "good wages" renders the contract fatally defective under the rule). And see *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Truman v. Truman*, 79 Iowa 506, 44 N. W. 721; *Corliss v. Conable*, 74 Iowa 58, 36 N. W. 891; *Recknagle v. Schmalz*, 72 Iowa 63, 33 N.

- W. 365; *Thomas v. Griffith*, 68 Iowa 11, 25 N. W. 900; *Dunn v. McGovern*, 116 Iowa 663, 88 N. W. 938; *Day v. Griffith*, 15 Iowa 104; *Williamson v. Williamson*, 4 Iowa 279; *Waters' Heirs v. Brown*, 7 J. J. Marsh. (Ky.) 123; *Burke v. His creditors*, 9 La. Ann. 56; *Higgins v. Butler*, 78 Maine 520, 7 Atl. 276; *Hopkins v. Roberts*, 54 Md. 312; *O'Brien v. Pentz*, 46 Md. 562; *Reese v. Reese*, 41 Md. 554; *Gelston v. Sigmond*, 27 Md. 334; *Smith v. Crandall*, 20 Md. 482; *Triebert v. Burgess*, 11 Md. 452; *Mundorff v. Kilbourn*, 4 Md. 459; *Beard v. Linthicum*, 1 Md. Ch. 345; *Grace v. Denison*, 114 Mass. 16; *Boston & C. R. Co. v. Babcock*, 3 Cush. (Mass.) 228; *Atwood v. Cobb*, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29; *Brown v. Brown*, 47 Mich. 378, 11 N. W. 205; *Kinyon v. Young*, 44 Mich. 339, 6 N. W. 835; *James v. Muir*, 33 Mich. 223; *Wright v. Wright*, 31 Mich. 380; *Blanchard v. Detroit & C. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *McClintock v. Laing*, 22 Mich. 212; *Munsell v. Loree*, 21 Mich. 491; *Wilson v. Wilson*, 6 Mich. 9; *McMurtrie v. Bennette*, Harr. (Mich.) 124; *Ramsdell v. Millerd*, Harr. (Mich.) 373; *Olson v. Erickson*, 42 Minn. 440, 44 N. W. 317; *Burke v. Ray*, 40 Minn. 34, 41 N. W. 240; *Nippolt v. Kammon*, 39 Minn. 372, 40 N. W. 266; *Fisher v. Kuhn*, 54 Miss. 480; *Aston v. Robinson*, 49 Miss. 348; *Montgomery v. Norris*, 1 How. (Miss.) 499; *Strange v. Crowley*, 91 Mo. 287, 2 S. W. 421; *Berry v. Hartzell*, 91 Mo. 132, 3 S. W. 582; *Charpiot v. Sigerson*, 25 Mo. 63; *Bernhardt v. Walls*, 29 Mo. App. 206; *Burks v. Stam*, 65 Mo. App. 455; *Belch v. Miller*, 32 Mo. App. 387; *Foster v. Kimmons*, 54 Mo. 488; *Lapham v. Dreisvoght*, 36 Mo. App. 275; *Clarke v. Koenig*, 36 Nebr. 572, 54 N. W. 842; *Schroeder v. Gemeinder*, 10 Nev. 355; *Bunton v. Smith*, 40 N. H. 352; *Myers v. Metzger*, 63 N. J. Eq. 779, 52 Atl. 274; *Banks v. Weaver* (N. J.), 48 Atl. 515; *Worch v. Woodruff*, 61 N. J. Eq. 78; *Rutan v. Crawford*, 45 N. J. Eq. 99, 16 Atl. 180; *Brown v. Brown*, 33 N. J. Eq. 650; *Green v. Richards*, 23 N. J. Eq. 32; *Nichols v. Williams*, 22 N. J. Eq. 63; *Walker v. Hill*, 21 N. J. Eq. 191; *Potts v. Whitehead*, 20 N. J. Eq. 55, affd. 23 N. J. Eq. 512; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Lokerson v. Stillwell*, 13 N. J. Eq. 357; *Smith v. McVeigh*, 11 N. J. Eq. 239; *Wallace v. Brown*, 10 N. J. Eq. 308; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Robeson v. Hornbaker*, 3 N. J. Eq. 60; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 274. See *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495; *Winne v. Winne*, 166 N. Y. 263; *Stokes v. Stokes*, 148 N. Y. 708, 43 N. E. 211; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Buckmaster v. Thompson*, 36 N. Y. 558; *McIneres v. Hogan* (C. Pl. Eq. T.), 61 How. Pr. (N. Y.) 446; *Foot v. Webb*, 59 Barb. (N. Y.) 38; *Port Jervis & C. R. Co. v. New York & C. R. Co.*, 56 Hun. (N. Y.) 647, 10 N. Y. S. 852, 22 N. Y. St. 359, modified, 132 N. Y. 439, 30 N. E. 855; *Lawrence v. Saratoga Lake R. Co.*, 36 Hun. (N. Y.) 467; *Greenleaf v. Blakemen* (Sup. Ct. Spec. T.), 25 Misc. (N. Y.) 564, 56 N. Y. S. 76; *Mehl v. Von Der Wulbeke*, 2 Lans. (N. Y.) 267, revd. 46 N. Y. 539; *Whitlock v. Duffield*, Hoffm. Ch. (N. Y.) 110; *Paget v. Melcher*, 42 App. Div. (N. Y.) 76, 58 N. Y. S. 913; *Flaherty v. Cary* (N. Y.), 67 N. E. 1082, affg. 62 App. Div. (N. Y.) 116, 70 N. Y. S. 951. And see *Gouge v. Gouge*, 26 App. Div. (N. Y.) 154; 49 N. Y. S. 879; *Teague v. Schaub*, 133 N. Car. 458, 45 S. E. 762. In the above case an injunction was sought. *Maud v. Maud*, 33 Ohio St. 147; *Ferguson v. Blackwell*, 8 Okla. 489, 58 Pac. 647; *Wagonblast v. Whitney*, 12 Ore. 83, 6 Pac. 339; *Ballou v. March*, 133 Pa. St. 64, 19 Atl. 304; *In re Delp's Appeal*, 109 Pa. St. 277; *In re Lord's Appeal*, 105 Pa. St. 451; *Hammer v. McEldowney*, 46 Pa. St. 334; *McCue v. Johnson*, 25 Pa. St. 306; *Charnley v. Hansbury*, 13 Pa. St. 16; *Wood v. Farmare*, 10 Watts (Pa.) 195; *Sherman v. Kitsmiller*, 17 Serg. & R. (Pa.) 45 (promise of one hundred acres of land without any reference to locality or value); *Spears v. Long*, 32 S. Car. 528, 11 S. E. 332; *May v. Cavender*, 29 S. Car. 598, 7 S. E. 489; *Izard v. Middleton*, 1 Desaus. (S. Car.) 116; *Morrison v. Searight*, 4 Baxt. (Tenn.) 476;

ance,^{3a} nor sued upon in an action at law.⁴ The intention of the parties should be taken out of the realm of conjecture by full and clear proof.⁵ But the courts very reluctantly reject an agreement regularly and fairly made as unintelligible or insensible. It will be sustained if the meaning of the parties can be ascertained, either from the express terms of the instrument or

Willis v. Matthews, 46 Tex. 478; Bracken v. Hambrick, 25 Tex. 408; Taylor v. Ashley, 15 Tex. 50; Reed v. Lowe, 8 Utah 39, 29 Pac. 740; Griggsby v. Osborn, 82 Va. 371; Litterall v. Jackson, 80 Va. 604; Shenandoah Valley R. Co. v. Lewis, 76 Va. 833; Pierce v. Catron, 23 Gratt. (Va.) 588; Broughton v. Coffey, 18 Gratt. (Va.) 184; Pigg v. Corder, 12 Leigh (Va.) 69; McCully v. McLean, 48 W. Va. 625, 37 S. E. 559; Hissam v. Parrish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. 892; Campbell v. Fetterman's Heirs, 20 W. Va. 398; Patrick v. Horton, 3 W. Va. 23; Park v. Minneapolis & C. R. Co., 114 Wis. 347, 89 N. W. 532; Stout v. Weaver, 72 Wis. 148, 39 N. W. 136; Tiernan v. Gibney, 24 Wis. 190; Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458.

^{3a}The subject of specific performance of contracts is treated in another part of this work (Ch. 48), but it is proper here to state that a greater degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. The action at law is founded upon the mere non-performance by the defendant, and the negative conclusion can often be established without determining all the terms of the agreement with exactness. In order that a contract may be enforced in equity, however, it has been held that it is only necessary that the subject-matter thereof in case the uncertainty relates to subject-matter, be ascertainable at the time the court is called upon to act. Daily v. Minnick, 117 Iowa 563, 91 N. W. 913, 60 L. R. A. 840.

⁴In re Clarke, L. R. 36 Ch. Div. 348; Figes v. Cutler, 3 Stark. 139;

Coles v. Hulme, 8 B. & C. 568; Van Slyke v. Broadway Ins. Co., 115 Cal. 644, 47 Pac. 689, 928; Truitt v. Fahey, 3 Pen. (Del.) 573, 52 Atl. 339; Hart v. Georgia R. Co., 101 Ga. 188, 28 S. E. 637; Chumasero v. Gilbert, 24 Ill. 293 (a case of a bond conditioned to pay "— dollars"); Gilpatrick v. Foster, 12 Ill. 355 (where it was held that a creditor of "50" indorsed on a note must be rejected as a nullity unless explained); Fairplay School Twp. v. O'Neal, 127 Ind. 95, 26 N. E. 686 (contract between school trustee and teacher to pay her good wages); Blakistone v. German Bank, 87 Md. 302, 39 Atl. 855; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Gelston v. Sigmund, 27 Md. 334; Myers v. Forbes, 24 Md. 598; Marble v. Standard Oil Co., 169 Mass. 553, 48 N. E. 783; Dayton v. Stone, 111 Mich. 196, 69 N. W. 515; Rue v. Rue, 21 N. J. L. 369; Buckley v. Wood, 67 N. J. L. 583, 52 Atl. 564; Thomas v. Thomasville Shooting Club, 123 N. Car. 285, 31 S. E. 654; Reed v. Lowe, 8 Utah 39, 29 Pac. 740. "If it is so uncertain and ambiguous that neither a general nor particular intent can be clearly gathered from it, * * * the contract cannot be enforced." Nevins, J., in Rue v. Rue, 21 N. J. L. 369. The contract must be sufficiently definite to ascertain what the parties meant. Lawrence v. Saratoga Lake R. Co., 36 Hun (N. Y.) 467; Buckmaster v. Thompson, 36 N. Y. 558. Less definiteness is required to support an action for damages than for a suit for specific performance. Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Olympia Bottling Works v. Olympia Brewing Co. (Ore.), 107 Pac. 969.

⁵Huntington & C. Development Co. v. Thornburg, 46 W. Va. 99, 33 S. E. 108.

by fair implication, and to this end words or phrases may often be supplied, transposed or treated as surplusage.⁶

§ 171. That is certain which can be made certain.—In other words, the courts will attempt to discover and enforce the intention of the parties, and an uncertain agreement may be so supplemented by subsequent acts, agreements or declarations of the parties as to make it certain and enforceable.⁷ This attitude of the courts toward contracts has given rise to a rule which is now axiomatic, to the effect that “that is certain which can be made certain,”⁸ or expressed by the Latin phrase, “*id certum est quod certum reddi potest.*”⁹

⁶Langdon v. Goole, 3 Lev. 21; Coles v. Hulme, 8 B. & C. 568; Targus v. Puget, 2 Ves. Sr. 194; Worthington v. Hylyer, 4 Mass. 196; Rue v. Rue, 21 N. J. L. 369, citing Lord Say and Sele's Case, 10 Mod. 40; Barnard's Admr. v. Russell, 19 Vt. 334; McCall Co. v. Icks, 107 Wis. 232, 83 N. W. 300. “The law leans against the destruction of contracts on the ground of uncertainty and a contract will not be declared void on that ground unless after reading it and interpreting it in the light of the circumstances under which it was made and supplying or rejecting words necessary to carry into effect the reasonable intention of the parties, their intention cannot be fairly collected and effectuated.” Boykin v. Bank of Mobile, 72 Ala. 262, 47 Am. Rep. 408; Leffler v. Dickerson, 1 Ga. App. 63, 57 S. E. 911; Sumner v. Williams, 8 Mass. 162. It may be perfectly certain that “North” was written for “South” in a description of land in a deed, and the court may, by construction, correct such a palpable discrepancy. If a contract is definite at the time it is made it cannot be rendered indefinite by the subsequent acts of a party thereto. Fraker v. Hyde, 135 App. Div. (N. Y.) 64, 119 N. Y. S. 879. See post, Ch. 35, Interpretation and Construction.

⁷If the agreement can be made definite by evidence aliunde, it is binding. Foy v. Dawkins, 138 Ala. 232, 35 So. 41; Alabama & C. R. Co. v. South & C. R. Co., 84 Ala. 573, 30 So. 286, 5 Am. St. 401; Daily v.

Minick, 117 Iowa 563, 91 N. W. 913, 60 L. R. A. 840; Wallace v. Ryan, 93 Iowa 115, 61 N. W. 395; Lovejoy v. Lovett, 124 Mass. 270. See also, San Reno Copper Min. Co. v. Moneuse, 133 N. Y. Supp. 509.

⁸Gaytes v. Hibbard, 5 Biss (U. S.) 99. See also, 9 Coke 47a; Wehner v. Bauer, 160 Fed. 240; Grier v. Puterbaugh, 108 Ill. 602; Norton v. Gale, 95 Ill. 533, 35 Am. Rep. 173; Bates v. Harris, 144 Ky. 399, 138 S. W. 276, 36 L. R. A. (N. S.) 154; Losecco v. Gregory, 108 La. 684, 32 So. 985; Crooker v. Holmes, 65 Maine 195, 20 Am. Rep. 687; Sturdivant v. Hull, 59 Maine 172, 8 Am. Rep. 409; Kirwan v. Roberts, 99 Md. 341, 58 Atl. 32; Cooper v. Bigly, 13 Mich. 463; Stillwell v. Craig, 58 Mo. 24; Woods v. Hart, 50 Nebr. 497, 70 N. W. 53; Parker v. Pettit, 43 N. J. L. 512; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218n; Thompson v. Stevens, 71 Pa. St. 161; Northern Cent. R. Co. v. Walworth, 193 Pa. St. 207, 44 Atl. 253; Riker v. Sprague Mfg. Co., 14 R. I. 402, 51 Am. Rep. 413.

⁹Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; Solomon v. Wilmington Sewerage Co. (N. Car.), 55 S. E. 300, 6 L. R. A. (N. S.) 391; Idalia Realty & Co. v. Norman, 232 Mo. 662, 135 S. W. 47, 34 L. R. A. (N. S.) 1069; Broom's Legal Max., 623-626. See also, Gordon v. Whitehouse, 18 C. B. 747; Baldwin v. Boyce, 152 Ind. 46, 51 N. E. 334; Brown v. Bellows, 4 Pick. (Mass.) 179; 1 Elliott Ev., §

§ 172. **Illustration of the maxim, "id certum est quod certum reddi potest."**—The following cases illustrate this principle. The defendant, by an instrument in writing, agreed with the plaintiff, a town, that a certain illegitimate child should not become a charge to the town "during such time as under the statute laws of this state the person accused of begetting such a child would be liable for the support of such child, and only to an amount not exceeding the amount to which under said statute laws the person begetting such a child would be liable." This agreement was upheld as sufficiently definite, the time and amount being capable of ascertainment in the mode provided by the statute referred to.¹⁰ A contract to convey lands will not be held invalid because of a defective description where the data are sufficient to enable a surveyor to locate the property.¹¹ So a contract giving the exclusive right to sell goods "in D, and the territory tributary thereto," has been held sufficiently certain.¹²

§ 173. **Other illustrative cases.**—An agreement to pay an attorney for his services an amount equal to that paid another attorney connected with the same action has been held valid.¹³ Upon similar grounds a contract providing that payment for cutting timber is to be according to a scale which is to exclude "dead culls" has been held to be unambiguous; and where a lumbering

602. But compare *Parsons v. Jackson*, 99 U. S. 434, 25 L. ed. 457.

¹⁰ *Town of Hamden v. Merwin*, 54 Conn. 418, 8 Atl. 670. In *Gelston v. Sigmond*, 27 Md. 334, it was decided that a contract on the part of a lessor "to let the tenant retain the possession from July 1, 1866, to July 1, 1867, upon his giving the lessor the same rent the latter might be able to obtain from other parties," was void for uncertainty and could not be enforced, citing *Bromley v. Jefferies*, 2 Vern. 415. But see *Cunningham v. Brown*, 44 Wis. 72, distinguishing *Gelston v. Sigmond*, 27 Md. 334. See also, *Idalia Realty & Co. v. Norman*, 232 Mo. 662, 135 S. W. 47, 34 L. R. A. (N. S.) 1069.

¹¹ *White v. Hermann*, 51 Ill. 243. See also, *Fidelity & Co. v. Robertson*, 136 Ala. 379, 34 So. 933; *Bates*

v. Harris, 144 Ky. 399, 138 S. W. 276, 36 L. R. A. (N. S.) 154 (farm described as my "Muddy Creek farm"); *Ferguson v. Arthur*, 128 Mich. 297, 87 N. W. 259, 8 Det. Leg. N. 658; *Woods v. Hart*, 50 Nebr. 497, 70 N. W. 53; *Boardman v. Lessees*, 6 Pet. (U. S.) 328; *Barnard v. Russell*, 19 Vt. 334; *Atwater v. Schenck*, 9 Wis. 160. "If the land granted be so inaccurately described as to render its identity wholly uncertain it is admitted that the grant is void."

¹² *Kaufman v. Farley Mfg. Co.*, 78 Iowa 679, 43 N. W. 612, 16 Am. St. 462.

¹³ *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270. See *Kent & Co. v. Ransom*, 46 Mich. 416, 9 N. W. 454.

contract provides that payment for cutting the timber is to be made according to the tally of a certain saw-mill where the logs were to be sawed, dead culls being excluded, the fact that the grading of the mill was higher than was customary among other mills is immaterial.¹⁴ Under a contract by which the plaintiff agreed for a price named to furnish defendant "free on board cars" at place of delivery a quantity of coal, it was held incumbent on the defendant to furnish the cars.¹⁵ But, on the other hand, an agreement to use one's best efforts, through a certain newspaper, to advance the value of lands, is too indefinite to constitute a valid consideration for an option to purchase.¹⁶

¹⁴ *Brigham v. Martin*, 103 Mich. 150, 61 N. W. 276.

¹⁵ *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836. "The appellee undertook to sell and deliver at the tippie the coal at the designated price, and the appellants covenanted to receive it there and pay for it. If so, they were bound to furnish the cars for it, and the appellee was required to be ready and willing to deliver it there. As he was so prepared, and as the latter neglected and refused to receive it, they became liable in damages for the nonperformance of their contract." In *Kunkle v. Mitchell*, 56 Pa. St. 100, it is said: "The article of agreement between the plaintiff and defendant is dated December 27th, 1862, by which the defendant Mitchell agreed to 'deliver on the cars at Indiana 75,000 feet of lumber at eighty-five cents per hundred feet. This is a controlling clause as to the place of delivery. The cars would be either the cars of the plaintiff or those of the railroad company, and in either case they were to be provided by the plaintiff, and not by the defendant. The cars, therefore, being to be provided by the plaintiff, * * * the duty was imposed upon him to see that he was at least ready with the cars or willing to provide them, and to have notified the defendant of such readiness and willingness." And in *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. 32, it is said: "It is a well-established principle of law that in a contract for the sale and delivery of goods 'free on board vessel' the seller

is under no obligation to act until the buyer names the ship to which the delivery is to be made."

¹⁶ *Barton v. Spinning*, 8 Wash. 458, 36 Pac. 439. See also, *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288, and note. An uncertainty or ambiguity in an agreement is usually to be resolved against the party causing such ambiguity or uncertainty. *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035. Where the language used is capable of being construed in two different ways it is to be interpreted in the sense in which the promisor, or the one who executed the agreement, knew. *Potter v. Ontario &c. Ins. Co.*, 5 Hill. (N. Y.) 147. See also, *Suttliff v. Seidenberg*, 132 Cal. 63, 64 Pac. 131; *McClenathan v. Davis*, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017; *Barlow v. Scott*, 24 N. Y. 40; *Jordon v. Dyer*, 34 Vt. 104, 80 Am. Dec. 668, or in the way he had reason to believe, it was understood by the other party. *Potter v. Berthelet*, 20 Fed. 240; *American Loan &c. Co. v. Toledo &c. R. Co.*, 47 Fed. 343; *Inman Mfg. Co. v. American Cereal Co.* (Iowa), 110 N. W. 287, 8 L. R. A. (N. S.) 1140; *Thoubboron v. Lewis*, 43 Mich. 635, 5 N. W. 1082, 38 Am. Rep. 218; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *Tallcot v. Arnold*, 61 N. Y. 616; *White v. Hoyt*, 73 N. Y. 505; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Johnson v. Hathorn*, 41 N. Y. 476, 2 Abb. Dec. (N. Y.) 465; *Sherwood v. Crane*, 12 Misc.

§ 174. **Reference to plans and specifications.**—Building contracts must be definite and certain;¹⁷ but their terms need not all be embodied in a single instrument. Plans and specifications may be a part of the contract, and when this is true they must be taken into consideration in determining the rights and obligations of the parties.¹⁸ But with such plans and specifications the contract must be definite and certain, in order that it may be possible to ascertain to a reasonable degree of certainty the meaning and intention of the parties.¹⁹ Where the contract or plans annexed

(N. Y.) 83, 33 N. Y. S. 17, 66 N. Y. St. 517; Ranson v. Wheelwright, 17 Misc. (N. Y.) 141, 39 N. Y. S. 342; Guccione v. Scott, 21 Misc. (N. Y.) 410, 47 N. Y. S. 475; Kendrick v. Mutual Ben. Life Ins. Co., 124 N. Car. 315, 32 S. E. 728, 70 Am. St. 592; Chamberlain v. Painesville & C. Co., 15 Ohio St. 225; Williamson v. McClure, 37 Pa. St. 402. For other statements of the rule, see Wells v. Carpenter, 65 Ill. 447; San Jacinto Oil Co. v. Ft. Worth Light & C. Co., 41 Tex. Civ. App. 293, 93 S. W. 173; Gunnison v. Bancroft, 11 Vt. 490; Clark v. Lillie, 39 Vt. 405. These rules apply only in those contracts the terms of which are open to construction. Chicago Wharfing & C. Co. v. Street, 54 Ill. App. 569, affd. 157 Ill. 605, 41 N. E. 1108; Gongower v. Equitable Mut. Life & C. Assn. (Iowa), 72 N. W. 416; Peterson v. Modern Brotherhood, 125 Iowa 562, 101 N. W. 289, 76 L. R. A. 631; Montgomery v. Firemen's Ins. Co., 16 B. Mon. (Ky.) 427. See also, Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391; Hill v. John P. King Mfg. Co., 79 Ga. 105, 3 S. E. 445; Lull v. Anamosa National Bank, 110 Iowa 537, 81 N. W. 784; Cobb v. McElroy, 79 Iowa 603, 44 N. W. 824; Schroeder v. Nielson, 39 Nebr. 335, 57 N. W. 993; Patterson v. First Nat. Bank, 78 Nebr. 228, 110 N. W. 721; American Soda Fountain Co. v. Gerreis Bakery, 14 Okla. 258, 78 Pac. 115. See post, Ch. 35, Interpretation and Construction.

¹⁷ Doyle v. Dessenberg, 74 Mich. 79, 41 N. W. 866; Thomas v. Thomasville Shooting Club, 123 N. Car. 285, 31 S. E. 654.

¹⁸ It may be embodied in more than

one instrument. Howard v. Pensacola & C. R. Co., 24 Fla. 560, 50 So. 356. See also, Francis v. Heine Safety Boiler Co., 109 Fed. 838, 48 C. C. A. 687. For plans and specifications as part of contract, see Willamette Steam Mills & C. Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Harvey v. United States, 8 Ct. Cl. 501. To the same effect, see O'Connor v. Adams, 6 Ariz. 404, 59 Pac. 105; Worden v. Hammond, 37 Cal. 61; Charles v. E. F. Hallack Lumber & C. Co., 22 Colo. 283, 43 Pac. 548; Howard v. Pensacola & C. R. Co., 24 Fla. 560, 5 So. 356; Suarez v. Duralde, 1 La. 260; Learmonth v. Veeder, 11 Wis. 138.

¹⁹ Worden v. Hammond, 37 Cal. 61; Willamette Steam Mills Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Donnelly v. Adams, 115 Cal. 129, 46 Pac. 916; United States v. Ellicott (U. S.), 32 Sup. Ct. 334. Where the agreement set out that the plans and specifications are made a part of the contract, but they are not attached to it, and where there is nothing to locate or identify them in any way, the agreement is incomplete. Almini Co. v. King, 92 Ill. App. 276. If the plans and specifications are so drawn as to make it impossible to erect the building to be constructed, there is no contract. Lyle v. Jackson Co., 23 Ark. 63. See also, Turney v. Town of Bridgeport, 55 Conn. 412, 12 Atl. 520; Nave v. McGrane, 19 Idaho 111, 113 Pac. 82 (suit by architect to recover contract price for certain building plans and specifications). As to the liability of a contractor who attempts to erect a building under plans that are imperfect, and because of such imper-

are not sufficiently definite to show just what was in the minds of the parties it is often necessary and proper for the court to admit testimony showing the facts existing at the time of the execution of the contract, the circumstances of the parties and the character of the work to be done.²⁰ The same general rule permitting contracts to be aided by plans and specifications referred to is also often applied in the case of contracts for street improvements and the like.²¹

§ 175. Agreement to make future contract.—As has been seen where the terms of a contract are clear, unambiguous and explicit a provision therein merely looking to the preparation of a formal instrument will not be treated as superseding that agreement.²² Unless an agreement to make a future contract is

fections the building collapses before completion, see *Loneragan v. San Antonio Loan &c. Co.*, 101 Tex. 63, 104 S. W. 1061, 130 Am. St. 803.

²⁰ *Whelan v. McCullough*, 4 App. D. C. 58; *St. Anthony Falls &c. Co. v. Eastman*, 20 Minn. 277; *Doane College v. Lanham*, 26 Nebr. 421, 42 N. W. 405. In the above case it appeared that the contract provided as follows: "All work done is to conform to plans to be furnished, and to be done under the supervision of the master mason to be appointed by the building committee, and to their entire satisfaction and acceptance." This was the only reference to a plan or plans contained in the contract. The court said: "This language doubtless refers to working plans, or drawings, showing the details of the work, but not necessarily nor ordinarily giving any information as to the height of the building, or the number of stories of which it should consist; and even these plans are not spoken of as having been seen by either of the parties, or even as having been drawn or prepared at the date of said contract." In this case it seemed that the contractor contemplated only erecting a two-story building, while he was compelled to erect a three-story building. He then brought suit to recover for the extra services. See also, *Stein v. McCarthy*, 120 Wis. 288, 97 N. W. 912.

Specifications not signed by the parties but agreed upon by them may be introduced in evidence. *Maxted v. Seymour*, 56 Mich. 129, 22 N. W. 219. Or a plan may be introduced in evidence which is not attached to the contract, but which was exhibited to the contractor at the time the agreement was signed and which purported to show how the work should be done. *Myer v. Friun* (Tex.), 16 S. W. 868. See also, note in 9 L. R. A. (N. S.) 1007. But see *Snead & Co. Iron Works v. Merchants' Loan &c. Co.*, 225 Ill. 442, 80 N. E. 237, 9 L. R. A. (N. S.) 1007; *Lennon v. Smith*, 23 App. Div. (N. Y.) 293, 48 N. Y. S. 456. The uncertainty must be such as to show there was no meeting of minds before the contract will be declared void for uncertainty. *American Surety Co. v. San Antonio Loan &c. Co.* (Tex. Civ. App.), 98 S. W. 387.

²¹ See 1 *Elliott on Roads & Sts.* (3rd ed.), §§ 633, 639. The fact that the government, in a public contract, has power to change details does not render it unenforceable for want of certainty. *United States v. McMullen* (U. S.), 32 Sup. Ct. 128.

²² See on *Intention to Reduce Contract to Writing*, ante, § 63. Also, *Gibbins v. Northeastern &c. Asylum*, 11 Beav. 1, 17 L. J. Ch. (N. S.) 5, 12 Jur. 22; *Lewis v. Brass*, L. R. 3 Q. B. Div. 667, 37 L. J. (N. S.)

definite and certain upon the subjects to be embraced therein it is nugatory.²³ Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation.²⁴ The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.²⁵ Applying this rule it was held that where the agreement providing for the future contract to deliver logs manifestly left the place of delivery to be agreed upon, and required certain payments to be made "within —— days" after the sale, evidently contemplating that the prospective contract should fix the

738; *Sanders v. Pottlitzer &c. Fruit Co.*, 144 N. Y. 209, 29 L. R. A. 431, and note. By such an agreement an obligatory contract is formed which neither party is at liberty to refuse to perform. *Pratt v. Hudson River R. Co.*, 21 N. Y. 305. For oral contract for insurance, see *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, and note. One of the parties cannot refuse to execute the written agreement after it has been prepared, in case all its terms have been agreed upon. *Blight v. Ashley*, 1 Pet. (U. S.) 15. See also, *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. 460; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671. See counsel's brief in the case of *Vicksburg Waterworks Co. v. J. M. Guffy Petroleum Co. (Miss.)*, 38 So. 302.

²³ *St. Louis &c. R. Co. v. Gorman*, 79 Kans. 643, 100 Pac. 647; *Dorr v. Johnson*, 170 Mass. 540, 49 N. E. 919; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10. Parties may bind themselves by a present contract to enter into another contract in the future. The execution of a lawful future contract, whereof all the terms are fixed, may be the subject of a present con-

tract. *Kaplan v. Whitworth*, 116 La. 337, 40 So. 723. It has been held that the parties may agree to renew a present contract at the expiration of a certain time, upon such reasonable terms as are mutually agreed upon at that time. *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201, and note.

²⁴ *Winn v. Bull*, L. R. 7 Ch. Div. 29. "The general rule is that an agreement to make at a certain time such an agreement as the parties may then agree on is invalid." *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201; *Wills v. Carpenter*, 75 Md. 80. There is no enforceable contract between the parties. *Connery v. Best*, 1 Cab. & El. 291; *Hussey v. Horne-Paine*, 4 App. Cas. 311; *Donnison v. Peoples' Cafe Co.*, 45 L. T. (N. S.) 187; *McDonald v. Bewick*, 51 Mich. 79, 16 N. W. 240; *Bourne v. Shapleigh*, 9 Mo. App. 64. If it is an agreement for a contract and not a contract no right of action exists. *Megrath v. Gilmore*, 10 Wash. 339, 39 Pac. 131. See also, *Chinnock v. Marchioness of Ely*, 4 De G. J. & S. 638; *Mathiasen v. Barkin*, 62 App. Div. (N. Y.) 614, 70 N. Y. S. 770.

²⁵ *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906.

number of days, these were deemed such important matters as to render the contract wholly void for want of precision.²⁶ So a memorandum, reciting the terms of a contract of employment, which are, however, "subject to the conditions and regulations of a contract which is to be substituted for the memorandum," imposes no legal obligation.²⁷ An agreement by the payee of a note with the maker that at its maturity he will double the loan to the latter and take a new note for double the amount of the first one, and a mortgage on certain lands to secure it, is void for uncertainty in the absence of any stipulation as to what the terms of the new note and mortgage shall be.²⁸ Nothing must be left open for future negotiations.²⁹ If the price is to be determined,³⁰ the time of delivery³¹ or a time and place appointed for "completing" the contract,³² or any material term of the agreement left unsettled,³³ there is no completed or binding obligation fastened on the parties.

§ 176. **Uncertainty as to time.**—There is danger that after a review of the cases on this subject one may be oppressed with a sense of hopeless confusion. This feeling will be exaggerated

²⁶ In *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906, Gilfillan, C. J., said: "Where a final contract fails to express some matter as, for instance, a time for payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon."

²⁷ *Walton v. Mather*, 4 Misc. (N. Y.) 261, 24 N. Y. S. 307.

²⁸ *Van Schaick v. Van Buren*, 70 Hun (N. Y.) 575, 24 N. Y. S. 306. See also, *Mayer v. McCreedy*, 119 N. Y. 434, 23 N. E. 1045; *Milliman v. Huntington*, 68 Hun (N. Y.) 258, 22 N. Y. S. 997, 52 N. Y. St. 273.

²⁹ *Appleby v. Johnson*, L. R. 9 C. P. 158; *Ridgway v. Wharton*, 6 H. L. Cas. 238, 264, 304; *Honeyman v. Marryatt*, 6 H. L. Cas. 112; *Page v. Norfolk*, 70 Law T. (N. S.) 781; *Martin v. Northwestern Fuel Co.*, 22 Fed. 596; *Monk v. McDaniel*, 116 Ga. 108, 42 S. E. 360; *Callanan v. Chapin*, 158 Mass. 113, 32 N. E. 941; *Topliff v. McKendree*, 88 Mich. 148, 50 N.

W. 109; *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906; *Krum v. Chamberlain*, 57 Nebr. 220, 77 N. W. 665; *Shaw v. Woodbury Glass Wks.*, 52 N. J. L. 7; *Brown v. New York Cent. R. Co.*, 44 N. Y. 79; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 4; *Sparks v. Pittsburgh Co.*, 159 Pa. St. 295, 28 Atl. 152; *Carr v. Duval*, 14 Pet. (U. S.) 77, 10 L. ed. 361; *Compania Bilbaina v. Spanish-American Light & Co.*, 146 U. S. 483, 36 L. ed. 1054, 13 Sup. Ct. 142; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888.

³⁰ *Sault Ste. M. Land & Co. v. Simons*, 41 Fed. 835. See also, *Hutton v. Moore*, 26 Ark. 382; *Hand v. Gas Engine Co.*, 167 N. Y. 142, 60 N. E. 425. But see *Greene v. Lewis*, 85 Ala. 221, 4 So. 740, 7 Am. St. 42, and compare, post, § 181.

³¹ *Decker v. Gwinn*, 95 Ga. 518, 20 S. E. 240.

³² *Edmondson v. Fort*, 75 N. Car. 404.

³³ *Wilfred v. Myers*, 40 Fed. 170.

unless some classification is attempted. For present purposes, the following grouping is perhaps most serviceable: (1) Contracts for the payment of money, no definite time for such payment being specified. (2) Contracts for the performance of certain definite work, labor or acts, no time within which such work, labor or acts is to be done being specified. (3) Contracts of employment or hiring, no mention being made of or limit fixed to their duration. These classes of contracts will be discussed in the order named.

Contracts for the payment of money in which no time for payment is fixed are payable on demand or within a reasonable time. Thus, where the promisor agreed to pay a certain sum of money "when I can make it convenient," it was held to be a promise to pay within a reasonable time.³⁴ Where the maker of a promissory note made it "payable when I sell my place where I now live," it was held that the maker was bound to sell his place within a reasonable time, and that if he failed to do this the note was due.³⁵ Likewise, where a note was renewed for an "indefinite" time, the agreement was construed to fix the time of payment at its date, or at least within a reasonable time.³⁶ Promises to pay "as soon as collected from accounts" at a certain designated place,³⁷ "from avails of logs bought of A when there is a sale made,"³⁸ "as soon as I have received the sum mentioned from the government, or as soon as otherwise convenient,"³⁹ have been construed as promises to pay within a reasonable time.⁴⁰ Where it was agreed that the time of payment for a mortgage may and shall be extended, the court said, "It is not unreasonable to infer the intention to have been that the

³⁴ *Lewis v. Tipton*, 10 Ohio St. 88, 75 Am. Dec. 498. Where a thing is sold without any definite understanding as to the time of payment the implication is that payment is to be made on delivery. *Drake v. Scott*, 136 Ala. 261, 33 So. 873, 96 Am. St. 25; *National Bank of Commerce v. Wisconsin Cent. R. Co.*, 44 Minn. 224, 46 N. W. 342, 20 Am. St. 566.
³⁵ *Crooker v. Holmes*, 65 Maine 195, 20 Am. Rep. 687. To same effect, see *Noland v. Bull*, 24 Ore. 479, 33 Pac. 983.

³⁶ *Ramot v. Schotenfels*, 15 Iowa 457, 83 Am. Dec. 425.

³⁷ *Ubsdell v. Cunningham*, 22 Mo. 124.

³⁸ *Sears v. Wright*, 24 Maine 278.

³⁹ *Jones v. Eisler*, 3 Kans. 134.

⁴⁰ *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571. In the above case the money was held payable on demand under the California code. *Kincaid v. Higgins*, 1 Bibb (Ky.) 396; *Page v. Cook*, 164 Mass. 116, 41 N. E. 115; *Smith v. Dotterweich*, 132 App. Div. (N. Y.) 489, 116 N. Y. S. 896.

duration of the extension should be likewise at his (the grantee's) option, within a reasonable time."⁴¹ Where a father agreed to pay his daughter a certain sum of money upon the sale of a designated piece of property, it was held that there was no uncertainty as to time such as would defeat the daughter's right to recover. In this case it appeared that the condition had happened and the obligation was due under its terms because the land had been sold.⁴²

If the payment is to be made on a contingency, the happening of the contingency renders unavailing a plea of uncertainty.⁴³ Thus, a contract to pay a railroad company the sum of six hundred dollars as soon as a specified line of railroad is constructed and put in operation has been held sufficiently definite as to the time the obligation becomes due.⁴⁴ A bill or note made payable at the death of the maker or a certain named person is sufficiently certain as to time of payment.⁴⁵ But an agreement to extend the time for the payment of a debt until such a time as a bank, which has suspended, should resume payment, is void for uncertainty.⁴⁶ A contract for the sale of land,

⁴¹ *Leis v. Sinclair*, 67 Kans. 748, 74 Pac. 261.

⁴² *Schweitzer v. Schweitzer* (Ky.), 82 S. W. 625.

⁴³ *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063.

⁴⁴ *Brise Valley Const. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070, 28 L. R. A. (N. S.) 968.

⁴⁵ *Conn v. Thornton*, 46 Ala. 587; *Buchtel College v. Chamberlin* (Cal.), 84 Pac. 1000; *Crider v. Shelby*, 95 Fed. 212; *Beatty v. Western College*, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. 242; *McClenathan v. Davis*, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017. In the above case the note was made payable at the termination of the life estate. *Chicago Trust &c. Bank v. Chicago Title &c. Co.*, 92 Ill. App. 366; *Kelsey v. Chamberlain*, 47 Mich. 241, 10 N. W. 355; *Riker v. Sprague Mfg. Co.*, 14 R. I. 402, 51 Am. St. 413.

⁴⁶ *Ahlstrom v. Fitzpatrick*, 17 Mont. 295, 42 Pac. 757. It being said in this case: "The time of the alleged extension was not only wholly indefinite, but for all that appears the

extension might last for all time."

A portion of the price of purchased crops was to be paid "when the crop is taken off at the end of the year." Held, that the end of the fruit season, and not the end of the calendar year, was meant. *Brown v. Anderson*, 77 Cal. 263, 19 Pac. 487. A note which provided that the payee or assigns might extend the time of payment from time to time indefinitely, as he or they might see fit, was held uncertain as to time and declared nonnegotiable. *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316. A writing which provided that it was payable when a certain estate was settled up was held nonnegotiable, as the estate might never be settled up. *Husband v. Eppling*, 81 Ill. 172, 25 Am. Rep. 273. Where a note was dated March 25, 1904, and made payable "the first day of November," it was construed to be a promise to pay on the first day of November in the year of its date. *Leffler Co. v. Dickerson* (Ga.), 57 S. E. 911.

the alleged terms of which were that if appellants would remain on the premises and cultivate the land and set out an orchard thereon, no forfeiture would be claimed for a period of five years; and at the end of this period, if the appellants had not paid for the land, then there would be an abundance of fruit growing thereon to pay for the same, has been held too indefinite to constitute a binding contract, for the reason that it fixed no time when payment for the land should be made.⁴⁷

If the agreement calls for the performance of work or labor or other acts, and no time for performance is fixed by the contract, the implication is that a reasonable time for performance is intended, and want of any stipulation as to time does not render the agreement void,⁴⁸ and there is no default until a reasonable time has elapsed.⁴⁹ This rule has been declared applicable in the case of building contracts,⁵⁰ contracts for the sale of personalty,⁵¹ realty,⁵² assignment of a patent,⁵³ and for the performance of work and labor.⁵⁴

⁴⁷ *Spokane Canal Co. v. Coffman*, 61 Wash. 357, 112 Pac. 383.

⁴⁸ *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640; *Griffin v. Ogletree*, 114 Ala. 343, 21 So. 488; *Comer v. Way*, 107 Ala. 300, 19 So. 966; *Bryant v. Atlantic Coast R. Co.*, 119 Ga. 607, 46 S. E. 829; *Atchison & C. R. Co. v. Burlingame Township*, 36 Kans. 628, 14 Pac. 271, 59 Am. Rep. 578; *Atwood v. Cobb*, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; *Howe v. Taggart*, 133 Mass. 284; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Van Arsdale v. Brown*, 18 Ohio C. C. 52, 9 Ohio C. D. 488; *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958; *Dennis v. Stoughton*, 55 Vt. 371; *Poling v. Condon-Lane Lumber Co.*, 55 W. Va. 529, 47 S. E. 279.

⁴⁹ *Bell v. Mendenhall*, 78 Minn. 57, 80 N. W. 843. Failure to perform within a reasonable time may constitute a breach. *Hume v. Mullins*, 18 Ky. L. 108, 35 S. W. 551; *Gainor v. Cheboygan River Boom Co.*, 86 Mich. 112, 48 N. W. 787; *Lind v. Printing Co.*, 20 R. I. 344, 39 Atl. 188.

⁵⁰ *Lane v. May & C. Hardware Co.*, 121 Ala. 296, 25 So. 809; *Florence Gas & C. Co. v. Hanby*, 101 Ala. 15, 13 So. 343; *Krause v. Board of School Trustees (Ind. App.)*, 66 N. E. 1010

(case transferred to the Supreme Court, which did not decide the point, 162 Ind. 279, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. 203); *North v. Malory*, 94 Md. 305, 51 Atl. 89; *Van Stone v. Stillwell & C. Mfg. Co.*, 142 U. S. 128, 35 L. ed. 961; *Brodek v. Farnum*, 11 Wash. 565, 40 Pac. 189. A building contract contained this stipulation: "If the work is pushed a few days of grace will be allowed." The court said, "We think it was not for the court to say that 13 days was (were) the few days of grace contracted for. The question depends upon the character of the work to be done, and the time necessarily required in doing it, and all the circumstances surrounding the transaction. The question should have been submitted to the jury." *Ross v. Loescher*, 152 Mich. 386, 116 N. W. 193, 125 Am. St. 418.

⁵¹ *Boyce v. Timpe (Iowa)*, 89 N. W. 83; *Watkins v. Morris*, 16 Mont. 309, 40 Pac. 600; *Smith v. Spratt Mach. Co.*, 46 S. Car. 511, 24 S. E. 376.

⁵² *Noyes v. Barnard*, 63 Fed. 782, 11 C. C. A. 424; *Michael v. Foil*, 100 N. Car. 178, 6 S. E. 264, 6 Am. St. 577.

⁵³ *Niles v. Graham*, 181 Mass. 41, 62 N. E. 986.

⁵⁴ *Griffin v. Ogletree*, 114 Ala. 343,

Contracts which are to continue in effect until the happening of some contingency have been upheld. Thus where a telephone company agreed to render free service to the city for the use of its officers so long as it maintained and operated a telephone exchange in said city, the company was bound according to the terms of the agreement, it being neither uncertain nor unreasonable.⁵⁵ And where it was provided that staves were to be manufactured so long as they could get sufficient timber for that purpose in the locality of the mill, there was no such uncertainty as to time as would render the contract void.⁵⁶ A contract not to engage in a certain business in a town while another carries on the same business there, is not invalid because indefinite as to its duration.⁵⁷ Such agreements are neither unreasonable nor uncertain when worded in such manner as to make them effective during the life of the promisor.⁵⁸ However, where a certain sewer company and some of its patrons entered into a contract whereby the sewer company agreed to furnish its patrons service at a specified annual rate and "no more" the contract was held uncertain as to time.⁵⁹ The time when a

21 So. 488; *Bonifay v. Hassell*, 10 Ala. 269, 14 So. 46; *Greenwood v. Davis*, 106 Mich. 230, 64 N. W. 26; *Gainor v. Cheboygan & Co. Boom Co.*, 86 Mich. 112, 48 N. W. 787; *Ferguson v. Arthur*, 128 Mich. 297, 87 N. W. 259; *Day v. Gravel*, 72 Minn. 159, 75 N. W. 1. To the effect that an offer must be accepted within a reasonable time, see *Offer and Acceptance*. An agreement whereby one contracted to care for another so long as that other was disabled was held not to be so indefinite and uncertain that it could not be enforced. *Henderson v. Spratlen*, 44 Colo. 278, 98 Pac. 14.

⁵⁵ *City of Superior v. Douglas County Telephone Co. (Wis.)*, 122 N. W. 1023.

⁵⁶ *Alderton v. Williams*, 139 Mich. 296, 102 N. W. 753.

⁵⁷ *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119, per Howard, J.: "The circumstance that the restraint is indefinite in point of time, viz.: 'while Hayes carries on the butcher business in Brownstown,' does not invalidate the contract. A contract of this nature, reasonable in other respects, is not

void merely on the ground that the restriction is indefinite as to duration. *Broyser v. Bliss*, 7 Blackf. 344; *Martin v. Murphy*, supra. See also, the late English case of *Nordenfellt v. Maxim, & Co.*, L. R. (1894) App. Cas. 535."

⁵⁸ *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Kramer v. Old*, 119 N. Car. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. 650. A contract not to engage in the practice of medicine within a certain territory, without specifying any time, is not invalid for uncertainty, since it is to be construed as enduring for the life of the promisor. *Hauser v. Harding*, 126 N. Car. 295, 35 S. E. 586. *Shute v. Heath*, 131 N. Car. 281, 42 S. E. 704. A contract which is in fact though not in form a lease but which fails to fix the time for the beginning of the term is void for uncertainty. *Gay Mfg. Co. v. Hobbs*, 128 N. Car. 46, 38 S. E. 26, 83 Am. St. 661.

⁵⁹ *Solomon v. Wilmington Sewerage Co.*, 142 N. Car. 439, 55 S. E. 300, 6 L. R. A. (N. S.) 391n.

contract is to commence to run may be fixed by the parties entering upon the performance of its provisions and where this may be and is done it is unnecessary for the date of the contract's commencement to be specified in the agreement.⁶⁰

There is considerable confusion found among the decisions dealing with contracts of employment or hiring where no definite mention is made as to the duration of such contract. In many jurisdictions it is held that where no term is specified during which the contract shall be in force but the amount of compensation is fixed as so much per day, week or year, the agreement is, in the absence of circumstances showing a different intention, construed as a hiring at will which may be ended at any time by either party without notice.⁶¹ A contract with a school teacher which left blank the length of the term, the date when it was to commence and the aggregate amount to be paid has been held too indefinite

⁶⁰ *South Chicago &c. Co. v. United Grain Co.*, 165 Fed. 132, 91 C. C. A. 166.

⁶¹ *Kansas P. R. Co. v. Roberson*, 3 Colo. 142 (year); *Greer v. Arlington Mills Mfg. Co.*, 1 Pen. (Del.) 581, 43 Atl. 609 (year); *Warren v. Hinds*, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529n; *Prund v. Zimmerman*, 29 Ill. 269 (year); *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176 (year); *Rose v. Eclipse Carbonating Co.*, 60 Mo. App. 28 (year); *Finger v. Koch & S. Brewing Co.*, 13 Mo. App. 310 (year); *Martin v. New York Life Ins. Co.*, 148 N. Y. 117, 42 N. E. 416 (year); *Tucker v. Philadelphia & R. Coal & I. Co.*, 53 Hun (N. Y.) 139, 25 N. Y. St. 318, 6 N. Y. S. 134 (year); *Copp v. Colorado Coal & I. Co.*, 20 Misc. (N. Y.) 702, 46 N. Y. S. 542 (year); *Granger v. American Brewing Co.*, 25 Misc. (N. Y.) 701, 55 N. Y. S. 695 (year); *Summers v. Phenix Ins. Co.*, 50 Misc. (N. Y.) 181, 98 N. Y. S. 226 (year); *Edwards v. Seaboard R. Co.*, 121 N. Car. 490, 28 S. E. 137 (year); *Weidman v. United Cigar Stores Co.*, 223 Pa. 160, 72 Atl. 377 (year), 132 Am. St. 727; *Prentiss v. Ledyard*, 28 Wis. 131 (year). And where an employee was to receive \$2,500 per annum, the court held, "The letter referred was not a special contract for a definite time

and at a fixed price, the complete performance of which was a condition precedent to a right to compensation. No time is fixed in the letter or any outside agreement during which the plaintiff was to act as engineer. \$2,500 was a stipulated rate according to which plaintiff was to be compensated for his services when performed. *Haney v. Caldwell*, 35 Ark. 156. A contract which provided that the salary should be \$15.00 a week the year around was held to be an employment by the week and not by the year. *Bauer v. Goldman*, 45 Colo. 163, 100 Pac. 435. This rule was held to apply even where the wages were fixed at a certain amount "for the year 1873" and a small increase for the year 1874. *Orr v. Ward*, 73 Ill. 318. Where the employee was to be paid "at the rate of \$780 for the first six months, being \$30 per week, payable weekly, and at the rate of \$910 for the second six months, being \$35 per week, as a fact his salary payable weekly" he is not hired by the year. *Stein v. Kooperstein*, 52 Misc. 481, 102 N. Y. S. 578. Or an agreement whereby the employee is to be paid by the month at the rate of \$500 a year, it was held to be a contract which might be terminated by either party at any time. *Pinckney v. Talmage*, 32 S. Car. 364, 10 S. E. 1083. For ad-

to sustain an action for damages for its breach.⁶² But it has been held in many other jurisdictions that where one is employed to work at so much per year, month, or week the agreement imports a contract of hiring for the full period of time mentioned.⁶³ It is generally held that a contract for permanent

ditional cases upholding the general rule stated, see *Robertson v. Jenner*, 15 L. T. (N. S.) 514; *McGreevy v. Quebec Harbour Comrs.*, Rap. Jud. Quebec, 11 C. S. 455 (year); *Lennan v. St. Lawrence &c. R. Co.*, 4 Lower Can. 91 (year); *Kansas &c. R. Co. v. Roberson*, 3 Colo. 142; *In re The Pokanoket*, 156 Fed. 241, 84 C. C. A. 49 (month); *In re The Pacific*, 18 Fed. 703 (month); *In re The Rescue*, 116 Fed. 380 (month); *Illinois State Journal v. Green*, 69 Ill. App. 305; *Lynch v. Eimer*, 24 Ill. App. 185; *Fuller v. Peninsular White Lead &c. Works*, 111 Mich. 221, 69 N. W. 492; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (year); *Evans v. St. Louis &c. R. Co.*, 24 Mo. App. 114 (month); *State v. Fisher Varnish Co.*, 43 N. J. L. 151; *Frank v. Manhattan Maternity & Dispensary*, 107 N. Y. S. 404 (month); *Frankel v. Central R. Co.*, 114 N. Y. S. 137 (month); *Carthage Wheel Co. v. Kelly*, 5 Ohio N. P. 310; *Kosloski v. Kelly*, 122 Wis. 665, 100 N. W. 1037 (month); 20 Am. & Eng. Ency. of L. (2d ed.) 15. In a contract of this character only nominal damages can be recovered for breach of the agreement. *Atkins v. Van Buren School Tp.*, 77 Ind. 447.

⁶² *Atkins v. Van Buren School Trustees*, 77 Ind. 447.

⁶³ *Clark v. Ryan*, 95 Ala. 406, 11 So. 22 (month); *Liddell v. Chidester*, 84 Ala. 508, 4 So. 405, 5 Am. St. 387 (year); *Moss v. Decatur Land &c. Co.*, 93 Ala. 269, 9 So. 188, 30 Am. St. 55 (month); *Jones v. Trinity Parish*, 19 Fed. 59 (month); *Magarahan v. Wright*, 83 Ga. 773, 10 S. E. 584 (month); *Great Northern Hotel Co. v. Leopold*, 72 Ill. App. 108 (month); *Nichols v. Coolahan*, 10 Metc. (Mass.) 449 (month); *Tubbs v. Cummings Co.*, 200 Mass. 555, 86 N. E. 921 (week); *Horn v. Western Land Assn.*, 22 Minn. 233 (year); *Bleecker v. Johnston*, 51 How. Pr. (N. Y.) 380, 69 N. Y. 309 (year); *Douglass*

Merchants Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822, (year); *Dunbar v. Cuban Land & S. S. Co.*, 37 Misc. (N. Y.) 360, 75 N. Y. S. 498 (week); *Bascom v. Shillito*, 37 Ohio St. 431 (year); *San Antonio & A. P. R. Co. v. Sale* (Tex. Civ. App.), 31 S. W. 325 (month); *In re The Hudson, Olcott* (U. S.) 396, Fed. Cas. No. 6831 (month); *Cronemillar v. Duluth-Superior Mill Co.*, 134 Wis. 248, 114 N. W. 432 (month). See also, *Fawcett v. Cash*, 5 B. & A. 904 (year); *Foxall v. International Land Credit Co.*, 16 L. T. (N. S.) 637 (year); *Lowe v. Walter*, 8 Times L. R. 358 (year); *Rex v. Mitcham*, 12 East 351 (week); *Rex v. Pucklechurch*, 5 East 382 (week); *Buckingham v. Surrey & H. Canal Co.*, 46 L. T. (N. S.) 885 (year); *Rex v. Newton Toney*, 2 T. R. 453; *Tennessee Coal &c. R. Co. v. Pierce*, 81 Fed. 814, 26 C. C. A. 632, 52 U. S. App. 355 (month); *revd.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. 335. A contract of employment at \$60 a month is the contract for an entire month. *Moss v. Decatur Land Improvement &c. Co.*, 93 Ala. 269, 9 So. 188, 30 Am. St. 55. Likewise an agreement whereby one was to receive a certain sum per month and the contract provided "at the end of the first year" an increase of salary was to be granted, was held to be a contract of hiring for the term of one year. *Morton v. Colwell*, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331. If the payment of monthly or weekly wages is the only circumstances from which the duration of the contract is to be inferred it will be taken to be a hiring for a month or week. *Beach v. Mullin*, 34 N. J. L. 343. A contract whereby one is to receive his pay quarterly was held to be a contract of hiring for a year, the court saying that "quarterly" is synonymous with "quarter yearly and means once in a quarter of a year." *Kirk v. Hartman*, 63 Pa. St. 97;

employment whereby the employer agrees to engage another for whatever length of time the latter may desire to serve and which does not bind him for either a definite or indefinite term is not sufficiently certain to entitle the employe to recover on such contract.⁶⁴ However, where the promise of the employer to furnish steady and permanent employment for a definite or indefinite period without demanding from the employe a corresponding promise to remain and work was given in consideration of the employe releasing the employer from liability for injuries received, the employer has been held bound,⁶⁵ and an agreement to give permanent employment at stipulated wages if the employe would give up his business and enter the service of the other party in the same occupation has been held not too indefinite to be enforced when construed as a contract of employment so long as the employer might be engaged in the business and had such work which the employe could and would do.⁶⁶ When it is stated in an agreement that the employment is to commence at not later than a certain named day but may begin at an earlier

Emmens v. Elderton, 4 H. L. Cas. 624; *Rex v. St. Andrew*, 8 B. & C. 664; *Liddell v. Chidester*, 84 Ala. 508, 4 So. 426, 5 Am. St. 387; *Rosenberger v. Pacific Coast R. Co.*, 111 Cal. 313, 43 Pac. 963; *Baldwin v. Western Union Tel. Co.*, 93 Ga. 692, 21 S. E. 212, 44 Am. St. 194; *M. Heminway & Co. v. Porter*, 94 Ill. App. 609; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394; *Maynard v. Royal Worcester & Co.*, 200 Mass. 1, 85 N. E. 877; *Graves v. Lyon Bros. Co.*, 110 Mich. 670, 68 N. W. 985. See also, *Mason v. New York Produce Exchange Co.*, 127 App. Div. (N. Y.) 282, 111 N. Y. S. 163; *Hotchkiss v. Godkin*, 63 App. Div. (N. Y.) 468, 71 N. Y. S. 629; *Seago v. White*, 45 Tex. Civ. App. 539, 100 S. W. 1015; *Kellogg v. Citizens Ins. Co.*, 94 Wis. 554, 69 N. W. 362.

⁶⁴*St. Louis & C. R. Co. v. Matthews*, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467; *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. 82. A contract of employment which is to continue until mutually agreed void is unenforceable for uncertainty as to the time of employment. *Faulkner*

v. Des Moines Drug Co. (Iowa), 90 N. W. 585; *Louisville & C. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 59 Am. St. 467; *Perry v. Wheeler*, 12 Bush (Ky.) 541. A theatrical manager's engagement which was to "continue as long as the same may mutually agree upon" is too indefinite to be enforced. *McIntosh v. Miner*, 37 App. Div. (N. Y.) 483, 55 N. Y. S. 1074; *East Line & C. R. Co. v. Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. 758. See also, *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862. *Contra, Newhall v. Journal Printing Co.*, 105 Minn. 44, 117 N. W. 228, 20 L. R. A. (N. S.) 899.

⁶⁵*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 189; *Carter White Lead Co. v. Kinlin*, 47 Nebr. 409, 66 N. W. 536; *Rhoades v. Chesapeake & C. R. Co.*, 49 W. Va. 494, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. 826. See also ch. 9. See, however, *Smith v. Crum Lynne & Co.*, 208 Pa. 462, 57 Atl. 953.

⁶⁶*Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512n, and note, 57 Am. St. 488.

day, the time within which the agreement is to go into effect is stated with sufficient definiteness.⁶⁷ But a writing which requested the plaintiff to "deliver 60 days' use horse, cart and driver at \$3.50 per day" without specifying at what time the 60 days' period should begin or whether it should run consecutively has been held insufficient to constitute a contract.⁶⁸ A contract with an actress for the season to commence May 12, 1902, was held not to be unenforcible, however, for indefiniteness as to time where there was a provision as to performance during Christmas week, from which it could be concluded that the engagement was not for the summer season only,⁶⁹ and it has also been held that there is no fatal uncertainty in a contract to deliver ice for sale at retail "during the coming season."⁷⁰

§ 177. **Uncertainty as to place.**—Contracts which are to be operative and executed only in a certain place or a locality must designate that place or locality with reasonable certainty and be construed according to the intention of the parties as gathered from the particular circumstances.⁷¹ It has been held that a

⁶⁷ *Troy Fertilizer Co. v. Logan*, 96 Ala. 619, 12 So. 712.

⁶⁸ *Durkin v. City of New York*, 49 Misc. (N. Y.) 114, 96 N. Y. S. 1059.

⁶⁹ *Shubert v. Angeles*, 80 App. Div. (N. Y.) 625, 80 N. Y. S. 146.

⁷⁰ *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247.

⁷¹ *Kaufman v. Farley Mfg. Co.*, 78 Iowa 679, 43 N. W. 612, 16 Am. St. 462. The court argued the case as follows: "While perhaps it would be very difficult, if not impossible, to establish definite lines as bounding the territory intended, the regulations of trade and the experience of tradesmen would enable the court to so find the fact as to meet the intent of all parties, and enforce the contract with reasonable certainty. If A should employ B as a traveling salesman in Dubuque and the territory tributary thereto, we do not think it would be held that either could avoid the contract merely because of indefiniteness as to the territory. The law assumes that the parties contracted understandingly upon the question, and the court will not dismiss them without inquiry as

to the fact, where its ascertainment is a matter of reasonable certainty. The case should not be confounded with the rule as to contracts being disregarded because of indefiniteness arising from the terms or language used in the contract, where the intent of the parties cannot be understood." *Cole v. Edwards*, 93 Iowa 477, 61 N. W. 940. The above case was an action for an injunction brought by one physician to restrain another from practicing medicine in the town of W or vicinity. The contract read, "Received of C \$262 for my share of the office fixtures, and proceeds of practice for month of March, and good will of business in Town of W, and agree not to practice therein." This contract was held sufficiently definite as to place. See, however, the case of *Hauser v. Harding*, 126 N. Car. 295, 35 S. E. 586. Where the agreement provided that the defendant was to turn over and deliver to the plaintiff his location, good will and practice in the territory surrounding Y, the court held that the language of that part of the contract which undertook to restrain the de-

contract by a railroad company to establish its depot "at" a specified town is complied with by locating at a convenient distance from the business portion of the town, and the location of such depot would be controlled more by the number and character of buildings composing the town than by the corporate limits as defined in its charter.⁷² And where the parties agree to erect a store building on a described tract of land at some place thereafter to be agreed upon, the site, however, to be not more than 40 rods from the right of way of a railroad running through the land, the contract was held sufficiently certain to sustain an action for damages when one of the parties refused to negotiate or agree with respect to a suitable location.⁷³

§ 178. Uncertainty as to subject-matter.—It is essential to the validity of an agreement either verbal or written, that its subject-matter be expressed by the parties in such terms that it may be ascertained with a reasonable degree of certainty.⁷⁴ Thus an agreement which provides for the payment of a contingent commission but which is silent as to the basis upon which the contingency depends and the sum or sums upon which it is calculated, fails to express any meaning and cannot be "holpen by

fendant from practicing medicine outside the town of Y was not sufficiently definite to mark and define any certain territory and was so uncertain as to be incapable of being marked out or being identified. The contract was held sufficiently definite as to the town of Y, however, and that the defendant was prohibited from practicing medicine in such town. And where the only means by which the place where the contract was to be operative was the word "Roxboro" written on the back of the contract it did not sufficiently describe the territory, and meant nothing more than that the contract had been signed at that place. *Teague v. Schaub*, 133 N. Car. 458, 45 S. E. 762. An agreement where one contracted not to engage in the wine and liquor business within a radius of 10 miles in either direction from a designated place, has been held sufficiently definite, especially as to that part which would be located in

the particular county where the central point was located, the boundaries being capable of exact ascertainment. *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249. See also, *Peck-Williamson & Co. v. Miller & Harris (Ky)*, 118 S. W. 376. Where a contract giving plaintiffs an exclusive agency in B and vicinity, was upheld the court also holding that where one was given an exclusive agency he should be given a reasonable time in which to prove his capacity.

⁷²*Frey v. Fort Worth R. Co.*, 6 Tex. Civ. App. 29, 24 S. W. 950. See also, *Williams v. Fort Worth & C. R. Co.*, 82 Tex. 553.

⁷³*Iowa-Minnesota Land Co. v. Conner (Iowa)*, 112 N. W. 820.

⁷⁴*Sutliff v. Seidenberg*, 132 Cal. 63, 64 Pac. 131; *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689; *Pope & Fleming v. Graniteville Mfg. Co.*, 1 Ga. App. 176, 57 S. E. 949; *Price v. Stipek*, 39 Mont. 426, 104 Pac. 195.

avement." So an agreement by one party to erect a first-class hotel and to maintain the same in a first-class manner in consideration of a railway giving it the patronage of its road, is too vague and indefinite to sustain an action for its breach.⁷⁵ And where the words used were "The only thing I ask you is that, when I ask you from time to time to give me something on account, to keep up my pay roll, you will do it" to which the appellant replied that he would help him, the agreement was correctly held too uncertain to confer any rights whatever, enforceable either at law or equity.⁷⁶ An order for three hundred and sixty dollars' worth of jewelry to be selected from articles named in a price list contained in the order which in no way designated either the quantity, quality or price of any of the articles ordered has been held void for uncertainty.⁷⁷ But the fact that the reference is made to matters incidental or immaterial to the agreement does not necessarily render the contract unenforceable.⁷⁸

⁷⁵ *Hart v. Georgia R. Co.*, 101 Ga. 188, 28 S. E. 637. See also, *Arundel Realty Co. v. Maryland Electric Rys. Co.* (Md.), 81 Atl. 787, in which a contract by the railway company to give a special rate between Baltimore and a new addition to the city, held too indefinite to sustain an action for breach thereof.

⁷⁶ *Blakistone v. German Bank of Baltimore* (Md.), 39 Atl. 855. Or the words "You shall have the option to come into the mill and take part in its management on the same terms as ourselves" does not guarantee the right to any particular office for any length of time or that the party to whom such statement is made shall have the same salary as the promisors and he cannot maintain an action to compel them to restore him to the office of secretary and have the agreement specifically enforced. *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

⁷⁷ *Price v. Wiesner* (Kans.), 111 Pac. 439, 31 L. R. A. (N. S.) 927.

⁷⁸ *Howe v. Howe & Co.*, 154 Fed. 820; *Kemp v. Davis Bros. Lumber Co.*, 122 La. 1046, 48 So. 451. The mere fact that an agreement fails to specify a particular kind of machinery to be bought to carry on a stave manufacturing establishment does not

render the contract indefinite. Indefiniteness in details of this character does not make the entire contract void. *Alderton v. Williams*, 139 Mich. 296, 102 N. W. 753. A contract by which the vendee agreed to erect "a good steam saw mill" is sufficiently definite to entitle him to maintain an action in damages, the words "good mill" having a reasonably definite meaning. *Fraleigh v. Bentley*, 1 Dak. 25, 46 N. W. 506. Where the defendant agreed to pay half the cost if the plaintiff would erect a good bridge across a certain river, he was held liable, plaintiff's city council having advertised for bids, let the contract and constructed the bridge, the defendant having knowledge of these facts and acquiescing therein. *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384. A contract to erect a "neat and tasteful" station is not invalid for indefiniteness. *Lawrence v. Saratoga Lake R. Co.*, 42 Hun (N. Y.) 655, 3 N. Y. St. 743. A contract whereby a railroad agrees to carry, free of charge, the personal freight of the plaintiffs, is not too indefinite to be enforced. By personal freight is meant freight owned by them individually. *Hurley v. Big Sandy & R. Co.* (Ky), 125 S. W. 302.

§ 179. **Uncertainty as to description.**—The description of the subject-matter of an agreement may be indefinite and yet if it is capable of being identified and rendered definite and certain by evidence aliunde, the contract may even be specifically enforced.⁷⁹ And where the contract contains one description of the property sold sufficiently definite to enable it to be identified and another description which is erroneous and false, the latter may be rejected as surplusage.⁸⁰ It has also been held that a description of land to be conveyed as the "Ideal Fruit Farm" located a certain distance in a given direction from a specified town and referred to as the property of the vendor, was sufficiently definite to be specifically enforced.⁸¹ But if it is impossible to locate or determine what property is intended to be conveyed, the agreement is invalid for uncertainty.⁸² Thus, a contract for the sale or transfer of realty which fails to identify in any way the land to be conveyed cannot be specifically enforced.⁸³

⁷⁹ Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; Woods v. Hart, 50 Nebr. 497, 70 N. W. 53. See also, Davis v. Seybold, 195 Fed. 402 (prior deeds looked to to secure a true description); Shortridge v. Allen, 2 Tex. Civ. App. 193, 21 S. W. 419. Where a building contract provides that the structure shall be located on the corner of two streets and names them, the description of the location is sufficiently definite to support an action on the agreement. Grier v. Puterbaugh, 108 Ill. 602. An agreement "to take 1,000 sets Dickens sheets, same as last," is sufficiently definite, the phrase "same as last" being held to indicate the kind of sheets. Routledge v. Worthington Co., 119 N. Y. 592, 23 N. E. 1111.

⁸⁰ Woods v. Hart, 50 Nebr. 497, 70 N. W. 53.

⁸¹ Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210. The description in a deed must be sufficiently accurate to enable a surveyor to locate it. Marks v. Ligonier Borough (Pa.), 82 Atl. 477. See also, McDougald v. Southern Pa. R. Co. (Colo.), 120 Pac. 766; Lambert v. Murray (Colo.), 120 Pac. 415; Franz v. Vincent, 152 Iowa 680, 133 N. W. 121; Whitwell v. Spiker, 238 Mo. 629,

142 S. W. 248; Noland v. Weems (Tex. Civ. App.), 141 S. W. 1031; Hurley v. Charles, 112 Va. 706, 72 S. E. 689.

⁸² Red Star Coal Co. v. Graves (Ala.), 56 So. 596 (contract held void because of uncertainty in the description of the land from which appellee contracted to extract coal); Leslie v. Smith, 32 Mich. 64; Beard v. Taylor, 157 N. Car. 440, 73 S. E. 213; Sherman v. Kitsmiller, 17 Serg. & R. (Pa.) 45. A description of property as "goods, wares and merchandise" has been held insufficient. Pennsylvania &c. Nav. Co. v. Dandridge, 8 Gill. & J. (Md.) 248. An agreement which provides that "undamaged goods be taken at cost price and damaged goods at price agreed upon" is too indefinite to constitute an enforceable contract, where no provision is made as to who should determine what goods were damaged or fix their prices. Dayton v. Stone, 111 Mich. 196, 69 N. W. 515. See also, Freed v. Mills, 120 Ind. 27, 22 N. E. 86. The parties by their actions and construction of the contract may render the description definite. Rhea v. Meyers' Estate, 111 Mich. 140, 69 N. W. 239.

⁸³ A contract for the conveyance of real estate for a right of way, which read, "said tract, after it intersects

§ 180. **Uncertainty as to amount.**—Mere indefiniteness as to the exact amount of material or goods which may be delivered under a contract is not necessarily a fatal uncertainty.⁸⁴ In case the agreement is to furnish goods, material or other commodity sufficient for the needs of a specified undertaking, the contract is not invalid for uncertainty. Thus, an agreement to furnish enough coal to supply three steamers for a year is a definite and binding contract on both parties.⁸⁵ Agreements to furnish all the iron a company may need in its business for the ensuing year,⁸⁶ to furnish a hotel proprietor with all the ice he may require for the use of the hotel,⁸⁷ to supply a company with all the oil their

the west line of the land of B in section 3 T. 2, N. R. 8 W. to run in a southerly or southeasterly direction, following the ravine along the southeasterly over the west half of the quarter to where it intersects the north line of section 10," is too indefinite. *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634. And where the land to be conveyed was described as block so and so in section 7, etc., it was held that there was no such governmental subdivision of the section as a "block" and that the agreement was too indefinite. *Glos v. Wilson*, 198 Ill. 44, 64 N. E. 734. Likewise an agreement to deed four lots in either section 8 or 9 cannot be enforced. *Rampke v. Buehler*, 203 Ill. 384, 67 N. E. 796. A contract whereby P agreed to convey 160 acres of land in any one of the following counties, viz., W. D. S. C. R. or T., cannot be enforced because there is no description of the land to be conveyed and therefore no contract of conveyance. *Newman v. Perrill*, 73 Ind. 153. Contracts containing no description or reference identifying the land cannot be specifically enforced. *Hanley v. Blackford*, 1 Dana (Ky.) 1, 25 Am. Dec. 114. And where a contract calls for the conveyance of a 100 acres "of the west end" of the land and did not specify whether it was to be taken from land which the grantor already owned or which he was to acquire, it is unenforceable because of the indefiniteness of the description. *Knight v. Alexander*, 42 Ore. 521, 71 Pac. 657. An agreement which merely states the size of the

lots without locating them is too indefinite to be enforced. *Agnew v. Southern Ave. Land Co.*, 204 Pa. 192, 53 Atl. 752. But, as elsewhere shown, that is certain which can be made certain, and it is usually sufficient if proper means of identification are furnished or the description is such that a surveyor can locate the property.

⁸⁴ *McIntyre Lumber & Co. v. Jackson Lumber Co.*, 165 Ala. 268, 51 So. 767, 138 Am. St. 66; *McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300. An agreement whereby one contracts to sell all the straw he has to spare, not exceeding three tons, is not uncertain since the amount to be sold can be ascertained by extrinsic evidence. *Parker v. Pettit*, 43 N. J. L. 512.

⁸⁵ *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218n. To the same effect, *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774. But of course, there are cases in which the amount must be designated, and even in the cases cited it was designated in a general sense. So, in sales of goods, the offer may not specify the amount to be ordered and yet acceptance by the purchaser who does state the amount may conclude the contract where such is the intention, and such, in many instances, is the usual course of business. *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389.

⁸⁶ *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427.

⁸⁷ *Smith v. Morse*, 20 La. Ann. 220. A contract by which the sellers agreed to furnish and the purchasers

plants may require,⁸⁸ or to purchase all the cross-ties of a designated kind made by a manufacturer of lumber, at a given price, until the vendee orders the manufacturer to make no more,⁸⁹ or to support the plaintiff,⁹⁰ have all been declared enforceable since the amounts necessary to be furnished could be ascertained with reasonable certainty.⁹¹ A contract to deliver a certain number of carloads of wood has been held not void for uncertainty because a carload varies from thirty-five thousand to sixty thousand feet. The vendee has a right to insist upon as much, at least, as the specified number of loads of the smallest capacity.⁹² However, where the amount to be furnished is not governed by the needs of a particular business or undertaking and the determining factor is altogether uncertain, as where the purchaser is not bound to take any of the thing bargained for or is free to demand, in many instances, an unlimited amount should he desire it, the agreement is too indefinite to be upheld.⁹³

agreed to buy all the ice necessary to carry on their business in a certain locality for a period of five years, is not void for want of mutuality, as the quantity to be taken is measured by the necessities of the business, which is presupposed to continue for the time agreed. *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. 227. See also, *East v. Cayuga Ice Line*, 66 Hun 636, 21 N. Y. S. 887.

⁸⁸*Vicksburg Water Co. v. J. M. Guffy Petroleum Co.*, 86 Miss. 60, 38 So. 302.

⁸⁹*McIntyre Lumber & Co. v. Jackson Lumber Co.*, 165 Ala. 268, 51 So. 767, 138 Am. St. 66.

⁹⁰*Henderson v. Spratlen*, 44 Colo. 278, 98 Pac. 14. See also, *In re Compton's Estate*, 30 Pa. Super. Ct. 605 (contract by son to pay his share of expenses of support and maintenance of his father).

⁹¹To same effect, *Eastern R. Co. of Minn. v. Tuteur*, 127 Wis. 382, 105 N. W. 1067; *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 93 N. W. 459. See, however, *Drake v. Vorse*, 52 Iowa 417, 3 N. W. 465; *Bailey v. Austrian*, 19 Gil. (Minn.) 465, 19 Minn. 535; *Consumers' Ice Co. v. E. Webster, Son & Co.*, 79 App. Div. (N. Y.) 350, 79 N. Y. S. 385.

⁹²*Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462, 34 N. E. 579, where the court said that "so far as the contract is uncertain the courts cannot enforce it, but within the limits that the contract is certain, the courts will enforce it." In *Schreiber v. Butler*, 84 Ind. 576, it was held that a contract for the delivery of a certain number of carloads of ice was not void for uncertainty and that the quantity could be made certain by averment and proof. The suit was based upon the refusal of the defendant, after delivering ten carloads, to deliver the remainder of the specified number of thirty. See also, *O'Ferrall v. Van Camp*, 124 Ind. 336, 24 N. E. 134.

⁹³*Keller v. Ybarru*, 3 Cal. 147; *Hazelhurst Lumber Co. v. Merchantile Lumber Co.*, 166 Fed. 191; *Drake v. Vorse*, 52 Iowa 417, 3 N. W. 465; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Jackson v. Alpha Portland Cement Co.*, 122 App. Div. (N. Y.) 345, 106 N. Y. S. 1052; *Houston & Co. R. Co. v. Mitchell*, 38 Tex. 85. See, however, *McCall v. Icks*, 107 Wis. 232, 83 N. W. 300. An agreement to "divide" the profits derived from a certain trade has been upheld as sufficiently definite since the word "divide" meant to

§ 181. **Uncertainty as to price.**—As a general rule, price is an essential ingredient of every executory contract for the sale or transfer of any and all property rights or the furnishing or rendering of services; consequently if there is a total absence of any agreement concerning the price to be paid for property or rights therein or for services to be rendered, the agreement will not be enforceable.⁹⁴ However, when a contract has been executed on one side the other party will not be permitted to receive and retain the benefit without paying unless such action is compelled by some binding rule of law. Thus where a defendant promised the plaintiffs that, if they would withdraw his appeal from the probate of a will and let the will be allowed he [the defendant] would “make it right * * * with a certain sum” and

sever in two equal parts. *Graves v. White*, 43 Colo. 131, 95 Pac. 347, 127 Am. St. 106. But a promise to divide the profits of a business on a “liberal basis” has been declared too indefinite to be enforced since it would be impossible to determine what the parties would consider a liberal basis. *Butler v. Kemmerer*, 218 Pa. 242, 67 Atl. 332.

⁹⁴ *Taylor v. Brewer*, 1 Mau. & Sel. 290; *Patrick v. Colorado Smelting Co.*, 20 Colo. 268, 38 Pac. 236; *Flagg v. Mann*, 2 Sumn. (U. S.) 486, Fed. Cas. No. 4847; *Fairplay School Tp. v. O’Neal*, 127 Ind. 95, 26 N. E. 686; *James v. Muir*, 33 Mich. 223; *Shaw v. Woodbury Glass Works*, 52 N. J. L. 7, 18 Atl. 696; *Thomas v. Thomasville Shooting Club*, 123 N. Car. 285, 31 S. E. 654; *Anders v. Ellis*, 87 N. Car. 207; *Bigley v. Risher*, 63 Pa. St. 152; *Smith v. Ankrum*, 13 Serg. & R. (Pa.) 39; *Lombard Investment Co. v. Carter*, 7 Wash. 4, 34 Pac. 209, 38 Am. St. 681. Where a stock of merchandise was sold, the undamaged goods to be taken at cost price and the damaged goods at price agreed upon, no provision being made as to who was to determine what goods were damaged and fix a price, the contract was held too indefinite to constitute a sale. *Dayton v. Stone*, 111 Mich. 196, 69 N. W. 515. See also, *Prince v. Thomas*, 15 Ark. 378; *Gulf & C. R. Co. v. Dawson* (Tex. Civ. App.), 24 S. W. 566. If the reference

to the price was so vague and indefinite as to be unintelligible, the contract cannot be enforced. *Adams v. Adams*, 26 Ala. 272; *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29. The price must be definitely fixed or the agreement contain provisions from which it can be ascertained. *Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. 32. Thus an order for 1,000 cases of lye to be furnished as heretofore sufficiently designates the price. *Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250. An agreement to pay \$50 or \$60 to another if he will find a purchaser for certain property and a purchaser is found by such party, is not so uncertain as to price as to defeat a recovery. And if the promisee elects to take the less valuable of two alternatives the promisor has no cause for complaint. *Cramer v. Ewing* (Okla.), 61 Pac. 1064. A promise in the alternative, as a general rule, gives the promisor the right to elect which alternative he will choose. *Foster v. Goldschmidt*, 21 Fed. 70; *Galloway v. Legan*, 4 Mart. (La.) (N. S.) 167; *Barker v. Jones*, 8 N. H. 413; *Smith v. Sanborn*, 11 Johns. (N. Y.) 59; *Mayer v. Dwinell*, 29 Vt. (3 Williams) 298. But if he fails or refuses to elect within the time given the right of election passes to the opposite party. *Phillips v. Cornelius* (Miss.), 28 So. 871; *Patchin v. Swift*, 21 Vt. 292.

"give a certain sum which would be satisfactory" the contract was upheld, the court saying: "The only element left undetermined in this contract is that of price. But this is not infrequently found to be indefinite in contracts of sale and for work and labor. * * * It is enough if there is a reasonable value, which can be ascertained by the practical methods of trial."⁹⁵ But there is no real or fatal uncertainty as to price if it is dependent on the market value at a certain date,⁹⁶ or upon the award of a referee.⁹⁷ A contract whereby one was to devote his time and skill to pro-

⁹⁵ *Silver v. Graves*, 210 Mass 26, 95 N. E. 948. If the services have been rendered without any definite understanding as to the price to be paid, the quantum meruit or value of the services may be recovered. *Hoadly v. McLaine*, 10 Bing. 482, 4 Moore & S. 340; *Levitt v. Miller*, 64 Mo. App. 147; *Albemarle Lumber Co. v. Wilcox*, 105 N. Car. 334, 10 S. E. 871; *Fenton v. Braden & Co.*, 2 Cranch (U. S.) 550, Fed. Cas. No. 4730. A contract whereby the defendant agrees to pay his proportion of the expense sustained by the plaintiff in pumping the water from the properties of both parties has been held sufficiently certain, the court being able to determine what would be a just and fair proportion. *Fisk Min. & Mill. Co. v. Reed*, 32 Colo. 506, 77 Pac. 240. A contract for the sale of stock is not indefinite where the price to be paid is fixed, the purchaser, however, having the right to retain sufficient of the purchase-money to assure him that the company is free from debt, since the amount of the indebtedness can be ascertained with certainty. *Northern Central R. Co. v. Walworth*, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. 683. It has been held that where an attorney was to receive a reasonable fee for his services, he could only recover nominal damages where he did not actually defend the suit and no special damage was shown. *Wilson v. Barnes*, 13 B. Mon. (Ky.) 330.

⁹⁶ *Acebal v. Levy*, 10 Bing. 376, 4 Moore & S. 217; *Lent v. Hodgman*, 15 Barb. (N. Y.) 274. See also, *James v. Muir*, 33 Mich. 223.

⁹⁷ *Brown v. Bellows*, 4 Pick. (Mass.) 179. One party may give another the

refusal of certain property. *Bromley v. Jeffries*, 2 Vern. 415; *Cothran v. Witham*, 123 Ga. 190, 51 S. E. 285; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741. There is no complete contract where the parties agree to fix a price at some subsequent time. *Milnes v. Gery*, 14 Ves. Jr. 400; *Watts v. Weston*, 62 Fed. 136, 10 C. C. A. 302; *Wittkowsky v. Wasson*, 71 N. Car. 451. Agreements to deliver ice for the price which will afford the profit not to exceed \$100 per ton (*Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313; compare with: *Noble v. Joseph Burnett Co.*, 208 Mass. 75, 94 N. E. 289). "If the horse was lucky to the plaintiff, he would give £5 more, or the buying of another horse" (*Buthing v. Lynn*, 2 B. & Ad. 232); or to "pay more if he could afford it" (*Clark v. Pearson*, 53 Ill. App. 310); or to return a fair proportion of the premiums should the insured wish to cancel the policy. *Hayward v. Knickerbocker Life Ins. Co.*, 12 Daly (N. Y.) 42, have been held too vague and uncertain to be enforced. See also, *Foster v. Lumbermen's Min. Co.*, 68 Mich. 188, 36 N. W. 171; *Devane v. Fennell*, 24 N. Car. 36. But if it is agreed that more is to be paid upon the happening of a certain contingency, the seller is entitled to recover the amount agreed upon the happening of the contingency. *Miller v. Kendig*, 55 Iowa 174, 7 N. W. 500. An agreement to pay the teacher the same salary for his services as was established at the date of the contract for like services by the board of directors of the school district has been held to fix the compensation

duce formulas of the kind therein specified for which he was to receive "a fair and equitable share of the net profits" has been held sufficiently definite to uphold an action for an accounting and division of accrued profits.⁹⁸

§ 182. Uncertainty as to what is to be done.—The foregoing sections of this chapter demonstrate that if the contract is so uncertain as to render it impossible to ascertain the intention of the parties or what was to be done by them, it cannot form the basis for an action either in law or equity. Where there is so great an uncertainty that it cannot be known what is contracted for, the contract is necessarily void on this account.⁹⁹ So, to give another illustration, where a building or working contract, insufficient in itself, refers to plans and specifications and no such plans nor specifications are in existence or none can be identified, so that it cannot be determined what is to be done, the uncertainty is fatal.¹

§ 183. Miscellaneous instances of uncertainty.—Two stockholders in a corporation entered into an agreement whereby one contracted "to provide, as a loan to said (corporation), whatever additional capital is needed to provide a working fund." Suit was brought for damages on failure of the promisor to advance the promised funds. The court held the agreement too uncertain and vague to be enforced in a court of law by an action to recover damages for defendant's breach.² Where one part of a contract is in the form of an unconditional obligation, and another part, which is evidently designed as a qualification or limitation, is ab-

with sufficient certainty. *Caldwell v. School Dist. No. 7 of Lake County*, 55 Fed. 372; *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270. See also, *Troy Laundry & Co. v. Dolph*, 138 U. S. 617, 11 Sup. Ct. 279.

⁹⁸ *Noble v. Joseph Burnett Co.*, 208 Mass. 75, 94 N. E. 289.

⁹⁹ *Rhyne v. Rhyne*, 151 N. Car. 400, 66 S. E. 348. If construing the understanding of the parties as a whole, it is impossible to determine with reasonable certainty what was the contract between them and the obligations of each, there is no contract.

Hart v. Georgia & C. R. Co., 101 Ga. 188, 28 S. E. 637.

¹ *Donnelly v. Adams*, 115 Cal. 129, 46 Pac. 916; *Worden v. Hammond*, 37 Cal. 64; *Almini Co. v. King*, 92 Ill. App. 276. See also, *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384; *Doyle v. Desenberg*, 74 Mich. 79, 41 N. W. 866. A contract may also be so uncertain from ambiguity that it cannot be enforced or the true intention discovered even with the aid of extrinsic evidence that may be available and permissible.

² *Jones v. Vance Shoe Co.*, 115 Fed. 707, 53 C. C. A. 289.

solutely unintelligible, the whole agreement is ineffective for radical uncertainty.³ An agreement which provided that it might be cancelled by either party for "good cause" has been held revocable for any cause assigned in good faith, as the phrase was so uncertain as to be incapable of being reduced to lawful certainty by judicial effort.⁴ A contract to sell oil to the buyer on such reasonable terms as will enable him to compete with other parties selling in the same territory is too indefinite to be enforced.⁵ Where the defendant, in consideration that the plaintiffs would purchase a storehouse and lot and a stock of goods, agreed to assist them by indorsing their paper and advancing money to enable them to carry on the mercantile business advantageously, the meaning of the parties could not be reduced to certainty by judicial effort.⁶ A contract to aid and assist another to procure an order of court was held too indefinite to sustain an action for refusal or neglect.⁷ A father's promise upon a valuable consideration to give his child "a full share" of his property was said to have no lineaments of a contract that the law could recognize.⁸

In one case the court denied a suitor's request to mulct a contractor who had tried in vain to build a house according to specifications calling for more dimensions than finite minds have yet discovered.⁹ The following order accompanied by a draft and measurement was written upon a postal card: "Please send us pice counter screen like draft." The order was declared to be unintelligible, and a refusal to submit it to the jury to determine whether the letters "pice" meant "piece" or "price" was sustained on appeal.¹⁰ Where, by a memorandum in

³ Leonard v. Carter, 16 Wis. 607. But see also, Giles v. Halsted, 24 N. J. Law 366, 61 Am. Dec. 668.

⁴ Cummer v. Butts, 40 Mich. 322, 29 Am. Rep. 530; Leslie v. Smith, 32 Mich. 64. At the bottom of a note payable on demand was a memorandum constituting a part of the contract—"one-half payable in twelve months, the balance in twentyfour months." The court decided that it was intended to limit and control the generality of the words "on demand", and thus avoided a fatal repugnancy. Heywood v. Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518. A contract by

which defendant agrees to furnish 300 men on demand of plaintiff, and by which the latter agrees to work not less than 100 men, is not so indefinite and uncertain as to be invalid. McConnell v. Arkansas Brick & Mfg. Co., 70 Ark. 568, 69 S. W. 559.

⁵ Marble v. Standard Oil Co., 169 Mass. 553, 48 N. E. 783.

⁶ Erwin v. Erwin, 25 Ala. 236.

⁷ Case v. Lennington, 3 N. J. L. 853.

⁸ Adams v. Adams, 26 Ala. 272.

⁹ Lyle v. Jackson County, 23 Ark. 63.

¹⁰ Cheney Bigelow Wire Works v.

writing a party agreed to convey to another "seventy acres of land," the vendee "to have half the wheat on the piece that is to be sowed," by a third party, "— exceeding seven acres," an action for breach of the contract was not sustained, as there was nothing from which it could be ascertained on what part of the earth the premises were situated.¹¹ An agreement to renew a note till business shall improve is not a promise but merely a hopeful prophecy.¹² A contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties so to do.¹³

§ 184. Miscellaneous instances of contracts held sufficiently certain.—An agreement whereby one party contracted to sell another "all the prunes and other fruit that may grow and may be produced during the year 1884," on a certain farm, a portion of the purchase-price to be paid "when the crop is taken off at the end of the year," has been upheld.¹⁴ Nor is a contract fatally uncertain whereby one sells his interest in a certain invention and agrees to continue to use his best effort to make further improvements thereon in consideration of the purchaser paying him \$20 per week, or in case of his death to his wife so long as they continue to use his patents.¹⁵ Where an agreement provides for an

Sorrell, 142 Mass. 442, 8 N. E. 332. "These letters do not mean anything," said Morton, C. J., "and neither the court nor the jury can construe them as meaning 'piece'."

¹¹ Rollin v. Pickett, 2 Hill (N. Y.) 552. But see Fish v. Hubbard's Admrs., 21 Wend. (N. Y.) 651. It was held in Palmer v. Albee, 50 Iowa 429 (by a divided court), that a subscription agreement to give "twenty acres of land" was too indefinite to sustain an action for damages for a failure to convey any certain tract, and that the uncertainty could not be removed by parol evidence. In Delashmutt v. Thomas, 45 Md. 140, there was an agreement under seal for the lease of a store for a term certain at a fixed rent containing the following words: "The said (lessee) to have the preference of renting said property so long thereafter as it shall be rented for a store." It was held that

the lessee derived no definite rights which he could enforce in law or equity. In Abeel v. Radcliff, 13 Johns. (N. Y.) 297, it was held that "a covenant in a lease, on the part of the lessor, to let the lot, at the expiration of the term, to the lessee, without mentioning any price for which it was to be let," was altogether void for uncertainty. See also, Clinan v. Cooke, 1 Sch. & Lef. 22. For other instances of contracts held void for uncertainty, see Moore v. Smith, 19 Ala. 774.

¹² Hall v. First Nat. Bank, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. 255.

¹³ Strauss v. Yeager (Ind. App.), 93 N. E. 877.

¹⁴ Brown v. Anderson, 77 Cal. 236, 19 Pac. 487.

¹⁵ Raymond v. White, 119 Mich. 438, 78 N. W. 469.

assignment of certain shares of stock to be held as collateral, such agreement is not void for uncertainty because it does not specify what kind of an assignment was intended.¹⁶ And where a physician agreed not to practice in a certain locality "unless forced to return because of unforeseen circumstances," it was held that mere failure to build up a practice in another locality was not such an unforeseen circumstance as would entitle him to return to the old location.¹⁷ Nor is an agreement void for indefiniteness (as to the time when it should become operative) which provides: "I hereby agree not to sell all, or any part of the stock (certain bank stock) at any time, until I have first offered the same to W in writing at the book value of said stock, giving him ample time to accept or refuse the purchase, binding my heirs, executors and the administrators in the above option and agreement."¹⁸ And an agreement where one sells certain fair grounds for part cash and "one-third of the proceeds of all privileges incident to the holding of fairs, races or other events of like character upon said grounds" is not void for indefiniteness.¹⁹

A contract which gives one the exclusive sale of a certain article in a specified territory for a definite time and which further provides that in case he succeeds in doing such a business as the other party may "reasonably expect" it will be renewed, is not indefinite nor uncertain that it will not support an action for damages should the defendant refuse to renew at the expiration of the first term.²⁰ So, also, a promise by a father to give his son a particular farm, "but should Providence determine otherwise he is to receive from my estate one thousand dollars," was held to involve an inscrutable condition and the court substituted the pronoun "I" in the place of "Providence."²¹ And in a contract to buy a stock of merchandise, "all soiled or damaged goods at valuation," the word valuation was construed to mean "value."²²

¹⁶ First Nat. Bank v. Park, 117 Iowa 552, 91 N. W. 826.

¹⁷ Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781.

¹⁸ Cothran v. Witham, 123 Ga. 190, 51 S. E. 285.

¹⁹ Dargin v. Hewlitt, 115 Ala. 510, 22 So. 128.

²⁰ Worthington v. Beeman, 33 C. C. A. 475, 91 Fed. 232.

²¹ Rue v. Rue, 21 N. J. L. 369.

²² Sargeant v. Dwyer, 44 Minn. 309, 46 N. W. 444. A contract is not void for uncertainty where from the contents of the contract itself any ambiguity which may exist can be as-

A contract which is originally indefinite and uncertain may be made definite by the conduct of the parties in construing its terms and performing the contract.²³ Moreover, if there is a patent ambiguity in one clause of a contract which renders it void for uncertainty, the nullity of such clause will not affect the remainder of the instrument, if there be enough left to constitute a complete contract.²⁴

§ 185. Effect of using terms "more or less", "about" and the like.—The words "more or less" have a plain, ordinary and popular signification, and are often used in contracts relating both to real and personal estate. As applied to quantity they are to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically stipulated in the contract. In sales of merchandise, especially in large quantities, the office and effect of the words "more or less," in connection with the specific amount which forms the subject-matter of the contract, is to cover any variation from the estimate which is likely to arise from difference in weight, errors in counting, diminution by shrinking or other similar causes. It is sometimes briefly expressed to be "an absolute contract for a specified quantity within a reasonable limit."²⁵ What is a reasonable limit and a sub-

plained. *Northern Central R. Co. v. Walworth*, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. 683.

²³ *Robson v. Mississippi River & Co.*, 61 Fed. 893. See, however, in connection with the above case, 69 Fed. 773, 16 C. C. A. 400, in which it is affirmed. *Louisville & C. R. Co. v. Coyle* (Ky.), 97 S. W. 772, 8 L. R. A. (N. S.) 433; *Loveridge v. Shurtz*, 111 Mich. 618, 70 N. W. 132; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. 341. See also, *Gray v. Hinton*, 7 Fed. 81, 2 McCrary 167; *Morrow v. Southern Exp. Co.*, 101 Ga. 810, 28 S. E. 998; *Savannah Ice & C. Co. v. American Refrigerator & C. Co.*, 110 Ga. 142, 35

S. E. 280; *American Refrigerator & C. Co. v. Chilton*, 94 Ill. App. 6. These latter cases are decided on the theory that part performance will neither supply mutuality nor show assent.

²⁴ *State v. Racine Sattley Co.* (Tex. Civ. App.), 134 S. W. 400.

²⁵ The words "more or less" do not render a contract *prima facie* void. *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440; *Morris v. Levison*, L. R. 1 C. P. Div. 155; *United States v. Pine River L. & I. Co.*, 89 Fed. 907, 32 C. C. A. 406; *Cabot v. Winsor*, 1 Allen (Mass.) 546, where it was held that a shortage of five per cent. on "500 bundles, more or less, gunny bags"

stantial compliance with such a contract, if the facts are not in dispute between the parties, are questions of law for the determination of the court.²⁶

A contract for a herd of cattle containing two hundred and sixty-two head, "more or less," was held not elastic enough to require an acceptance of one hundred and seventy-eight.²⁷ Under a contract calling for "about three hundred quarters more or less" of rye, the buyer was not compelled to accept three hundred fifty quarters.²⁸ But under a contract to deliver five hundred thousand feet of lumber, "more or less," a delivery of four hundred seventy-three thousand feet was said to be a deviation quite within the degree the courts have held to be reasonable.²⁹ A contract to pay "a claim * * * of about \$150" was held to be a contract to pay the whole amount, although the latter was in fact \$50 more than the sum mentioned.³⁰ The

was not such a deficiency as to fall outside of the fair and reasonable limit of short delivery, and that by delivering a portion of 475 bundles and a readiness to deliver the residue of the 475, the plaintiff proved a full compliance with the terms of the contract. After declaring the law in substantially the language of the text, the court continued: "In such cases parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified and the effect of the words, 'more or less,' is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract after making due allowance for an excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold." See, further, to the point that the words "more or less" do not render a contract *prima facie* void, *Brown v. Bellows*, 4 Pick. (Mass.) 179, 190; *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167, and cases there cited.

²⁶ *Moore v. Campbell*, 10 Exch. 323;

Bourne v. Seymour, 16 C. B. 337; *Cross v. Eglin*, 2 B. & Ad. 106; *Cabot v. Winsor*, 1 Allen (Mass.) 546; *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589; *Watson v. New York*, 67 App. Div. (N. Y.) 570, 73 N. Y. S. 1027, affg. 34 Misc. (N. Y.) 701, 70 N. Y. S. 1033; *Stebbins v. Eddy*, 4 Mason (U. S.) 414, 419.

²⁷ *Tilden v. Rosenthal*, 41 Ill. 385. "We understand the phrase 'more or less'" said *Lawrence, J.*, "as having been used by the parties to cover such trifling deficiencies in number as might be caused by the ordinary casualties of death or loss."

²⁸ *Cross v. Eglin*, 2 B. & Ad. 106.

²⁹ *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167.

³⁰ *Turner v. Whidden*, 22 Maine 121. "The terms 'about' and 'more or less' have frequently found their way into contracts, and the courts have without disagreement held that they induced no ambiguity, and that extrinsic evidence of previous or contemporaneous conversations is not admissible to show what the parties meant by their use unless the contract on its face makes reference to some independent circumstances to identify the thing said." *Peterson v. Chaix* (Cal.), 90 Pac. 948 (quoting from *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622). Where a contract is made to

effect of the words, "more or less," when annexed to a specified quantity in contracts relating to land has been thus stated: "In an agreement for the sale and purchase of land for an entire sum, either the description of the land by its boundaries, or the insertion of the words, 'more or less,' or equivalent words, will control a statement of the quantity of land or of the length of one of the boundary lines so that neither party may be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract."⁸¹

sell or furnish certain goods identified by independent circumstances, such as the entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about", or "more or less", or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is required of the party making it. In all such cases the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity. But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, "about", "more or less", and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight. If, however, the qualifying words are supplemented by other stipulations or conditions, which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions. If it be agreed to furnish so many bushels of

wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by the quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. So, when a manufacturer contracts to deliver at a certain price all the articles he shall make in his factory for the space of two years, "say one thousand to twelve hundred gallons of naphtha per month," the designation of quantity is qualified not only by the indeterminate word, "say", but by the fair discretion or ability of the manufacturer, provided, always, he acts in good faith. *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622, 13 Ct. Cl. (U. S.) 521.

⁸¹ *Stull v. Hurtt*, 9 Gill (Md.) 446; *Noble v. Googins*, 99 Mass. 231, citing *Stebbins v. Eddy*, 4 Mason (U. S.) 414; *Weart v. Rose*, 15 N. J. Eq. 290, 1 C. E. Green 290; *Marvin v. Bennett*, 8 Paige (N. Y.) 312, 26 Wend. (N. Y.) 169; *Morris Canal Co. v. Emmett*, 9 Paige (N. Y.) 168; *Faure v. Martin*, 7 N. Y. 210, 57 Am. Dec. 515; *Ketchum v. Stout*, 20 Ohio 453. The latitude which will be given by a court of equity to the words "more or less" in such cases was thoroughly discussed in the light of authorities by *Comstock, J.*, in *Belknap v. Sealey*, 14 N. Y. 143. For other cases involving the phrase "more or less" in deeds, see *Thomas v. Perry*, Pet. (C. C.) 49; *United States v. D'Aguirre*,

§ 186. "Say" and "say about" and the like.—The same words may have different meanings, according to the context, in different contracts. But, unless there is something in the context to dictate a more positive signification, such words as "say," or "say about," when used to specify quantity, ought not to be construed as words of warranty.³² In a similar connection, the words "say about" afford a contractor as much latitude as the words "say from."³³ On the other hand, an agreement to furnish "say not less than" a certain quantity leaves no uncertainty as to the minimum.³⁴ A contract to load "a full and complete cargo of iron, say about one thousand one hundred tons," where the ship could carry one thousand two hundred ten tons, was not fulfilled by loading one thousand eighty tons.³⁵ Oral evidence may in certain instances be admitted to prove local usage or custom when the local meaning of certain words or phrases is involved. Thus the meaning of the term "gross ton" has been held to be explainable

1 Wall. (U. S.) 311. See also, Harrell v. Hill, 19 Ark. 102, 68 Am. Dec. 202; Dale v. Smith, 1 Del. Ch. 1, 12 Am. Dec. 64; Patton v. Schneider, 23 Ky. L. 2190, 66 S. W. 1003. In the above case the description read 33½ acres, "more or less," when in fact it contained only 20½ acres; it was held the vendor must make good the difference. Poague v. Allen, 3 J. J. Marsh. (Ky.) 421; Shipp v. Swan, 2 Bibb (Ky.) 82; Williford v. Bentley, 5 J. J. Marsh. (Ky.) 181; Pollock v. Wilson, 3 Dana (Ky.) 25; McCoun v. Delany, 3 Bibb (Ky.) 46, 6 Am. Dec. 635; Fannin v. Bellomy, 5 Bush (Ky.) 663; Hoffman v. Johnson, 1 Bland (Md.) 103; Smallwood v. Hatton, 4 Md. Ch. 95; Tyson v. Hardesty, 29 Md. 305; Blaney v. Rice, 20 Pick. (Mass.) 62, 32 Am. Dec. 204; Phipps v. Tarpley, 24 Miss. 597; Sullivan v. Ferguson, 40 Mo. 79; McConnell v. Brayner, 63 Mo. 461; Williamson v. Hall, 62 Mo. 405; Gerrens v. Huhn, 10 Nev. 139; Couse v. Boyles, 4 N. J. Eq. 212, 38 Am. Dec. 514; Brady v. Hennion, 8 Bosw. (N. Y.) 528; Pettit v. Shepard, 32 N. Y. 97; Gentry v. Hamilton, 3 Ired. Eq. (N. Car.) 376; Smith v. Evans, 6 Bin. (Pa.) 102; Baynard v. Eddings, 2 Strob. (S. Car.) 374; Peden v. Owens, Rice

(S. Car.) 55; Allison v. Allison, 1 Yerg. (Tenn.) 16; Smith v. Fly, 24 Tex. 345; Pendleton v. Stewart, 5 Call (Va.) 1; Duvals v. Ross, 2 Munf. (Va.) 290. A deficiency of eight acres in a contract for 552 acres is more than a purchaser who buys for more or less can reasonably expect. Nelson v. Matthews, 2 Hen. & M. (Va.) 164. The words "more or less" as used in a deed ordinarily mean "about." Carling v. Wilson (Ala.), 58 So. 417.

³² M'Connel v. Murphy, L. R. 5 P. C. 203. Thus, a contract to sell all the naphtha that the vendor might make during a certain period, "say from one thousand to one thousand two hundred gallons per month," was held not to impose an absolute obligation to supply that number of gallons. Gwillim v. Daniel, 2 C. M. & R. 61.

³³ M'Connel v. Murphy, L. R. 5 P. C. 203, holding that 496 will satisfy "say about 600."

³⁴ Leeming v. Snaith, 16 Q. B. 275, was declared in M'Connel v. Murphy, cited in the preceding note, not to be inconsistent with Gwillim v. Daniel, 2 C. M. & R. 61.

³⁵ Morris v. Levison, L. R. 1 C. F. D. 155.

by parol evidence.⁸⁶ The same is true as to the meaning of the term, "no trees to be counted less than one foot high,"⁸⁷ "amber colored bottles to be of uniform weight and color,"⁸⁸ and "for three years at a salary of five, six and seven pounds per week" during all the term of a theatrical engagement.⁸⁹

⁸⁶ Higgins v. California Petroleum &c. Co., 120 Cal. 629, 52 Pac. 1080.

⁸⁷ Barton v. McKelway, 22 N. J. Law 165.

⁸⁸ Whitney v. Hop Bitters Mfg. Co., 2 N. Y. S. 438, 18 N. Y. St. 891.

⁸⁹ Grant v. Maddox, 15 M. & W. 737, 16 L. J. Ex. 227. See also, Leavitt v. Kennicott, 157 Ill. 235, 41 N. E. 737. But in the following cases oral evidence was held inadmissible to explain the meaning by local usage or custom to the following terms: "good three-coat plastering" (Cook v. Hawkins, 54 Ark. 423, 16 S. W. 8), "clear, grub and pile the brush on the land south of the road" (Holmes v. Stummel, 15 Ill. 412), "delivered" (Willmering v. McGaughey, 30 Iowa 205, 6 Am. Rep. 673). It has been held that parol evidence is not admissible to explain the meaning of the term, "fully insured", as its plain ordinary signification would mean insured to the full value of the original. Kentucky Wagon Co. v. People's Supply Co., 77 S. Car. 92, 57 S. E. 676, 122 Am. St. 540. The right to explain the meaning of the terms, "to be advertised

until sold" (Wikle v. Johnson Laboratories, 132 Ala. 268, 31 So. 715), and "new and useful improvements" (Adams v. Turner, 73 Conn. 38, 46 Atl. 247), has been denied. See also, Withers v. Moore, 140 Cal. 591, 74 Pac. 159; Hale v. Milliken, 142 Cal. 134, 75 Pac. 653; Mayer v. Lawrence, 58 Ill. App. 194; Covington v. Kanawha Coal Co., 121 Ky. 681, 89 S. W. 1126, 3 L. R. A. (N. S.) 248; Bigelow v. Legg, 102 N. Y. 652, 6 N. E. 107; Goetze v. Dunphy, 63 N. Y. St. 751, 31 N. Y. S. 302; O'Donohue v. Leggett, 55 Hun (N. Y.) 607, 8 N. Y. S. 426, 29 N. Y. St. 983; Richard v. Haebler, 55 N. Y. S. 583; Burton v. Forest Oil Co., 204 Pa. 349, 54 Atl. 266. The object and purpose of this chapter is mainly to illustrate and explain the necessity for certainty in the terms of the offer and acceptance, so that there is a meeting of the minds and a complete contract. Matters that might have been placed in this chapter will be found under such titles as Interpretation and Construction, Specific Performance, Time, When the Essence of a Contract, etc.

CHAPTER IX.

CONSIDERATION.

- § 195. Necessity for.
- 196. When it is presumed or imported.
- 197. Contracts in restraint of trade.
- 198. When presumed or imported—Statutory abolition of seals.
- 199. When presumed—Negotiable instruments.
- 200. When presumed—Consideration declared unnecessary by statute or rule of law.
- 201. When presumed—Contracts in writing.
- 202. When presumed—Executed contracts.
- 203. What is meant by consideration.
- 204. Distinguished from motive.
- 205. Concurrent, executed, executory and continuing consideration.
- 206. Good consideration.
- 207. Valuable consideration.
- 208. Nudum pactum.
- 209. Sufficient consideration or adequate consideration.
- 210. Insufficient or inadequate consideration.
- 211. Moral consideration.
- 212. New promise—Equitable consideration.
- 213. Past or antecedent consideration.
- 214. Exceptions to rule that past consideration will not support a subsequent promise.
- 215. Doing what one is legally bound to do.
- 216. Same—Refusal to perform without further recompense.
- 217. Same—Part payment of liquidated liability.
- 218. The rule against satisfaction by payment of a lesser sum strictly construed.
- § 219. Other consideration—Receiving property in addition to the sum paid.
- 220. Other consideration—Payment of debt before due, or at different place.
- 221. Other consideration—Additional security.
- 222. Miscellaneous exceptions.
- 223. Rule deducible from the authorities.
- 224. Impossible consideration.
- 225. Physical and legal impossibility.
- 226. Illegal consideration.
- 227. Voluntary subscription.
- 228. Voluntary subscription valid when supported by a consideration.
- 229. Mutual promises as a consideration therefor.
- 230. Obligation to apply the funds in a certain way as a consideration.
- 231. Promise for promise.
- 232. Mutuality, options.
- 233. Abandonment of legal right.
- 234. Forbearance.
- 235. Forbearance to sue—Time.
- 236. Extension of time.
- 237. Compromise of disputed claims.
- 238. Delivery of property in trust.
- 239. Incurring liabilities or obligations.
- 240. Services.
- 241. Marriage.
- 242. Name and change of name.
- 243. Contracts and contractual rights generally.
- 244. Rights to personal property.
- 245. Interests in real property.
- 246. Blood or natural affection.
- 247. Evidence of consideration.
- 248. Entire or indivisible consideration.
- 249. Divisible considerations or promises.

- | | |
|---|---------------------------------------|
| 250. From whom consideration must move. | 252. To whom consideration must move. |
| 251. At whose instance the consideration must move. | 253. Want of consideration. |
| | 254. Failure of consideration. |

§ 195. **Necessity for.**—Prior to the year 1505 the binding force of a simple promise had not been definitely established.¹ In that year it was settled that failure to perform a simple promise was actionable in case the promisee had parted with a thing of value on the faith of the promise.² With this principle once established it was not long until the doing of almost any act by the promisee was held sufficient to support a promise to procure the doing of that act.³ But, notwithstanding the dictum of Lord Mansfield, in a case decided as late as 1765, to the effect that no consideration is essential to a commercial contract in writing,⁴ the general rule has long been settled that executory contracts not under seal must be supported by a consideration whether in writing or not. And since the year 1778,⁵ it has been consistently held by all courts that every executory contract, with few exceptions, must be supported by a consideration. A promise, whether oral or written, must be founded on a sufficient consideration, either of benefit to the one party or of detriment to the other or of both combined.⁶

¹ Year Book, 20 Henry VII 8, pl. 18; Walton v. Brinth, Y. B. 2 Hen. IV 3, pl. 9.

² Mich. term 21 Henry VII, Kielw. 77, 78.

³ Estrigge v. Owles (1587), 3 Leon. 200; Gill v. Harewood, 1 Leon. 61; Banes's Case, 9 Coke 94; Mapes v. Sidney, Cro. Jac. 683; Y. B. 2 Hen. VII 41, pl. 66.

⁴ Pillans v. Van Mierop, 3 Burr. 1663.

⁵ Rann v. Hughes, 7 T. R. 350n.

⁶ Chapman v. Franklin, 21 T. L. 515; Watson v. Dunlap, Fed. Cas. No. 17282, 2 Cranch (U. S.) 14; Consolidated Portrait & Co. v. Barnett, 165 Ala. 655, 51 So. 936; Wheeler v. Glasgow, 97 Ala. 700, 11 So. 758; Summers v. Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Hochstein v. Berghausen, 123 Cal. 681, 56 Pac. 547; Kephart v. Buddecke, 20 Colo. App. 546, 80 Pac. 501; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Littlepage

v. Neale Pub. Co., 34 App. D. C. 257; Arnold v. Scharbauer, 116 Fed. 492; Lowe v. Bryant, 32 Ga. 235; Mason v. Terrell, 3 Ga. App. 348, 60 S. E. 4; Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781; Heartt v. Sherman, 229 Ill. 581, 82 N. E. 417; Berry v. Bates, 2 Blackf. (Ind.) 118; Bright v. Coffman, 15 Ind. 371, 77 Am. Dec. 96; Starr v. Earle, 43 Ind. 478; Plunkett v. Black, 117 Ind. 14, 19 N. E. 537; Eastman v. Miller, 113 Iowa 404, 85 N. E. 635; Gilmore v. Green, 77 Ky. (14 Bush) 772; Streshley v. Powell, 51 Ky. 178; Adams v. Wathen, 21 Ky. L. R. 101, 50 S. W. 962; Broadus v. Nolley, 25 La. Ann. 184. The requiring of a small pecuniary consideration to support an agreement is a mere fiction, unknown to the civil law and to the laws of this state. Mouton v. Noble, 1 La. Ann. 192; Williams v. Robinson, 73 Maine 186, 40 Am. Rep. 352; Wyman v. Gray, 7 Harr. & J. (Md.) 409; Wilson v.

§ 196. **When it is presumed or imported.**—This rule, however, is not universal, at least in so far as it seems to require the showing of an actual consideration in all cases of contract. In the case of certain contracts or quasi contracts, a consideration is unnecessary or is presumed or imported. To this class of contracts belong contracts under seal or specialties. Independent of any statute, at common law the seal obviates the necessity for a consideration and renders its proof needless, because the instrument binds the parties by force of the natural and conclusive presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient con-

Clements, 3 Mass. 1; Fowler v. Shearer, 7 Mass. 14; Tenney v. Prince, 21 Mass. (4 Pick.) 385, 16 Am. Dec. 347; Mecorney v. Stanley, 8 Cush. (Mass.) 85; Chase v. Chase, 191 Mass. 556, 78 N. E. 115; Koppitz-Melchers Brewing Co. v. Behm, 130 Mich. 649, 90 N. W. 676, 9 Detroit Leg. N. 226; Gloeckner v. Kittlaus, 192 Mo. 477, 91 S. W. 126; George v. Chicago &c. R. Co., 214 Mo. 551, 113 S. W. 1099; Scriba v. Neely, 130 Mo. App. 258, 109 S. W. 845; Clark v. Robertson, 135 Mo. App. 90, 115 S. W. 514; Riley v. Stevenson, 118 Mo. App. 187, 94 S. W. 781; Burton v. Kipp, 30 Mont. 275, 76 Pac. 563; Portsmouth Brewing Co. v. Mudge, 68 N. H. 462, 44 Atl. 600; Conover v. Stillwell, 34 N. J. L. (5 Vroom) 54; Day v. Gardner, 42 N. J. Eq. (15 Stew.) 199, 7 Atl. 365; Drake v. Lanning, 49 N. J. Eq. 452, 24 Atl. 378; Graham v. Spence (N. J. Eq.), 63 Atl. 344; Powell v. Brown, 3 Johns. (N. Y.) 100; Moskowitz v. Hornberger, 20 Misc. 558, 46 N. Y. S. 462; Majory v. Schubert, 82 App. Div. 633, 81 N. Y. S. 703; Perkins v. Smith, 83 App. Div. 630, 81 N. Y. S. 955; Hollins v. Hubbard, 38 App. Div. 629, 56 N. Y. S. 711, affd. 165 N. Y. 534, 59 N. E. 317; Hayden v. Hayden, 8 App. Div. 547, 75 N. Y. St. 259, 40 N. Y. S. 865; Bodine v. Andrews, 47 App. Div. 495, 62 N. Y. S. 385; Buckley v. Zimmerman, 32 Misc. 704, 65 N. Y. S. 512; Oldham v. Pincus, 32 Misc. (N. Y.) 199, 65 N. Y. S. 691; McBride v. Adams, 84 N. Y. S. 1060; New York Automobile Co. v. Franklin, 49 Misc. (N. Y.) 8, 97 N. Y. S. 781; Leeming v. Dur-

yea, 49 Misc. 240, 97 N. Y. S. 355; Engel v. Gordon, 49 Misc. (N. Y.) 641, 97 N. Y. S. 981; Berkow v. Lampel, 125 N. Y. S. 513; Springstead v. Nees, 125 App. Div. 230, 109 N. Y. S. 148; Bull v. Payne, 47 Ore. 580, 84 Pac. 697; Kennedy v. Ware, 1 Pa. St. (1 Barr) 445, 44 Am. Dec. 145; In re Crawford's Appeal, 61 Pa. St. 52, 100 Am. Dec. 609; In re Lenning's Estate, 182 Pa. St. 485, 38 Atl. 466, 38 L. R. A. 378, 61 Am. St. 725; Roper v. Stone, 3 Tenn. (Cooke) 497; Clark v. Small, 14 Tenn. (6 Yerg.) 418; Patrick v. Wilson, 1 Nott & McC. (S. Car.) 112; Mueller v. Bell (Tex. Civ. App.), 117 S. W. 993; Thorp v. Gordon (Tex. Civ. App.), 43 S. W. 323; Brin v. McGregor (Tex. Civ. App.), 45 S. W. 923; Beverly v. Holmes, 4 Mun. (Va.) 95; Southern R. Co. v. Willcox, 98 Va. 222, 35 S. E. 355; Triplett v. Woodward's Admr., 98 Va. 187, 35 S. E. 455; Sturm v. Parish, 1 W. Va. 125; Templeton v. Butler, 117 Wis. 455, 94 N. W. 306. By sufficient consideration, however, as the term is used above, is not meant that the consideration must necessarily be adequate. See post, § 209. But it must not be illegal and must be of *some* value in the eye of the law. An executory contract not supported by a consideration cannot be enforced in a court either of law or equity. Heartt v. Sherman, 229 Ill. 581, 82 N. E. 417. "It is always in order to plead want of consideration as a defense to the enforcement of a contract." First Nat. Bank v. Asel (Mo. App.), 134 S. W. 110, 111.

sideration.⁷ It thus becomes possible by means of a deed under seal to make a voluntary promise, that is, one that is gratuitous or without any consideration, in a manner which shall be binding on the promisor, when such promise would not be binding in the form of a simple contract.⁸ Equity, however, ordinarily requires a consideration and permits the want of it to be shown, notwithstanding the seal.⁹

⁷ *Lowe v. Peers*, 4 Burr. 2225; *Pillans v. Van Mierop*, 3 Burr. 1663; *Rann v. Hughes*, 7 T. R. 350n; *Fallowes v. Taylor*, 7 T. R. 475; *Tracy v. Alvord*, 118 Cal. 654, 50 Pac. 757; *Sims v. Scheussler*, 5 Ga. App. 850, 64 S. E. 99; *Sivil v. Hogan*, 119 Ga. 167, 46 S. E. 67; *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Gray v. Bloomington & C. R. Co.*, 120 Ill. App. 159; *Gourley v. Chicago & C. R. Co.*, 96 Ill. App. 68; *Bullen v. Morrison*, 98 Ill. App. 669; *Leonard v. Bates*, 1 Blackf. (Ind.) 172; *Ruth v. Ford*, 9 Kans. 17; *Van Valkenburgh v. Smith*, 60 Maine 97; *Wing v. Chase*, 35 Maine 260; *Edelen v. Gough*, 5 Gill (Md.) 103; *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 416; *Paige v. Parker*, 8 Gray (Mass.) 211; *Fletcher v. Fletcher*, 191 Mass. 211, 77 N. E. 758; *Hobbs v. Brush & C. Co.*, 75 Mich. 550, 42 N. W. 965; *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266; *Erickson v. Brandt*, 53 Minn. 10, 55 N. W. 62; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. 319; *First Presbyterian Church v. Nat. Bank*, 57 N. J. L. 27, 29 Atl. 320; *Kam v. Benjamin*, 158 N. Y. 725, 53 N. E. 1126, affg. 10 App. Div. 419, 42 N. Y. S. 99; *Rothschild v. Frank*, 14 App. Div. (N. Y.) 399, 43 N. Y. S. 951; *Williams v. Whittell*, 69 App. Div. 340, 74 N. Y. S. 820; *Howie v. Kasnowitz*, 83 App. Div. 295, 82 N. Y. S. 42; *Parker v. Parmele*, 20 Johns. (N. Y.) 130, "a mere failure of consideration is no defense at law to an action on a deed or specialty"; *Vrooman v. Phelps*, 2 Johns. (N. Y.) 177; *Dorr v. Munsell*, 13 Johns. (N. Y.) 430; *Smith v. Northrup*, 80 Hun. (N. Y.) 65; *Childs v. Barnum*, 11 Barb. (N. Y.) 14; *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 13; *Dickey v. Jackson*, 47 Ore. 531, 84 Pac. 701; *Clymer v.*

Groff, 22 Pa. St. 580, 69 Atl. 1119; *Cosgrove v. Cummings*, 195 Pa. St. 497, 46 Atl. 69; *Geiselbrecht v. Geiselbrecht*, 8 Pa. Super. Ct. 183; *Owens v. Wehrle*, 14 Pa. Super. Ct. 536; *Evans v. Dravo*, 24 Pa. (12 Harns) 62, 62 Am. Dec. 359; *Yard v. Patton*, 13 Pa. 278; *Carter v. King*, 11 Rich. (S. Car.) 125; *United States v. Linn*, 15 Pet. (U. S.) 290; *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42; *Barrett v. Carden*, 65 Vt. 431, 26 Atl. 530, 36 Am. St. 876; *Harris v. Harris' Exr.*, 23 Grat. (Va.) 737; *Carey v. Dyer*, 97 Wis. 554, 73 N. W. 29.

⁸ *Morley v. Boothby*, 3 Bing. 107; *Sharlington v. Strotton*, 1 Plowden 298; *Rann v. Hughes*, 7 T. R. 350n; *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380n; *Aller v. Aller*, 40 N. J. L. 446, the head-note of the above case is "It is not a good defense to a promise in writing, under seal" to pay a sum of money, for value received, that it was voluntary. *Kam v. Benjamin*, 10 App. Div. 419, 42 N. Y. S. 99, affd. in 158 N. Y. 725, 53 N. E. 1126; *Stanley v. Smith*, 15 Ore. 505, 16 Pac. 174; *Burkholder's Exrs. v. Plank*, 69 Pa. St. 225; *Hirschhorn v. Nelden-Judson Drug Co.*, 26 Utah 110, 72 Pac. 386. At common law contracts under seal were enforceable in the absence of consideration not because a consideration is conclusively presumed but because consideration is not an essential element of such contracts. *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S. E. 105.

⁹ *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S. E. 105; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874. Equity will not decree the specific performance of a gratuitous promise under seal. *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Buford v. Mc-*

§ 197. **Contracts in restraint of trade.**—There is an exception to the doctrine of the last preceding section in cases of contracts in restraint of trade. Here there must be an actual consideration, and the seal does not import one.¹⁰ This is the only exception usually noted, and it is said that it is the only case in which a contract of specialty is void merely because there is no actual consideration.¹¹ But a late writer seems to regard a contract, under seal, in restraint of marriage as another exception.¹²

§ 198. **When presumed or imported—Statutory abolition of seals.**—Legislation dealing with the question of seals has taken three forms: The first is where the use of private seals is absolutely abolished;¹³ the second is where all distinction between sealed and unsealed instruments is done away with;¹⁴ the third

Kee, 1 Dana (Ky.) 107, 46 N. E. 755; Bosley v. Bosley, 85 Mo. App. 424.

¹⁰ Horner v. Ashford, 3 Bing. 322; Hitchcock v. Coker, 6 Ad. & El. 438; Archer v. Marsh, 6 Ad. & El. 959; Mitchel v. Reynolds, 1 P. Wms. 181; Palmer v. Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204; Pierce v. Fuller, 8 Mass. 223. The consideration in this case was one dollar, the promise being not to run a stage on a certain road specified. This sum was held adequate to support the promise. Draper v. Snow, 20 N. Y. 331, 75 Am. Dec. 408. See Ross v. Sadgbeer, 21 Wend. (N. Y.) 166, where it is said: "It is true that a consideration will be implied from the seal, where the parties contract by deed. * * * But the seal only imports that there was some consideration—not that there was a peculiar one, such as this case requires. If we imply a pecuniary consideration, however large it may be in amount, it will not remove the difficulty under which the plaintiff labors. It must appear that he purchased the defendant's works, or a secret which he possessed in the relation to the manufacturing of ashes, or that there was some other good reason for taking this bond. Otherwise, it was a contract to deprive a man of his livelihood, and the public of a useful member, without any benefit to the plaintiff, which the law will not permit."

Lemon v. Graham, 131 Pa. St. 447, 19 Atl. 48, 6 L. R. A. 663; In re Hacker's Appeal, 121 Pa. St. 192, 15 Atl. 500, 1 L. R. A. 861; Keeler v. Taylor, 53 Pa. St. 467, 91 Am. Dec. 221; Sanders v. Bagwell, 32 S. Car. 238. Compare Bender v. Been, 78 Iowa 283, 43 N. W. 216, 5 L. R. A. 596. "An agreement not to carry on a certain business anywhere is invalid, whether it be by parol or specialty." Story on Contracts, § 650.

¹¹ Lawson Cont., § 65, citing Metc. Cont. 270; Ross v. Sadgbeer, 21 Wend. (N. Y.) 161.

¹² 2 Page Cont., § 561, p. 875.

¹³ Globe Acc. Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947. The common-law rule that a seal imports a consideration, still obtains in the state of Washington, notwithstanding § 4523, Ballinger's Ann. Codes & Stat., abolishing the use of private seals. Monro v. National Surety Co. (Wash.), 92 Pac. 280. The following states have legislation of this sort: Ohio, Indiana, Iowa, Kansas, Nebraska, Tennessee, Texas, North Dakota, South Dakota, Montana, Mississippi and Washington. Stimson's "American Statute Law", p. 197.

¹⁴ This obtains in Kentucky, Tennessee, Texas, California, Oregon and Mississippi; Stimson's "American Statute Law", p. 197. It will be seen that some states have enacted both forms of legislation, as Indiana.

is where a seal raises only a presumption of consideration, which may be rebutted as if the instrument were not sealed.¹⁵ But although there are these different forms of legislation upon the subject, their effect is in most respects substantially the same. These enactments merely take away from the seal its character of conclusive evidence of a sufficient consideration and in effect make it only presumptive evidence. In the absence of misapprehension or fraud, these statutes do not affect voluntary agreements under seal unsupported by a consideration where no consideration was intended.¹⁶

§ 199. When presumed—Negotiable instruments.—A second apparent exception to the rule declaring the necessity of consideration is that concerning negotiable instruments. But it is

¹⁵ *Mitchel v. Reynolds*, 1 P. Wms. 181; *Ruppert v. Frauenknecht*, 146 Ill. App. 397; *United &c. Mfg. Co. v. Conard*, 80 N. J. L. 286, 78 Atl. 203, Ann. Cas. 1912A. 412; *Weller v. Hersee*, 10 Hun (N. Y.) 431; *Williams v. Whittell*, 69 App. Div. 340, 74 N. Y. S. 820; *Ross v. Sadgbeer*, 21 Wend. (N. Y.) 166; *Vulcan Iron Works v. Pittsburg-Eastern Co.*, 144 App. Div. 827, 129 N. Y. S. 676; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Boutten v. Wellington &c. Co.*, 128 N. Car. 337, 38 S. E. 920; *Gompers v. Rochester*, 56 Pa. St. 194; *Carey v. Dyer*, 97 Wis. 554, 73 N. W. 29; *Waterman v. Norwalk*, 145 Wis. 663, 130 N. W. 479; *Sixta v. Ontonagon, Valley Land Co.*, 148 Wis. 186, 134 N. W. 34. This sort of legislation obtains in New York, New Jersey, Michigan, Wisconsin, Oregon and Alabama; *Stimson's "American Statute Law"*, p. 455. There is a fourth form of legislation in some states, which enacts that all contracts in writing import a consideration. The following are these states: Iowa, Kansas, Tennessee, Missouri, Texas, California, Dakota, Alabama, Florida, and South Dakota. While the language of the statutes may differ they are all referable to one or the other kinds stated in the text. Legislation has in a great many states accurately defined "a seal".

¹⁶ *Jones v. Morris*, 61 Ala. 518. Here

an instrument which purported to be a deed was so construed, and held that, as the principal did not purport to sign it and the agent executed it in his own name, it could not be varied by parol evidence. *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Hobbs v. Brush &c. Co.*, 75 Mich. 550, 42 N. W. 965; *Aller v. Aller*, 40 N. J. Law 446; *Waln v. Waln* (N. J.), 22 Atl. 203; *Conover's Admr. v. Brown's Exrs.*, 49 N. J. Eq. 156, 23 Atl. 507; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617. In *Fay v. Richards*, 21 Wend. (N. Y.) 626, the head note is: "Where a party obtains what he contracted for, he cannot avoid his contract on the ground that what he received is valueless, unless he shows fraud, or a misapprehension in respect to the subject-matter of the contract." A plea of want of seisin in a vendor who has conveyed real estate with covenant of seisin, is no bar to an action of debt on bond given for the purchase-money. *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Talmadge v. Wallis*, 25 Wend. (N. Y.) 107; *Avery v. Latimer*, 14 Ohio 542; *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; *Osborn v. Kistler*, 35 Ohio St. 99. It is a grossly inaccurate statement of the law to say "that equity always required an actual consideration, and permits the want of it to be shown notwithstanding the seal." The truth is that equity recog-

not a real exception, for a consideration is presumed, and if there is none in reality it may be equally fatal, as between the parties, as in other cases. Such instruments import a consideration. In the absence of any showing to the contrary it will be presumed there was a sufficient consideration.¹⁷ This is true even though

nized the failure of consideration as a defense to a sealed instrument, but never so recognized the want of a consideration. In *re Candor's Appeal*, 27 Pa. St. 119. See further to this effect, *Kennedy v. Howell*, 20 Conn. 349; *Wing v. Chase*, 35 Maine 260; *Walker v. Walker*, 13 Ired. (N. Car.) 335; *Harrell v. Watson*, 63 N. Car. 454; *Meek v. Frantz*, 171 Pa. St. 632, 33 Atl. 413; *Yard v. Patton*, 13 Pa. St. 278; *Sherk v. Endress*, 3 W. & S. (Pa.) 255; *Carter v. King*, 11 Rich. L. (S. Car.) 125; *Harris v. Harris's Exr.*, 23 Grat. (Va.) 737. See also, *Miles v. Hemenway (Ore.)*, 117 Pac. 273. See also, the following cases which deal with the question as to how far consideration can be inquired into, and the effects of statutes abolishing distinctions between sealed instruments and simple contracts. *Carrington v. Potter*, 37 Fed. 767; *Williams v. State*, 25 Fla. 734; *McCoy v. Cassidy*, 96 Mo. 429, 9 S. W. 926; *Bosley v. Bosley*, 85 Mo. App. 424; *Excelsior Mfg. Co. v. Wheelock*, 6 N. M. 410, 28 Pac. 772; *Todd v. Union Dime Co.*, 118 N. Y. 337; *Kam v. Benjamin*, 158 N. Y. 725, 53 N. E. 1126, affg. 10 App. Div. (N. Y.) 419, 42 N. Y. S. 99; *Williams v. Whittell*, 69 App. Div. 340, 74 N. Y. S. 820; *Stegman v. Hollingsworth*, 60 Hun (N. Y.) 597, 14 N. Y. S. 465; *Boutten v. Wellington & Co.*, 128 N. Car. 337, 38 S. E. 920; *Osborne v. Hubbard*, 20 Ore. 318, 25 Pac. 1021; *Stevens v. Philadelphia Ball Club*, 142 Pa. St. 52, 21 Atl. 797; *Frost v. Wolf*, 77 Texas 455, 14 S. W. 440, 19 Am. St. 761; *Jacobs v. Daugherty*, 78 Texas 682, 15 S. W. 160. But the presumption of consideration arising from a seal will not overcome the express language and consideration of a sealed instrument, showing that it is without consideration. *Bender v. Been*, 78 Iowa 283, 43 N. W. 216, 5 L. R. A. 596. In some jurisdictions where a contract

is executed under seal and such seal is not essential it will be given no practical effect and the agreement held good as a simple contract. *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135, 37 Am. St. 199; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. 600; *McNeal & Co. Foundry Co. v. Woltman*, 114 N. Car. 176, 19 S. E. 109. And in case a seal is affixed to an instrument not necessarily under seal and the addition of the seal would render the contract void, it may be treated as surplusage. *Hartnett v. Baker*, 4 Pennew. (Del.) 431, 56 Atl. 672; *McIntosh v. Hodges*, 110 Mich. 319, 322, 68 N. W. 158, 70 N. W. 550; *Long v. Hartwell*, 34 N. J. L. (5 Vroom) 116; *Robinson v. Crowder*, 4 McCord (S. Car.) 519, 17 Am. Dec. 762.

¹⁷ *Lipsmeier v. Vehslage*, 29 Fed. 175; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Whitford v. Herting*, 60 Ill. App. 413; *Murry v. Clayburn*, 2 Bibb (Ky.) 300; *Townsend v. Derby*, 3 Metc. (Mass.) 363; *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726; *Young v. Shepard's Estate*, 124 Mich. 552, 83 N. W. 403; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Nichols & Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110; *Cox v. Sloan*, 158 Mo. 411, 57 S. W. 1052; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. 424; *Dalrymple v. Wyker*, 60 Ohio St. 108, 53 N. E. 713; *Derry v. Holman*, 27 S. Car. 621, 2 S. E. 841; *Tillman v. Heller*, 78 Texas 597, 14 S. W. 700, 11 L. R. A. 628, 22 Am. St. 77; *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003. See *Ginn v. Dolan*, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. 761, and note on the burden of proving want of consideration. But see *Huntington v. Shute*, 180 Mass. 371, 62 N. E. 380, 91 Am. St. 309, in which it is said that although the

there is no recital in the instrument averring consideration, such as, "for value received."¹⁸ This presumption, however, becomes conclusive only when the instrument in question is in the hands of a bona fide holder for value. As against such a holder it cannot be shown that the paper is not founded upon a sufficient consideration.¹⁹

§ 200. When presumed—Consideration declared unnecessary by statute or rule of law.—Neither is a consideration necessary when declared unnecessary by statute. The rule requiring consideration is an equitable and common-law rule which may be repealed by statute.²⁰ Contracts of record, more correctly termed quasi contracts, such as judgments²¹ and recognizances, or indemnity bonds²² need not be supported by a consideration, but are binding by virtue of the fact that they are founded upon the authority and the sanction of a court of competent jurisdiction.

§ 201. When presumed—Contracts in writing.—In most of the code states all written contracts are presumed to have been made on sufficient consideration and the burden of proving want

introduction of the note makes a prima facie case, yet if the question is put in issue the party relying on the note must establish the existence of consideration "by a fair preponderance of the evidence."

¹⁸Holliday v. Atkinson, 5 Barn. & Cr. 501; Grant v. Da Costa, 3 Mau. & Sel. 351; Hatch v. Traves, 11 Ad. & El. 702; Clayton v. Gosling, 5 Barn. & Cr. 360; People v. McDermott, 8 Cal. 288; Benjamin v. Tillman, Fed. Cas. No. 1304, 2 McLean 213; Kendall v. Galvin, 15 Maine 131, 32 Am. Dec. 141; Townsend v. Derby, 3 Metc. (Mass.) 363; Clarke v. Marlow, 20 Mont. 249, 50 Pac. 713; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. 424; Hughes v. Wheeler, 8 Cow. (N. Y.) 77; Hubble v. Fogartie, 3 Rich. (S. Car.) 413, 45 Am. Dec. 775; Arnold v. Sprague, 34 Vt. 402.

¹⁹Goodman v. Harvey, 4 Ad. & El. 870; Murray v. Beckwith, 81 Ill. 43; Shenandoah Nat. Bank v. Marsh, 89 Iowa 273, 57 N. W. 458, 48 Am. St.

381; Howry v. Eppinger, 34 Mich. 29; Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. 373; Greneaux v. Wheeler, 6 Tex. 515.

²⁰Roberts v. Brooks, 71 Fed. 914, affd. 78 Fed. 411, 24 C. C. A. 58; Thompson v. Blanckard, 3 N. Y. 335; Bildersee v. Aden, 62 Barb. (N. Y.) 175. See also, Withers' Admr. v. Withers' Heirs, 30 Ky. L. 1099, 100 S. W. 253, holding that a promise by the recipient of assets of an estate to pay a debt of the estate was not without consideration when the beneficiary is by statute made liable for the debts of the testator to the extent of the assets received.

²¹Reid v. Brown, Wilson Super. Ct. (Ind.) 312; Kimbro v. Clark, 17 Nebr. 403, 22 N. W. 788; Burgess v. Simonson, 45 N. Y. 225; Minnesota Thresher Mfg. Co. v. Schaack, 10 S. Dak. 511, 74 N. W. 445. Contra, Davis v. Davis, 20 Ore. 78, 25 Pac. 140.

²²Buffington v. Bronson, 61 Ohio St. 231, 56 N. E. 762. See ch. 31, Implied or Quasi Contracts.

of consideration rests on the party seeking to impugn it.²³ But this is not always true.

§ 202. **When presumed—Executed contracts.**—And in case a contract has been so far performed by one of the parties that the other party has received all that he contracted for, the consideration, even if lacking at the beginning, attaches and relates back to the inception of the contract and makes it binding on the parties.²⁴ Where a contract has been fully performed and executed the mere fact that it was never supported by a considera-

²³ *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257; *Toomy v. Dumphy*, 86 Cal. 639, 25 Pac. 130; *Southern R. Co. v. Blunt*, 155 Fed. 496; *First M. E. Church v. Donnell*, 95 Iowa 494, 64 N. W. 412; *Byers v. Harris*, 67 Iowa 685, 25 N. W. 879; *Roller v. Ott*, 14 Kans. 609; *Waynick v. Richmond*, 11 Kans. 488; *Fuller v. Scott*, 8 Kans. 25; *Snowden v. Light*, 5 Ky. L. 603; *Williams Com. Co.'s Assignee v. W. A. Shirley*, 136 Ky. 303, 124 S. W. 327; *Houck v. Frisbee*, 66 Mo. App. 16; *Wulze v. Schaefer*, 37 Mo. App. 551; *Shelton v. St. Louis & C. R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063; *Dackich v. Barich*, 37 Mont. 490, 97 Pac. 931; *Western Twine Co. v. Wright*, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438; *Smith v. Gale*, 13 S. Dak. 162, 82 N. W. 385; *Grimsrud Shoe Co. v. Jackson*, 22 S. Dak. 114, 115 N. W. 656; *Kimm v. Wolters (S. Dak.)*, 133 N. W. 277; *Tillman v. Heller*, 78 Tex. 597, 14 S. W. 700, 11 L. R. A. 628, 22 Am. St. 77; *Gulf & C. R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80; *Ash v. Beck (Tex. Civ. App.)*, 68 S. W. 53; *Howard v. Zimpelman (Tex.)*, 14 S. W. 59; *Western Mfg. Co. v. Freeman (Tex. Civ. App.)*, 126 S. W. 924. "Every contract in writing hereinafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done." *First Nat. Bank v. Home Ins. Co. (N. M.)*, 113 Pac. 815, quoting § 12, c. 62, laws 1901. But if the plaintiff attempts, although unnecessarily, to show that there was a consideration for the written agreement, the presumption ceases. *Noe v.*

Keen, 5 Ky. L. 928; *Drexelius v. Leathers*, 12 Ky. L. 142. A telegram containing a warranty of goods constitutes a contract in writing under § 3538, Comp. Laws S. Dak. which makes a written instrument presumptive evidence of consideration. *Western Twine Co. v. Wright*, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438. A recital of consideration in a contract of shipment is not conclusive evidence thereof, but it is prima facie evidence which must be contradicted or such contract will be sustained. *Shelton v. St. Louis & C. R. Co.*, 131 Mo. App. 560, 110 S. W. 627. A contract which recites negotiations leading up to its execution, and the consideration and purpose of the agreement is prima facie evidence of all the facts necessary to give it validity, including its consideration. In *re Wickersham's Estate*, 153 Cal. 603, 96 Pac. 311. But under such statutes, no presumption arises where the contract shows on its face that no consideration exists. *Lane v. Richards*, 119 Iowa 24, 91 N. W. 786. The burden of showing want of consideration sufficient to support a written instrument is upon him seeking to invalidate the instrument. *Grimsrud Shoe Co. v. Jackson (S. Dak.)*, 115 N. W. 656.

²⁴ *Laboyteaux v. Swigart*, 103 Ind. 596, 3 N. E. 373; *Maxwell v. Graves*, 59 Iowa 613, 13 N. W. 758; *Oregon & C. R. Co. v. Forrest*, 128 N. Y. 83, 28 N. E. 137. A promise, although a nudum pactum when made, because the promisee is not bound, may become binding when he subsequently furnishes the consideration by doing what he was expected to do. *Peoples*

tion is immaterial, and affords no ground for rescission.²⁵ This is true even of a promise to make a gift.²⁶ Notwithstanding the donor obtains possession of the gift after it has been delivered, he cannot retain it in case the donee seeks its recovery.²⁷

§ 203. **What is meant by consideration.**—Soon after the theory of consideration was differentiated from the then general rules governing the law of contracts and it had gained recognition as a fundamental principle, we find it spoken of as the *quid pro quo*, essential to an enforceable simple contract.²⁸ This designation of consideration is cumbersome and it was unsatisfactory for the reason that usage associated it with a promise to pay a debt or money obligation, while the origin of the defendant's liability in *assumpsit* was that the plaintiff had been induced to act in reliance upon his promise. And it is upon this latter theory that the modern principle governing consideration rests. Therefore, broadly stated, consideration may be defined as any act or forbearance called for and induced by the promise.²⁹ It is quite generally stated that a consideration sufficient to support a con-

v. Citizen's Nat. Life Ins. Co., (Ga.), 73 S. E. 1034. See also, *Finnerty v. Stratton's Estate* (Colo.), 123 Pac. 667 (involving commissions earned by finding purchaser for real estate). But see as to payment of part of a liquidated claim, post, § 217 et seq; note to *Melroy v. Kenmerer*, 11 L. R. A. (N. S.) 1018; *Ex parte Zeigler*, 83 S. Car. 78, 64 S. E. 513, 21 L. R. A. (N. S.) 1005, and note.

²⁵ *Lamb's Estate v. Morrow* (Iowa), 117 N. W. 1118, 18 L. R. A. (N. S.) 226.

²⁶ *Smith v. Youngblood*, 68 Ark. 255, 58 S. W. 42; *Williams v. Smith*, 66 Ark. 299, 50 S. W. 513; *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *In re Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39; *Berry v. Kinnaird*, 14 Ky. L. 578, 20 S. W. 511; *Grover v. Grover*, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; *Rockwood v. Wiggin*, 16 Gray (Mass.) 402; *Holmes v. McDonald*, 119 Mich. 563, 78 N. W. 647, 75 Am. St. 430; *Walker v. Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885; *Fasset's Appeal*, 167 Pa. St. 448, 31 Atl. 686; *Marshall v.*

Russell, 93 Tenn. 261, 25 S. W. 1070; *Williamson v. Johnson*, 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277, 22 Am. St. 117.

²⁷ *Whiting v. Ralph*, 75 Conn. 41, 52 Atl. 406; *Whitford v. Horn*, 18 Kans. 455; *Allen v. Knowlton*, 47 Vt. 512.

²⁸ Y. B. 37 Hen. VI 8, pl. 18.

²⁹ *Street v. Galt*, 136 App. Div. 724, 121 N. Y. S. 514; *Lyndon Sav. Bank v. International Co.*, 78 Vt. 169, 62 Atl. 50, 112 Am. St. 900. See *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855, where it is said: "Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising," quoting from *Pillan v. Van Mierop*, 3 Burr. 1663. In *Powell on Contracts*, § 330, it is defined as "the material cause of a contract or agreement, or that, in expectation of which each party is induced to give his assent to what is stipulated reciprocally between both

tract may be either a benefit accruing to the promisor, or a loss or disadvantage sustained by the promisee.⁸⁰ However, it will be found that in practically every case the element of benefit to the promisor was accompanied by a detriment to the promisee, while on the other hand, detriment to the promisee unaccompanied by any benefit to the promisor is sufficient consideration to sustain the contract.⁸¹ Consequently in unilateral contracts or contracts

parties." In *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, consideration is defined or designated as "that which the party to whom a promise is made does or agrees to do in exchange for the promise."

⁸⁰ *Alabama G. S. R. Co. v. South R. Co.*, 84 Ala. 570, 3 So. 286, 5 Am. St. 401; *Phoenix Cement Sidewalk Co. v. Russellville & Co. (Ark.)*, 140 S. W. 996; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Kemp v. Nat. Bank*, 109 Fed. 48, 48 C. C. A. 213; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345; *Tompkins v. Philips*, 12 Ga. 52; *Molyneux v. Collier*, 17 Ga. 46; *Doyle v. Knapp*, 4 Ill. (3 Scam.) 334; *Buchanan v. International Bank*, 78 Ill. 500; *People v. Commercial Life Ins. Co.*, 247 Ill. 92, 93 N. E. 90; *Brown v. Marion Commercial Club (Ind. App.)*, 97 N. E. 958; *Glasgow v. Hobbs*, 32 Ind. 440; *Starr v. Earle*, 43 Ind. 478; *Judd v. Martin*, 97 Ind. 173; *Grant v. Isett*, 81 Kans. 439, 105 Pac. 1021; *Van Winkle v. King*, 141 Ky. 691, 141 S. W. 46; *Lemaster v. Burckhart*, 5 Ky. (2 Bibb) 25; *Talbott v. Stemmons*, 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. 531; *Ryan v. Trimble*, 22 Ky. L. 1444, 60 S. W. 633; *Overstreet v. Philips*, 11 Ky. (1 Litt.) 120; *Forster v. Fuller*, 6 Mass. 58; *Train v. Gold*, 22 Mass. 380; *Tucker v. Dolan*, 109 Mo. App. 442, 84 S. W. 1126; *Carr v. Card*, 34 Mo. 513; *Frye v. Hubbell*, 74 N. H. 358, 68 Atl. 325; *Conover v. Stillwell*, 34 N. J. L. (5 Vroom.) 54; *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356; *Powell v. Brown*, 3 Johns. (N. Y.) 100; *Wilkinson v. Chamber of Commerce*, 73 Misc. 141, 130 N. Y. S. 676 (promise by chamber of commerce to pay the owner of property the difference between the price asked

by him and the price offered by a purchaser if he would sell. Held, sale was in part for the benefit of the chamber of commerce); *Erie Forge Co. v. Pennsylvania Iron Works Co.*, 22 Pa. Super. Ct. 550; *Townsley v. Sumrall*, 27 U. S. (2 Pet.) 170; *Utah Nat. Bank v. Nelson (Utah)*, 111 Pac. 907 (giving a number of definitions); *Dorwin v. Smith*, 35 Vt. 69; *Tindall v. Northern Pac. R. Co. (Wash.)*, 107 Pac. 1045. When a benefit is derived on each side it satisfies the demand for a consideration. *John L. Rowan & Co. v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. 998; *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 197. "In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then and his agreement to pay the rest at certain periods while it continues in force. * * * The expression at the beginning of the policy, that the insurance is made 'in consideration of the representations made in the application for this policy,' and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such."

⁸¹ *Dyer v. McPhee*, 6 Colo. 174; *Clark v. Sigourney*, 17 Conn. 511; *White v. Walker*, 31 Ill. 422; *Milby v. Mowry*, 125 Ill. App. 417; *Hughes v. Sprague*, 4 Ill. App. (4 Bradw.) 301; *Druckamiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028; *Hunt v. Dederick*, 105 Ind. 555, 5 N. E. 710; *Pitcher v. Dove*, 99 Ind. 175; *Greene*

when the consideration is executed, it would seem that the primary if not the sole element which gives to the assumptual promise its binding force is a detriment to the promisee.

§ 204. **Distinguished from motive.**—The “motive” for entering into a contract and the “consideration” of the contract are not the same. An expectation of certain results is often the motive which leads to the formation of a contract, but neither the expectation nor the result necessarily make the contract binding. As is said in a frequently quoted case,³² “Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for the promisor’s undertaking.”³³ There

v. Bartholomew, 34 Ind. 235; Moench v. Hower (Iowa), 115 N. W. 229; Brown v. Jennett, 130 Iowa 311, 106 N. W. 747, 5 L. R. A. (N. S.) 725; Riegel v. Ormsby, 111 Iowa 10, 82 N. W. 432; Fain v. Turner’s Admr., 96 Ky. 634, 16 Ky. L. 719, 29 S. W. 628; Ford v. Ingles Coal Co., 31 Ky. L. 382, 102 S. W. 332; Magee v. Catching, 33 Miss. 672; Bigelow v. Bigelow, 95 Maine 17, 49 Atl. 49; Underwood Typewriter Co. v. Century Realty Co., 118 Mo. App. 197, 94 S. W. 787; Halsa v. Halsa, 8 Mo. 303; Houck v. Frisbee, 66 Mo. App. 16; Hartzell v. Saunders, 49 Mo. 433, 8 Am. Rep. 136; Brannock v. Magoon, 141 Mo. App. 316, 125 S. W. 535; Southern Realty Co. v. Hannon, 89 Nebr. 802, 132 N. W. 533; Mack v. Mack, 87 Nebr. 819, 128 N. W. 527; Faulkner v. Gilbert, 57 Nebr. 544, 77 N. W. 1072; Henry v. Dussell, 71 Nebr. 691, 99 N. W. 484; White v. Baxter, 71 N. Y. 254; Kirkman v. Hodgin, 151 N. Car. 588, 66 S. E. 616; Brown v. Ray, 32 N. Car. (10 Ired.) 72, 51 Am. Dec. 379; Watkins v. James, 50 N. Car. 105; Wright v. Snell, 22 Ohio C. Co. 86; Corbett v. Cochran, 3 Hill (S. Car.) 41, 30 Am. Dec. 348; Johnson v. Laurence, 88 S. Car. 496, 70 S. E. 1025; Bills v. Polk, 4 Lea (Tenn.) 494; McKinney v. E. F. Rowson & Co. (Tex. Civ. App.), 146 S. W. 643; Violet v. Patton, 9 U. S. 142; County Court of Barbour County v. Hall, 51 W. Va. 269, 41 S. E. 119. Consideration means not so much that one party is profited as that the other abandons some legal

right in the present, or limits his legal freedom of action in the future as an inducement for the act or promise for the first. *Scriba v. Neely*, 130 Mo. App. 258, 109 S. W. 845. The detriment to the promisee which suffices as a consideration for a contract must be a detriment on entering into the contract, not from the breach of it. *Ridgway v. Grace*, 2 Misc. (N. Y.) 293, 50 N. Y. St. 326, 21 N. Y. S. 934. See also, *Phillips v. Riser*, 8 Ga. App. 634, 70 S. E. 79; *Ruppert v. Frauenknecht*, 146 Ill. App. 397 (holding the execution of an instrument by one not obliged to execute it a sufficient consideration especially when a benefit is thereby conferred on the other party); *Brown v. Jennett*, 130 Iowa 311, 106 N. W. 747, 5 L. R. A. (N. S.) 725 (broker releasing claim for commission against owner upon agreement of the purchaser to pay it). See also, in connection with the last case the case of *Cole v. Mendenhall*, 117 App. Div. 786, 102 N. Y. S. 1030; *Yeager v. Scott* (Tex. Civ. App.), 132 S. W. 83 (attorney abandoning right to a fee); *Utah Nat. Bank v. Nelson* (Utah), 111 Pac. 907.

³² *Philpot v. Gruninger*, 14 Wall. (U. S.) 570, 20 L. ed. 743.

³³ *Levy & Cohn Mule Co. v. Kauffman*, 114 Fed. 170. To same effect, *Brown v. Marion Commercial Club* (Ind. App.), 97 N. E. 958. “The mere presence of some incident to a contract which might, under certain circumstances, be upheld as a consideration for a promise, does not

is a motive for every promise given; therefore, if "motive" and "consideration" were synonymous, every promise, not vitiated by fraud or duress, would be enforceable at law but, as every one well knows, such is not the case.³⁴

§ 205. Concurrent, executed, executory and continuing consideration.—While practically every executory contract must be supported by a consideration, the consideration may be rendered or performed at different times. Classified as to time, consideration may be concurrent, executed, executory or continuing. Concurrent considerations arise in the case of mutual simultaneous promises, the promise of each being the consideration for the other.³⁵

A consideration becomes executed in case the promisee does or forbears to do some lawful act which concludes his part of the contract and renders the proposal of the promisor binding upon such promisor. In short, an executed consideration is an act executed for a promise by virtue of which act the promise is made binding. The defendant has received that for which he bargained and is bound by his promise.³⁶ Sir William Anson defined it in much the same language when he said: "Where the benefit in contemplation of which a promise is made is conferred

necessarily make it the consideration for the promise in that contract. To give it that effect, it must have been offered by one party, and accepted by the other, as one element of the contract." *Fire Ins. Assn. v. Wickham*, 141 U. S. 564. Compare with *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673.

³⁴ *Thomas v. Thomas*, 2 Q. B. 851; *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. 244; *Davis v. Morgan*, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. 171; *Trimble v. Rudy* (Ky.), 53 L. R. A. 353; *Graham v. Spence*, 71 N. J. Eq. 183, 63 Atl. 344; *Langdell's Summary of the Law of Contracts*, § 60. An expectation on the part of the promisee that the promisor would marry her is not a sufficient consideration for a promise. *Raymond v. Sellick*, 10 Conn. 480. Nor is a note given by the maker for the purpose of equalizing the distribution of his

estate supported by a sufficient consideration. *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378. Nor is a note given by the wife in order to save the husband from disgrace supported by a sufficient consideration. *Mawhinney v. Cassio*, 63 N. J. L. 412, 43 Atl. 676.

³⁵ *Cooke v. Oxley*, 3 T. R. 653. See post, § 231. Promise for Promise.

³⁶ A promise with an executed consideration is a unilateral contract. Where there are two promises, each the consideration of the other, the contract is bilateral. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558. "In suits upon unilateral contracts it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound." *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. 213. Thus where a publisher agrees with an author to publish his book and the author con-

at the same time that the promise acquires a binding force,—where it is the doing of an act that concludes the contract,—then the act so done is called an executed or present consideration for the promise.”³⁷

The term “executed consideration” must not be confused with that of “past consideration.” A “past consideration” arises when some act has been done or forborne, without any promise having been given to induce such action and without any being implied by law, whereby a man is benefited. A subsequent promise by the beneficiary of the act to compensate the doer thereof is null and of no binding force. This principle was early recognized.³⁸ The term “past consideration” is a misnomer. It

tracts to pay a designated sum of money to the publisher which the latter is to repay when a specified number of volumes of the book have been sold, and the publisher does nothing toward publishing the book, the agreement of the author to pay the sum named is without consideration and cannot be enforced. *Littlepage v. Neale Pub. Co.*, 34 App. D. C. 257. It is a general rule that where a surety assumes the obligations of suretyship in consideration of something to be done by the creditor, failure on the part of the latter to perform releases the surety. *Lawrence v. Walmsley*, 12 C. B. (N. S.) 799, 104 E. C. L. 799; *Rolt v. Cozens*, 18 C. B. 673, 25 L. J. C. P. 254; *Smith v. Compton*, 6 Cal. 24; *Weldin v. Porter*, 4 Houst. (Del.) 236; *Jones v. Keer*, 30 Ga. 93; *Capps v. Smith*, 3 Scam. (Ill.) 177; *Jeffries v. Lamb*, 73 Ind. 202; *Campbell v. Gates*, 17 Ind. 126; *Port v. Robbins*, 35 Iowa 208; *Griggs v. Moors*, 168 Mass. 354, 47 N. E. 128; *Fay v. Jenks*, 93 Mich. 130, 53 N. W. 163; *Bookstaver v. Jayne*, 60 N. Y. 146, revg. 3 Thomp. & C. 397; *Crigler v. Bedell*, 51 Hun (N. Y.) 638, 20 N. Y. St. Rep. 623, 4 N. Y. S. 653; *Walker v. Goldsmith*, 7 Ore. 161; *Durrell v. Farwell*, 88 Tex. 98, 30 S. W. 539, 31 S. W. 185. Compare with *United & C. Mfg. Co. v. Conard*, 80 N. J. L. 286, 78 Atl. 203, Ann. Cas. 1912A, 412. See also, post, § 254, *Failure of Consideration*. See also, *Gause v. Commonwealth Trust Co.*, 196 N.

Y. 134, 89 N. E. 476. But upon the execution of the consideration or condition the contract becomes absolute. *Kennaway v. Treleavan*, 5 M. & W. 498; *Morton v. Burn*, 7 Ad. & El. 19; *Jones v. Robinson*, 17 L. J. Ex. 36; *Mills v. Blackall*, 11 Q. B. 358; *Butler v. Thomson*, 92 U. S. 412, 23 L. ed. 684; *Frue v. Houghton*, 6 Colo. 318. See also, *Mott v. Jackson (Ala.)*, 55 So. 528; *Buffington v. McNally*, 192 Mass. 198, 78 N. E. 309; *Holt v. United States Security & C. Co. (N. J. L.)*, 67 Atl. 118. See also, *Underwood Typewriter Co. v. Century Realty Co.*, 118 Mo. App. 197, 94 S. W. 787. Where defendant requested certain information which was furnished by plaintiff the law implied a promise to pay for such information where it was received and acted upon. An executed consideration given upon such a request will sustain a promise upon it. *Friedman v. Suttle*, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 933.

³⁷ Anson on Cont. (4th Ed.) 13.

³⁸ 1 Rolle Abr. 11 pl. 1. See also, *Allen v. Bryson*, 57 Iowa 591, 56 Am. Rep. 358; *Whitall v. Morse*, 5 Serg. & R. (Pa.) 358; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588; *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364. In *Forbis v. Inman & C. Co.*, 23 Ore. 68, 31 Pac. 204, it is said, that if the consideration be past and the party derives a benefit, or if he is legally bound to pay, the subsequent promise implies a previous request, the legal effect of which is the same as if it

is in fact no consideration at all.³⁹ But, as hereafter shown, that which is often called a past consideration may support a subsequent promise where there was a request, either actual or implied under such circumstances as evidence an intention that there should be a recompense.

An executory consideration arises where a promise is given to do or refrain from doing some act in return for another promise. In this case the consideration on both sides is executory, i. e., each promises to give or do something in the future. The contract is bilateral, because each of the parties is bound to fulfil an outstanding promise.⁴⁰ A consideration which is executed in part before any promise is given in return therefor is called a continuing consideration, and is valid, the executory portion being sufficient to support the entire promise.⁴¹ "Continuing considerations" might be termed as be-

existed from the beginning, and the contract will be enforced. A promisor may bind himself by merging an oral agreement into a written contract, and cannot escape liability merely because the consideration had passed to the promisee prior to the execution of the written contract. *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063. It seems to be the general rule that past services are not a sufficient consideration for a promise to pay therefor, made at a subsequent time, and after such services have been fully rendered and completed; but in some courts a modified doctrine of moral obligation is adopted, and it is held that a moral obligation founded on previous benefits received by the promisor at the hands of the promisee will support a promise to pay him. *Edson v. Poppe*, 24 S. Dak. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534. See also, note 26 L. R. A. (N. S.) 520, 53 L. R. A. 353.

³⁹ *Hopkins v. Logan*, 5 M. & W. 241; *Brooks v. Haigh*, 10 Ad. & El. 323.

⁴⁰ *People v. Suburban R. Co.*, 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. 141. "A contract may be valid, though based on no consideration presently supplied, if there is a promise that

one shall be supplied." *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652.

⁴¹ *Stilk v. Myrick*, 2 Camp. 317; *Beston v. Roberts*, 58 Ala. 331; *Parke & Co. v. San Francisco Bridge Co.*, 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71; *Irwin v. Locke*, 20 Colo. 148, 36 Pac. 898; *Fisk Min. & Co. v. Reed*, 32 Colo. 506, 77 Pac. 240; *Hargroves v. Cooke*, 15 Ga. 321; *Wiggins v. Keizer*, 6 Ind. 252; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Carroll v. Nixon*, 4 Watts & S. (Pa.) 517. It cannot be doubted that where there is a request and continuous services of value are rendered to the person making the request, the consideration is a valid one, and will support a promise to pay for such services, although some of them were rendered prior to the request. *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16. A promise to pay for the support of a bastard child, past and future, if the stepfather will continue to support it, is binding on the father. *Wiggins v. Keizer*, 6 Ind. 252. Where defendant's wife, at his request, resided with the plaintiff for a year after their marriage, and about the middle of the year defendant promised to pay his wife's board for the whole year at the end thereof, the promise was held good. *Colton v. Wescott*, 3 Bulst. 187. Where the

ing in the "twilight zone" between "past considerations" and "executed considerations."

§ 206. **Good consideration.**—Apart from the time of their rendition or performance, considerations may be distinguished according to their nature as good, valuable and equitable or moral. A "good consideration" is such as that of blood, or of natural love and affection, as when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty.⁴²

§ 207. **Valuable consideration.**—A valuable consideration is generally defined as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."⁴³ There is danger, however, of misunderstanding this definition. The term "benefit" does not refer necessarily to a money gain arising out of the transaction, but has reference to any advantage or benefit slight but recognizable at law, derived by the promisor in return for his promise.⁴⁴ Nor does the term detriment refer to

defendant, after the plaintiff, a doctor, had made several professional calls on his married daughter, promised to pay plaintiff's bill, it was held that the promise was founded on a valid consideration. *Bagley v. Moulton*, 42 Vt. 184.

⁴² 2 Black. Comm. 297; 1 Parsons on Contracts (6th ed.) 431; *Candee v. Connecticut Sav. Bank*, 81 Conn. 372, 71 Atl. 551. See post, § 246. The relationship of parent and child or husband and wife is such that it may constitute a good consideration. *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089; *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *Pierson v. Armstrong*, 1 Iowa 282, 63 Am. Dec. 440; *In re Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. 885; *Stafford v. Stafford*, 41 Tex. 111. See also, *Schneiter v. Carman*, 98 Iowa 276, 67 N. W. 249 (parent and step-child); *Beith v. Beith*, 76 Iowa 601, 41 N. W. 371 (mother-in-law and daughter-in-law); *Bell v. Scammon*, 15 N. H. 381, 41 Am. Dec. 706 (father-in-law and son-in-law).

⁴³ *Currie v. Misa*, L. R. 10 Exch.

162; *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170; *Riegel v. Ormsby*, 111 Iowa 10, 82 N. W. 432; *Price's Admx. v. Price's Admx.*, 23 Ky. L. 1911, 66 S. W. 529; *Cooper v. Hayward*, 71 Minn. 374, 74 N. W. 152, 70 Am. St. 330; *Brownlow v. Wollard*, 66 Mo. App. 636; *In re Lehnhoff's Estate (Nebr.)*, 109 N. W. 164; *Faulkner v. Gilbert*, 57 Nebr. 544, 77 N. W. 1072; *Morse v. Belhows*, 7 N. H. 549, 28 Am. Dec. 372; *Corle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. 157; *Dalrymple v. Wyker*, 60 Ohio St. 108, 53 N. E. 713; *Rector v. Wood*, 24 Ore. 396, 34 Pac. 18, 41 Am. St. 860; *Eastman Land & Co. v. Long-Bell Lumber Co. (Okla.)*, 120 Pac. 276; *Darcey v. Darcey*, 29 R. I. 384, 71 Atl. 595; *Brooklyn City & Co. v. Nat. Bank*, 102 U. S. 14, 26 L. ed. 61.

⁴⁴ *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345; *Talbott v. Stemmon's Admr.*, 10 Ky. L. 33; *Ryan v. Trimble*, 22 Ky. L. 1444, 60 S. W. 633; *Tucker v. Dolan*, 109 Mo. App. 442, 84 S. W. 1126; *Erie Forge Co. v. Pennsylvania Iron Works Co.*, 22 Pa.

any pecuniary loss. Any act done by the promisee, at the request of the promisor, by which the former sustains any loss, trouble or inconvenience, even of the most trifling description, if not utterly worthless in the eye of the law, constitutes a valuable consideration for a promise.⁴⁵ While it is well recognized that the term "valuable consideration" as used in a deed necessarily requires something of actual value, capable of pecuniary measurement, in estimation of law, such as the parting with money or money's worth or an actual change of the purchaser's legal position, the amount is not material if the transaction is otherwise in good faith.⁴⁶ Whether the contract rests upon a valuable consideration must be determined by the conditions as they exist

Super. Ct. 550. Marriage is a valuable consideration. *Nelson v. Brown*, 164 Ala. 397, 57 So. 360, 137 Am. St. 61. The leasing of property may be a valuable consideration for a promise by one who is interested in the property leased. *Person &c. Co. v. Lipps*, 219 Pa. 99, 67 Atl. 1081. See also, *Phoenix Cement &c. Co. v. Russellville Water &c. Co.* (Ark.), 140 S. W. 996. An expectation or a hope, if it has an appreciable value, is a sufficient consideration to support a contract of sale. *Gill v. Stebbins*, 2 Paine (U. S.) 417, Fed. Cas. No. 5431; *Garrow v. Davis*, 15 How. (U. S.) 271.

⁴⁵ *Clark v. Sigourney*, 17 Conn. 511; *Talbott v. Stemmons's Admr.*, 10 Ky. L. 33; *Bigelow v. Bigelow*, 95 Maine 17, 49 Atl. 49; *Nicholson v. Acme Cement Plaster Co.*, 145 Mo. App. 523, 122 S. W. 773; *Tucker v. Dolan*, 109 Mo. App. 442, 84 S. W. 1126. In order to constitute a valuable consideration for a promise, neither the benefit to the promisor nor the detriment to the promisee need be actual. It would be a detriment to the promisee, in a legal sense, if he, at the request of the promisor and on the strength of his promise, performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obliged to perform. *Bigelow v. Bigelow*, 95 Maine 17, 49 Atl. 49. Under the circumstances, remaining in the house was a detriment to the lessee, and this

would be a good consideration for the new agreement between him and his lessor. *White v. Walker*, 31 Ill. 422. It may be a benefit in fact but a detriment at law, as the giving up of a vicious habit. *Dunton v. Dunton*, 18 Vict. L. R. 114; *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256. A change of residence at another's request is a valid consideration for a promise to pay money. *Burgesser v. Wendel*, 73 N. J. L. 286, 62 Atl. 994.

⁴⁶ *Tourville v. Naish*, 3 P. Wms. 306; *Story v. Windsor*, 2 Atk. 631; *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Keys v. Test*, 33 Ill. 316; *Palmer v. Williams*, 24 Mich. 328; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Aubuchon v. Bender*, 44 Mo. 560; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Wood v. Chapin*, 13 N. Y. 509; *Lawrence v. Clark*, 36 N. Y. 128; *Williams v. Shelly*, 37 N. Y. 375; *Weaver v. Barden*, 49 N. Y. 286; *Delancy v. Stearns*, 66 N. Y. 157; *Westbrook v. Gleason*, 79 N. Y. 23; *Cary v. White*, 52 N. Y. 138; *Reed v. Gannon*, 3 Daly (N. Y.) 414, revd., 50 N. Y. 345; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Pickett v. Barron*, 29 Barb. (N. Y.) 505; *Webster v. Van Steenberg*, 46 Barb. (N. Y.) 211; *Penfield v. Dunbar*, 64 Barb. (N. Y.) 239; *Roxborough v. Messick*, 6 Ohio St. 448, 67 Am. Dec. 346; *Munn v. McDonald*, 10 Watts (Pa.) 270; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410; *Spurlock v. Sullivan*, 36 Texas 511.

when it is made, not as they may be at some subsequent time.⁴⁷ In the absence of any sufficient consideration the law supplies no means and affords no remedy to compel the performance of a simple executory agreement made without consideration; such a contract is a nude pact, and not binding in law no matter how strongly it may appeal to the conscience.⁴⁸

§ 208. **Nudum pactum.**—The term *nudum pactum* is of ancient origin, and was originally adopted from the Roman law. In Roman law the *pactum* was an agreement which could not support an action for affirmative relief, though it might supply the subject-matter of a good defense. In medieval times the distinction between the contract and *pactum* was broken down, and it came to be the generally accepted doctrine that any contract was enforceable provided it was based on an adequate “*causa*” or cause. A nude pact then became known as an agreement or promise not supported by a sufficient “*causa*” in the eye of the civil law. The “*causa*” of the civil law corresponds to the consideration of the common law. We adopted the term *nudum pactum* without change.⁴⁹ In St. Germain’s *Doctor and Student*, Dialogue II, chap. 24, it is said: “A nude contract is, when a man maketh a bargain, or a sale of his goods or lands, without any recompense appointed for it; as if I say to another, I sell thee all my land, or else my goods, and nothing is assigned that the other shall give or pay for it; this is a nude contract, and as I take it, it is void in the law and conscience. And a nude or naked promise is, where a man promiseth another to give him certain money such a day, or to build an house, or to do him such certain service, and nothing is assigned for the money, for the building, nor

⁴⁷ *Casserleigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212.

⁴⁸ *Rann v. Hughes*, 7 T. R. 350n; *Cooke v. Oxley*, 3 Term. R. 653; *Wilkinson v. Oliveira*, 1 Bing. N. C. 490; *Smith’s Case*, 3 Leon. 88; *Hendy v. Kier*, 59 Cal. 138; *Lowe v. Bryant*, 32 Ga. 235; *Eagle Mfg. Co. v. Jennings*, 29 Kans. 657, 44 Am. Rep. 668; *Gay v. Botts*, 13 Bush. (Ky.) 299; *Ames v. Taylor*, 49 Maine 381; *Richardson v. Williams*, 49 Maine 558; *Aldridge v. Turner*, 1 Gill & J. (Md.) 427; *Tenney v. Prince*, 4 Pick.

(Mass.) 385, 7 Pick. (Mass.) 243; *Culver v. Banning*, 19 Minn. 303; *State v. Associated Press*, 159 Mo. 410, 81 Am. St. 368; *Reynolds v. Burlington & C. R. Co.*, 11 Neb. 186, 7 N. W. 737; *Lang v. Johnson*, 24 N. H. 302; *Conover v. Stillwell*, 34 N. J. L. 54; *Pearson v. Pearson*, 7 Johns. (N. Y.) 26; *Travis v. Duffau*, 20 Texas 49; *Dorwin v. Smith*, 35 Vt. 69.

⁴⁹ *Street on Foundations of Legal Liability* 36, 37. See also, *Broom’s Leg. Max.* 745.

for the service; these be called naked promises, because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they should not be performed. Also if I promise to another to keep him such certain goods safely to such a time, and after I refuse to take them, there lieth no act on against me for it. But if I take them, and after they be lost or impaired through my negligent keeping, there an action lieth."

Many illustrative cases are referred to in subsequent sections of this chapter, but the following are typical. Thus, a gratuitous promise by the payee of a note to the surety thereon to sue forthwith, not founded upon any new consideration, is a mere nudum pactum.⁵⁰ And a mere gratuitous promise "not to make any trouble" on a claim which could not be enforced, where no advantage accrues to the one party and no loss or disadvantage is caused the other, is a nudum pactum.⁵¹ So, where A had made a binding contract with B to give B a mortgage on certain property, but afterward, as a condition to the execution of the mortgage, exacted a promise from B to pay a debt due from A to C, not included in the original transaction, such promise was held to be without consideration and not enforceable by C.⁵² A promise in writing to sell cotton, not signed by the other party to the agreement and which showed no promise to take and pay for the cotton, or other consideration for the promise to sell, has been held a nudum pactum.⁵³

§ 209. Sufficient consideration or adequate consideration.

—While the courts refuse to give effect to a contract unsupported by a consideration, and insist that the consideration be something

⁵⁰ Mendel v. Cairnes, 84 Ind. 141.

⁵¹ Anderson v. Nystrom, 103 Minn. 168, 114 N. W. 742, 123 Am. St. 320. See also, the leading case of White v. Bluett, 23 L. J. Exch. 36; Widger v. Baxter, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436, and note. A voluntary promise to perform a gratuitous service is a nudum pactum. Brown v. Lyford, 103 Maine 362, 69 Atl. 544. See also, New York Automobile Co. v. Franklin, 49 Misc. (N. Y.) 8, 97 N. Y. S. 781. One is not liable for the breach of a gratui-

tous promise. Hardison v. Reel, 154 N. Car. 273, 70 S. E. 463.

⁵² Runkle & Fouse v. Kettering, 127 Iowa 6, 102 N. W. 142.

⁵³ Mallett v. Watkins, 132 Ga. 700, 64 S. E. 999. See also, Eustice v. Neytrott (Ark.), 140 S. W. 590; Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324. In case the consideration is subsequently furnished a nude pact may become binding. Peeples v. Citizens' Nat. Life Ins. Co. (Ga. App.), 74 S. E. 1034.

of value in the eyes of the law, yet it need not be adequate. Courts do not inquire into the proportionate value of the thing received; that is for the parties to settle. If the parties get that which they bargained for and were not acting under mistake, fraud or the like, the courts do not concern themselves with the relative values exchanged or the wisdom of the contract.⁵⁴ This general doctrine is applied and illustrated in a multitude of cases.^{54a} The promisor will not be heard to say that that which

⁵⁴ "When a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." *Sturlyn v. Albany*, Cro. Eliz. 67; *Brooks v. Haigh*, 10 Ad. & El. 323; *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *Pilkington v. Scott*, 15 M. & W. 657; *Skate v. Beale*, 11 Ad. & El. 983; *Hitchcock v. Coker*, 6 Ad. & El. 438; *Phillips v. Bateman*, 16 East 356; *Kirwan v. Kirwan*, 2 Cr. & M. 617; *Lawrence v. McCalmont*, 2 How. (U. S.) 426, 11 L. ed. 326; *Hoot v. Sorrell*, 11 Ala. 386; *Woodruff v. McDonald*, 33 Ark. 97; *In re Wickersham's Estate* (Cal.), 96 Pac. 311; *Barnum v. Barnum*, 8 Conn. 469, 21 Am. Dec. 689; *Clark v. Sigourney*, 17 Conn. 511; *Bates v. Capital State Bank* (Idaho), 121 Pac. 561; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Chicago & C. R. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Price v. Jones*, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; *Knarr v. Sand Creek Tpk. Co.*, 45 Ind. 278; *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Farber v. National Forge & C. Co.*, 140 Ind. 54, 39 N. E. 249; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797; *Pierce v. Pierce*, 17 Ind. App. 107, 46 N. E. 480; *Drefahl v. Security & C. Bank*, 132 Iowa 563, 107 N. W. 179; *Mail & C. Pub. Co. v. Marks*, 125 Iowa 622, 101 N. W. 458; *Caplice v. Kelley*, 27 Kans. 359; *Matthis v. O'Brien*, 137 Ky. 651, 126 S. W. 156; *Scholl v. Hopper*, 134 Ky. 83, 119 S. W. 770; *Guerand v. Dandeleit*, 32 Md. 561, 3 Am. Rep. 164; *Drury v. Briscoe*, 42 Md. 154; *Hubbard v. Coolidge*, 1 Metc. (Mass.) 84; *Forbs v. St. Louis & C. R. Co.*, 107 Mo. App. 661, 82 S. W. 562; *Clark v. Robertson*, 135 Mo. App. 90, 115 S. W. 514 (promise to release claim for rent bill supported by promise to cut wil-

lows); *Bedel v. Loomis*, 11 N. H. 9; *Sanborn v. French*, 2 Foster (N. H.) 246; *Earl v. Peck*, 64 N. Y. 596; *Oakley v. Boorman*, 21 Wend. (N. Y.) 588; *Worth v. Case*, 42 N. Y. 362; *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; *Van Arsdale v. Brown*, 18 Ohio Cir. Ct. 52; *Threlkeld v. Stewart*, 24 Okl. 403, 103 Pac. 630; *Hind v. Holdship*, 2 Watts (Pa.) 104, 26 Am. Dec. 107; *Harlan v. Harlan*, 20 Pa. St. 303; *Davidson v. Little*, 22 Pa. St. 245, 60 Am. Dec. 81; *Whitefield v. McLeod*, 2 Bay (S. Car.) 380, 1 Am. Dec. 650; *Gore v. Wilson*, 1 Bail. (S. Car.) 597; *Randle v. Harris*, 6 Yerg. (Tenn.) 508; *Giddings v. Giddings' Admr.*, 51 Vt. 227, 31 Am. Rep. 682; *Whittle v. Skinner*, 23 Vt. 531; *Troy Academy v. Nelson*, 24 Vt. 189; *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67; *Tausick v. Tausick*, 52 Wash. 301, 100 Pac. 757; *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610n. "It is sufficient that the consideration be of some value. It may only be of slight value or such as would be of value to the party promising." *Bloodworth v. Booser* (Ark.), 138 S. W. 457.

^{54a} "Adequacy or inadequacy of consideration is a subject to be considered by the parties at the time they make the contract. There is no law regulating the amount of consideration necessary to support a particular promise. If the parties have the capacity to contract and there is no fraud or misplaced confidence, and there is any valuable consideration, the courts will enforce the contract according to its terms." *Atlanta & C. R. Co. v. Camp*, 130 Ga. 1, 60 S. E. 177, 124 Am. St. 151. "Where the parties agree upon a consideration, and it is one of indeterminate value, the courts will not substitute their judgment for that of the

he contracted for was of no value in case he has received the benefit of it, and would not have been entitled to such benefit except for the contract.⁵⁵

contracting parties, but will uphold the contract." *First Nat. Bank v. Farmers' &c. Nat. Bank*, 171 Ind. 323, 86 N. E. 411. If an agreement be made bona fide it will be valid no matter how insignificant the consideration or how slight the inconvenience or damage appears to be to the promisee, provided it be susceptible of legal estimation. *Blake v. Blake*, 7 Iowa 46. A contract by which one's right and interest in the dead, against desecration of their graves, is supported by a consideration. *Orr v. Dayton &c. Tract. Co. (Ind.)*, 96 N. E. 462. The contract between a railroad company and a traction company, whereby each was to bear one-half the cost of installing and maintaining lights on certain corners where the railroad lines of the parties intersected, has been held supported by a sufficient consideration. *Beaumont Tract. Co. v. Texarkana &c. R. Co. (Texas)*, 123 S. W. 124. An agreement not to publish certain matter (said to be defamatory and false) predicated upon the delivery of certain papers, the value of which was not disclosed, has been held supported by a sufficient consideration. *National Life Ins. Co. v. Myers*, 140 Ill. App. 392. The sufficiency of the consideration for an honest bargain could not be inquired into if there was any consideration of value which was not separable at the time into specific values. *Kennedy v. Shaw*, 43 Mich. 359, 5 N. W. 396. One consideration may sustain a number of agreements covering more than one subject. *Studwell v. Bush Co.*, 126 App. Div. (N. Y.) 818, 111 N. Y. S. 293. To same effect, *Johnson v. Wilkerson (Ark.)*, 131 S. W. 690. See also, *McAuliffe v. Vaughan*, 135 Ga. 852, 70 S. E. 322, 33 L. R. A. (N. S.) 255.

⁵⁵ *Mound City Land &c. Assn. v. Slauson*, 65 Cal. 425, 4 Pac. 396; *Mizell Live Stock Co. v. J. J. McCaskill Co.*, 59 Fla. 322, 51 So. 547; *Cates v. Bales*, 78 Ind. 285; *Hall Mfg. Co. v. American R. &c. Co.*, 48 Mich. 331, 12 N. W. 205; *Marston v. Swett*, 82 N. Y. 526; *Angier v. Eaton &c. Co.*, 98

Pa. St. 594; *Sykes v. Chadwick*, 18 Wall. (U. S.) 141, 21 L. ed. 824; *Brooks v. Wage*, 85 Wis. 12, 54 N. W. 997. The licensee of an invalid patent, in case he uses the invention the same as if it were valid and receives the benefit of it, cannot avoid paying the license fees because of the invalidity. *Bartlett v. Holbrook*, 1 Gray (Mass.) 114; *Marston v. Swett*, 66 N. Y. 206, 23 Am. Rep. 43; *Davis v. Gray*, 17 Ohio St. 330; *Kinsman v. Parkhurst*, 18 How. (U. S.) 289, 15 L. ed. 385. But it is otherwise if by reason of the invalidity he has not enjoyed a monopoly contemplated by the license. *White v. Lee*, 14 Fed. 789; *Harlow v. Putnam*, 124 Mass. 553. The advantage to the surety on a contractor's bond of having the work progress has been held sufficient consideration for the surety's promise to pay the owner of a dredge the amount due him if he would continue work. *Taylor v. Guinan*, 67 Misc. (N. Y.) 262, 124 N. Y. S. 408, affd. 141 App. Div. (N. Y.) 921, 126 N. Y. S. 1147. "The fact that a foolish contract was made, so far as one party is concerned, will not invalidate the contract." *Dewitt v. Bowers (Tex. Civ. App.)*, 138 S. W. 1147. The courts are not concerned with the wisdom or folly of contracts. *Florida Assn. v. Stevens*, 61 Fla. 598, 55 So. 981. In the absence of fraud or overreaching the adequacy of the consideration is solely the business of the parties. The court inquires only into its legality, and not whether an improvident bargain has been made. *Nelson v. Brassington*, 64 Wash. 180, 116 Pac. 629. The consideration must be valuable and legal. *Saunders v. Bank of Mecklenburg*, 112 Va. 443, 71 S. E. 714. A contract of employment, which provides for a certain wage in any event and for additional compensation in case the employé stays with his employment for a stipulated period of time, has been held not a nude pact. *Hoag v. Rogers (Ga. App.)*, 72 S. E. 46. See also, *Johnston v. Stearns*, 160 Mich. 247, 125 N. W. 29, 16 Detroit Leg. N. 1076

§ 210. **Insufficient or inadequate consideration.**—To this rule there is one well-recognized exception. Where the things contracted for on each side are either money or something fixed by law at a certain value in money, the courts may pass upon the adequacy of the consideration.⁵⁶ A money consideration is capable of exact and definite admeasurement; its value is fixed and unalterable, and there can be no uncertainty as to its adequacy or inadequacy. Therefore, a promise to pay one sum of money in exchange for another is without consideration, except in so far as the money to be repaid equals the original money plus a legal rate of interest.⁵⁷ And so where the law fixes a certain value on specified services a contract to pay more⁵⁸ or less⁵⁹ than the fee allowed by law is without consideration and invalid, even though such officer exerts himself more than usual.⁶⁰

So, if the consideration is so grossly inadequate as to "shock the conscience", and amounts in itself to conclusive evidence of

(agreement by employer to sell shares of its stock to employé to be paid out of the profits of the business, upheld). See also in connection with this last case, *Herron v. Stewart*, 30 Ohio Cir. Ct. 662.

⁵⁶ *Wolford v. Powers*, 85 Ind. 298, 44 Am. Rep. 16; *Kennedy v. Shaw*, 43 Mich. 359, 5 N. W. 396. "In estimating the value of a thing as the consideration for a promise, there is a manifest distinction between property of a certain and determinate value and things which have but a contingent and indeterminate value." *Bloodworth v. Booser* (Ark.), 138 S. W. 457.

⁵⁷ *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453; *Hey v. Harding*, 21 Ky. L. 771, 53 S. W. 33; *Andrews v. Schmidt*, 10 N. Dak. 1, 84 N. W. 568; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573. A judgment recovered upon a promissory note, payable in gold, was paid in full in legal tender notes. Gold was at a premium and at the time of the above payment the judgment debtor executed to the creditor a note to cover the difference between the value of legal tender notes and gold. The latter note was held to be without consideration. *Turner v. Young*, 27

Ind. 373, 89 Am. Dec. 508. Contra, *Smith v. McKinney*, 22 Ohio St. 200.

⁵⁸ *Stotesbury v. Smith*, 2 Burr. 924; *Morrell v. Quarles*, 35 Ala. 544; *Decatur v. Vermillion*, 77 Ill. 315; *Kernion v. Hills*, 1 La. Ann. 419; *Burk v. Webb*, 32 Mich. 173; *Evans v. Trenton*, 24 N. J. L. 764; *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53; *Crofut v. Brandt*, 58 N. Y. 106, 47 How. Pr. (N. Y.) 263, 17 Am. Rep. 213; *Downs v. McGlynn*, 6 Abb. Pr. (N. Y.) 241, 2 Hill. 14; *Gilmore v. Lewis*, 12 Ohio 281; *Territory v. King*, 1 Ore. 106; *Smith v. Whildin*, 10 Pa. St. 39, 49 Am. Dec. 572; *Dull v. Mammoth Min. Co.*, 28 Utah 467, 79 Pac. 1050.

⁵⁹ *Settle v. Sterling*, 1 Idaho 259; *Hawkeye Ins. Co. v. Brainard*, 72 Iowa 130, 33 N. W. 603; *People v. Board of Police*, 75 N. Y. 38; *Tappan v. Brown*, 9 Wend. (N. Y.) 175. For county clerk agreeing to charge less than legal fee for certain services, see *Duncan v. Scott County*, 68 Ark. 276, 57 S. W. 934. For notary agreeing to accept less than legal fee, see *Ohio Nat. Bank v. Hopkins*, 8 App. D. C. 146.

⁶⁰ *Hatch v. Mann*, 15 Wend. (N. Y.) 44.

fraud, it will enable the promisor to resist a suit for specific performance,⁶¹ or obtain a cancellation of the promise.⁶² The consideration may be so grossly inadequate as to raise a presumption of fraud and mistake.⁶³ But it is the fraud and not the mere inadequacy of the consideration that invalidates the contract.⁶⁴

⁶¹ *Shepherd v. Bevin*, 9 Gill (Md.) 32; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445; *Galloway v. Barr*, 12 Ohio St. 354; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395. An unconscionable contract is one "such as no man in his senses, and not under a delusion, would make on the one hand, and no honest and fair man would accept on the other." *Weninger v. Mitchell*, 139 Mo. App. 420, 122 S. W. 1130.

⁶² *Gwynne v. Heaton*, 1 Brown Ch. 1; *Bowhan v. Patrick*, 36 Fed. 138, revd., 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811; *Stephens v. Ozbourn*, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. 957; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39. The inadequacy must be established as of the date of the contract, and if there were not, at that date, such an inadequacy as to shock the "moral sense" none can arise from subsequent enhancement, depreciation or change of circumstances. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39. Where one sold and another bought a diamond worth \$700 for one dollar, the stone being open to the inspection of both, both being ignorant of its real value and supposing the price to be a fair one, the sale cannot be rescinded. *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610, and note. This case merely goes to the point that, when an executed sale has been fairly made, inadequate consideration is alone insufficient to set it aside. Mere inadequacy of consideration, unless extremely gross, does not per se prove fraud. *Kempner v. Churchill*, 8 Wall. (U. S.) 362, 19 L. ed. 461.

⁶³ *Griffith v. Spratley*, 1 Cox 383; *Cowen v. Adams*, 78 Fed. 536, 24 C. C. A. 198; *Eyre v. Potter*, 15 How. (U. S.) 42, 14 L. ed. 592; *Follett v. Rose*, 3 McLean (U. S.) 332, Fed. Cas. No. 4900. For confidential re-

lation between principal and agent, see *Burke v. Taylor*, 94 Ala. 530, 10 So. 129; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Duncan v. Sanders*, 50 Ill. 475; *Brown v. Budd*, 21 Ind. 442; *Hunter v. McLaughlin*, 43 Ind. 38; *Blake v. Blake*, 7 Clarke (Iowa) 46; *Talbott's Devisees v. Hooser*, 12 Bush (Ky.) 408. For confidential relation between attorney and client, see *Leggat v. Leggat*, 13 Mont. 190, 33 Pac. 5. For confidential relation between guardian and ward, see *Williams v. Powell*, 1 Ired. Eq. (N. Car.) 460; *Green v. Thompson*, 37 N. Car. 365; *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; *Knobb v. Lindsay*, 5 Ohio 468; *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 209; *Mann v. Russey*, 101 Tenn. 596, 49 S. W. 835; *Talbott v. Manard*, 106 Tenn. 60, 59 S. W. 340; *Briscoe v. Bronaugh*, 1 Tex. 326, 46 Am. Dec. 108; *Lowe v. Trundle*, 78 Va. 65; *Crebs v. Jones*, 79 Va. 381.

⁶⁴ *Harrison v. Guest*, 6 De G. M. & G. 424; *Davies v. Cooper*, 5 M. & Cr. 270; *Falcke v. Gray*, 4 Drew. 651; *Mortlock v. Buller*, 10 Ves. 315; *Coles v. Trecothick*, 9 Ves. 234; *Borell v. Dann*, 2 Hare 440; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Winter v. Goebner*, 2 Colo. App. 259, 30 Pac. 51; *Kennedy v. Howell*, 20 Conn. 349; *Stock v. Stoltz*, 34 Ill. App. 645; *Blake v. Blake*, 7 Iowa 46; *Lewis v. Arbuckle*, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; *Wing v. Chase*, 35 Maine 260; *Rice v. Gibbs*, 33 Nebr. 460, 50 N. W. 436; *Aller v. Aller*, 40 N. J. L. 446; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Walker v. Walker*, 13 Ired. (N. Car.) 335; *Harrell v. Watson*, 63 N. Car. 454; *In re Candor's Appeal*, 27 Pa. St. 119; *Yard v. Patton*, 13 Pa. St. 278; *Henrici v. Davidson*, 149 Pa. St. 323, 24 Atl. 334; *Sherk v. Endress*, 3 Watts & S. (Pa.) 255; *Carter v. King*, 11 Rich. L. (S. Car.) 125; *Hunter v. Mills*,

Inadequacy of consideration may also be treated as corroborative evidence of fraud.⁶⁵ Suppression of material facts,⁶⁶ oppressive circumstances⁶⁷ or undue influence⁶⁸ may render the contract unenforceable in equity.

§ 211. **Moral consideration.**—There are dicta in certain early English cases which lay down the broad general doctrine that a moral obligation is a sufficient consideration for an express promise.⁶⁹ This doctrine was, however, repudiated in a note to an early case⁷⁰ where it was stated “An express promise, therefore, as it should seem, can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action of the obligation on which it is founded never could have been en-

29 S. Car. 72, 6 S. E. 907; *Harris v. Harris' Ex'r.*, 23 Grat. (Va.) 737; *Hibbert v. Mackinnon*, 79 Wis. 673, 49 N. W. 21.

⁶⁵ *Clarkson v. Hanway*, 2 P. Wms. 203; *Morse v. Royal*, 12 Ves. Jr. 371; *St. Louis &c. R. Co. v. Phillips*, 66 Fed. 35, 13 C. C. A. 315; *Baldwin v. National Hedge &c. Co.*, 73 Fed. 574, 19 C. C. A. 575; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *St. Louis &c. R. Co. v. Phillips*, 27 U. S. App. 643. “The adequacy of the consideration is an element of the good faith of the transaction.” *Lindley v. Blumberg* (Cal.), 93 Pac. 894; *Wormack v. Rogers*, 9 Ga. 60; *Goff v. Rogers*, 71 Ind. 459; *Boyd v. Ellis*, 11 Iowa 97; *Van Norsdall v. Smith*, 141 Mich. 355, 104 N. W. 660; *Chouteau v. Nuckolls*, 20 Mo. 442; *Shotwell v. Shotwell*, 24 N. J. Eq. 378; *Hamet v. Dundass*, 4 Pa. St. 178; *Davidson v. Little*, 22 Pa. St. 245, 60 Am. Dec. 81; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289. For conveyance by child to parent, see *Muzzy v. Tompkinson*, 2 Wash. 616, 27 Pac. 456, 28 Pac. 652; *Deepwater Council No. 40 v. Renick*, 59 W. Va. 343, 53 S. E. 552; *Fisher v. Shelver*, 53 Wis. 498, 10 N. W. 681; *Kuelkamp v. Hidding*, 31 Wis. 503.

⁶⁶ *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Witherwax v. Riddle*, 121 Ill. 140; *Havlin v. Reed*, 9

Ky. L. 552, 5 S. W. 554; *Bean v. Valle*, 2 Mo. 126; *Hume v. United States*, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. 134.

⁶⁷ *Kellogg v. Kellogg*, 21 Colo. 181, 40 Pac. 358; *Ritchie v. McMullen*, 79 Fed. 522, 25 C. C. A. 50; *McLean v. Equitable Life &c. Society*, 100 Ind. 127, 50 Am. Rep. 779; *Bruguier v. Pepin*, 106 Iowa 432, 76 N. W. 808; *Stewart v. Stewart*, 7 J. J. Marsh (Ky.) 183, 23 Am. Dec. 396; *Musick v. Fisher*, 96 Ky. 15, 16 Ky. L. 277, 27 S. W. 812; *Cobb v. Day*, 106 Mo. 278, 17 S. W. 323; *Rothenbarger v. Rothenbarger*, 111 Mo. 1, 19 S. W. 932.

⁶⁸ *Gartside v. Isherwood*, 1 Bro. C. C. 558; *Fox v. Mackreth*, 2 Cox 158. For conveyance by niece to uncle who had been her guardian, see *Earhart v. Holmes*, 97 Iowa 649, 66 N. W. 898; *Richardson v. Barrick*, 16 Iowa 407; *Beard v. Campbell*, 2 A. K. Marsh (Ky.) 125, 12 Am. Dec. 362; *Case v. Case*, 26 Mich. 484; *Bunch v. Shannon*, 46 Miss. 525; *Simonton v. Bacon*, 49 Miss. 582; *Whelan v. Whelan*, 3 Cow. (N. Y.) 537.

⁶⁹ *Atkins v. Banwell*, 2 East 505; *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Cowp. 289; *Watson v. Turner*, Bull. N. P. 281.

⁷⁰ *Wennall v. Adney*, 3 B. & P. 247.

forced at law, though not barred by any legal maxim or statute provision." The doctrine of this note has gained almost universal acceptance, although there are sporadic cases which seem to announce a contrary doctrine, and the courts of one or two jurisdictions have consistently refused to give it their assent and hold a moral obligation sufficient.⁷¹ It is well settled that a moral consideration alone is not sufficient to give an original cause of action if the obligation on which it is founded was never enforceable at law, though not barred by any legal rule, statutory or otherwise.⁷² There are, however, some apparent differences of

⁷¹ *Barnes v. Hedley*, 2 Taunt. 184; *Lee v. Muggeridge*, 5 Taunt. 36; *Wells v. Horton*, 2 Car. & P. 383; *Robinson v. Hurst*, 78 Md. 59, 26 Atl. 958, 20 L. R. A. 761, 44 Am. St. 266 (in effect overruled by *Linz v. Schuck*, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789n, 124 Am. St. Rep. 481, 14 Am. & Eng. Ann. Cas. 495; *Wilson v. Burr*, 25 Wend. (N. Y.) 386; *Hemphill v. McClimans*, 24 Pa. St. 367; *Bailey v. Philadelphia*, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. 691; *Kelly v. Eby*, 141 Pa. St. 176, 21 Atl. 512; *Holden v. Banes*, 140 Pa. St. 63, 21 Atl. 239; *Brooks v. Merchants' Nat. Bank*, 125 Pa. St. 394, 17 Atl. 418; *Shenk v. Mingle*, 13 Serg. & R. (Pa.) 29; *Bentley v. Lamb*, 112 Pa. St. 480, 4 Atl. 200, 6 Am. Rep. 330, 25 Am. Law Reg. (N. S.) 632; *In re Sutch's Estate*, 201 Pa. 305, 50 Atl. 943; *Commissioners of Canal v. Perry*, 5 Ohio 58; *Ferguson v. Harris*, 39 S. Car. 323, 17 S. E. 782, 39 Am. St. 731. "There is no doubt of the soundness of defendant's position that a perfect moral obligation is in this state a sufficient consideration to support a contract." *Bank of Spartanburg v. Mahon*, 78 S. Car. 408, 59 S. E. 31. The perfect moral obligation referred to in this case is defined as "an obligation of justice, and not of benevolence or piety. Therefore, if a man should pay money to relieve the distresses of my father or mother, this perhaps would be no consideration for my promise to reimburse him. Otherwise it seems in the case of a wife, or son, from whom I am bound to provide. * * * I

think the cases point to a distinction of this sort, which is probably the correct one—where a person is under a legal obligation to pay money, and another pays it for him without request, the law raises an implied assumpsit, to refund without any express promise on his part. But where he was not under any legal obligation, but receives the benefit of a payment made, or labor done by another * * * and I promise to reimburse him * * * and pay him for his trouble, here the express promise is good." *McMorris v. Herndon*, 2 Bail. (S. Car.) 56, 21 Am. Dec. 515. It is provided by statute in South Dakota that "a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no farther or otherwise. Civ. Code S. Dak., § 1225. *Barlow v. Smith*, 4 Vt. 139; *Glass v. Beach*, 5 Vt. 172; *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519. See also, *Hoover v. Wasson*, 11 Colo. App. 589, 105 Pac. 945.

⁷² *Eastwood v. Kenyon*, 11 Ad. & El. 438, 6 Eng. Rul. Cas. 23. *Beaumont v. Reeve*, 8 Q. B. 483; *Littlefield v. Shee*, 2 B. & Ad. 811; *Jennings v. Brown*, 9 M. & W. 496; *Humphrys v. Polak*, 70 L. J. K. B. 752, 2 K. B. 385, 85 L. T. 103, 49 Week. Rep. 612; *Kenen v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 153; *Sponhaur v. Malloy*, 21 Ind. App. 287, 52 N. E. 245; *Nightingale v. Barney*, 4 G.

opinion as to the application of this general doctrine in particular cases.^{72a}

Greene (Iowa) 106; *Allen v. Bryson*, 67 Iowa 591, 56 Am. Rep. 358; *Farnham v. O'Brien*, 22 Maine 475; *Warren v. Whitney*, 24 Maine 561; *Linz v. Schuck*, 106 Md. 220, 67 Atl. 286; 11 L. R. A. (N. S.) 789, 124 Am. St. 481, 14 Am. & Eng. Ann. Cas. 495. *Shepherd v. Young*, 8 Gray (Mass.) 152, was the case of a widow who supported a destitute infant grandchild. She cannot, upon the death of the child by a railroad accident, and the payment of damages to its administrator by the railroad, maintain an action against the administrator for the amount of the child's board, even if he has expressly promised to pay it. *Hale v. Rice*, 124 Mass. 292; *Valentine v. Foster*, 1 Metc. (Mass.) 520; *Robinson v. McAfee*, 59 Mich. 375, 26 N. W. 643. In *Greenbaum v. Elliott*, 60 Mo. 25, *Wagner, J.*, said: "A moral obligation by itself is not a good consideration for a promise. To impart to it any binding character, there must be some antecedent legal ability to which it can attach." *Ehle v. Judson*, 24 Wend. (N. Y.) 97; *Edwards v. Davis*, 16 Johns. (N. Y.) 281; *Sternbergh v. Provost*, 13 Barb. (N. Y.) 365; *Puckett v. Alexander*, 102 N. Car. 95, 8 S. E. 767, 3 L. R. A. 43; *Fisher v. Harrisburg Gas Co.*, 1 Pears. (Pa.) 118; *Hawley v. Farrar*, 1 Vt. 420; *Gooch v. Gooch* (W. Va.), 73 S. E. 56. The only moral obligation which affords consideration for a promise is one which has at some time been a legal duty. *Schwerdt v. Schwerdt*, 141 Ill. App. 386, affd., 235 Ill. 386, 85 N. E. 613. The moral obligation resting on a feme covert to pay for goods purchased by her, under a contract void under the law in force at that time, is not sufficient to support a promise to pay therefor made after the passage of a law giving her the right to contract as if unmarried. *Lyell v. Walbach*, 113 Md. 574, 77 Atl. 1111. For promises to pay for the past support of a relative which the promisor is under no legal obligation to support, see *Mortimer v. Wright*, 6 M. & W. 482; *Cook v. Bradley*, 7 Conn. 57, 18 Am.

Dec. 79; *Schnell v. Neil*, 17 Ind. 29, 79 Am. Dec. 453; *Wiggins v. Keizer*, 6 Ind. 252; *Dawson v. Dawson*, 12 Iowa 512; *Mercer v. Mercer*, 87 Ky. 30, 9 Ky. L. 884, 7 S. W. 401; *Freeman v. Dodge*, 98 Maine 531, 57 Atl. 884, 66 L. R. A. 395. In *Dodge v. Adams*, 19 Pick. (Mass.) 429, where a man's minor children were taken from his house without his consent, and were boarded by his wife's father during the pendency of a suit for a divorce, it was held that the father's express promise to pay after the board had been furnished was void. *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Mills v. Wyman*, 3 Pick. (Mass.) 207 (promise to pay for one's infant children's board held void); *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382. *Freeman v. Robinson*, 38 N. J. Law 383, 20 Am. Rep. 399. In this case goods were sold to a minor child without parent's knowledge or consent. It was held that the parent's subsequent promise to pay was invalid, the court saying: "The principle thus enunciated (that a moral consideration will not support a promise) was approved by Lord Dennen in *Eastwood v. Kenyon*, 11 A. & E. 438, and adopted by the judges of the Queen's Bench in *Beaumont v. Reeve*, 8 Q. B. 486, and may now be considered as the settled law in the English courts. It has also been approved and made the basis of the judicial decision quite generally by the courts in this country." *Chilcott v. Trimble*, 13 Barb. (N. Y.) 502.

^{72a}In Pennsylvania the moral obligation to provide for an illegitimate child is a sufficient consideration to support a trust declared by its parent for the child. *K. X. v. A. Y.* (1894), 34 W. N. Cas. (Pa.) 145; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588. In *Easley v. Gordon*, 51 Mo. App. 637, it is held that a promise by the father of a bastard child to the mother to pay the latter for the support of the child was without consideration and unenforceable since it was the duty of the mother to support the child. The

§ 212. **New promise—Equitable consideration.**—Where a former legal liability is no longer enforceable, and the promisor has received all he bargained for, and by reason of some positive rule of law the promisee cannot obtain what he was promised, a new promise given by the party benefited after capacity to contract is acquired, or after the positive rule of law is repealed, and in those cases when it may be done, operates to waive the statutory provision protecting him, and such new promise is binding. Thus in case an infant enters into a contract, and after he attains his majority he ratifies such contract and gives a new promise, such promise is binding and needs no new consideration. He is then supposed to have acquired the power of deciding for

court states that if the promise had been made to a third person for future support it would have been binding. To same effect, *Wiggins v. Keizer*, 6 Ind. 252. The father is under a moral obligation to support his children, and that duty alone, even in the absence of the bastardy statute, is, without doubt, a sufficient consideration for a bond conditioned for its performance. *Trayer v. Setzer*, 72 Nebr. 845, 101 N. W. 989. For promise by child to pay obligation of parent, see *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79 (a promise by a son to pay for necessities which had previously been furnished to his father, who was indigent); *McElven v. Sloan*, 56 Ga. 208; *Tucker v. Denton*, 32 Ky. L. 521, 106 S. W. 280, 15 L. R. A. (N. S.) 289; *Schroeder v. Fink*, 60 Md. 436; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513. Where the son gave notes for old notes given by his father, it was held that since the son had the right to pay his father's debt he had the right to promise to pay it, he had the right to bind himself as he did, and since he had seen fit to bind himself he was bound. *Matthews v. Williams*, 25 La. Ann. 585. See, however, *Worth v. Daniel*, 1 Ga. App. 15, 57 S. E. 898 (upholding contract by child making provision for the support of its parent). For promise to pay legacy or make a particular distribution of property, see *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11

Am. St. 244; *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453; *Gay v. Botts*, 13 Bush (Ky.) 299; *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64; *Murphy's Estate*, 11 Phila. (Pa.) 2. A promise made subsequent to the sale to correct a mistake or to relieve the purchaser from a hardship resulting from such sale is not supported by a sufficient consideration. *Eakin v. Fentom*, 15 Ind. 59; *Williams v. Hathaway*, 19 Pick. (Mass.) 387; *Smith v. Ware*, 13 Johns. (N. Y.) 257; *Geer v. Archer*, 2 Barb. (N. Y.) 420. Contra, *Cardwell v. Strother*, Litt. Sel. Cas. (Ky.) 429, 12 Am. Dec. 326. For past cohabitation, see *Binnington v. Wallis*, 4 B. & Ald. 650; *Beaumont v. Reeve*, 8 Q. B. 483, 15 L. J. Q. B. (N. S.) 141. Contra, *Shenk v. Mingle*, 13 Serg. & R. (Pa.) 29; *Wyant v. Leshner*, 23 Pa. St. 338. See also, *Robbins v. Potter*, 11 Allen (Mass.) 588. The statement in this case to the effect that past cohabitation is sufficient consideration is obiter. For promise by wife to pay debt of husband, see *Fidelity & Co. v. Thompson*, 128 Cal. 506, 61 Pac. 94; *Grimes v. Grimes*, 28 Ky. L. 549, 89 S. W. 548; *Stevens v. Mayberry*, 82 Maine 65, 19 Atl. 92; *Widger v. Baxter*, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436n. A moral obligation is not a sufficient consideration to support the promise of a third person to pay it. *Widger v. Baxter*, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436n. The moral obligation must have once been a

himself whether the transaction in question is one of meritorious character by which in good conscience he ought to be bound.⁷³

In some jurisdictions it is held that a contract made during coverture, and which was unenforcible because of that fact, may be ratified after discovery without a new consideration. In the leading case on this subject⁷⁴ a married woman carrying on business in her own name bought goods for her business on her own credit, and gave her notes for a part of the price. Subsequent to her husband's death she promised to pay the notes so given and the residue of the price of the goods bought. This promise was held good because supported by the moral obligation founded upon the antecedent valuable consideration created for her own personal benefit. It will be seen that the facts in this case distinguish it from those cases, when the original debt, although contracted in the name of the wife, was in fact or legal effect the debt of the husband. But this distinction is not controlling, and the broad, general principle as laid down in the case reviewed is followed in Pennsylvania⁷⁵

legal one to support a contract. *Hulse v. Hulse*, 155 Ill. App. 343. See also, *Brown v. Akeson* (Kans.), 86 Pac. 299 (promise to pay state judgment).
⁷³ *Cockshott v. Bennett*, 2 T. R. 765, 1 R. R. 617; *Cooper v. Martin*, 4 East 76; *Williams v. Moor*, 11 M. & W. 263, 2 Dowl. (N. S.) 993; *Kay v. Smith*, 21 Beav. 522; *American Freehold Land &c. Co v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366; *Jefford's Admr. v. Ringgold*, 6 Ala. 544; *Conklin v. Ogborn*, 7 Ind. 553; *Heady v. Boden*, 4 Ind. App. 475, 30 N. E. 1119; *Minock v. Shortridge*, 21 Mich. 304; *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307; *Grant v. Beard*, 50 N. H. 129; *Taft v. Sergeant*, 18 Barb. (N. Y.) 320. In some cases it is said that the new promise must be equivalent to a new contract, or must possess all the ingredients of a complete agreement, in order to constitute a valid ratification. But this supposes that the action is on the new promise, in which case no new consideration would be required. *Wat-*

kins v. Stevens, 4 Barb. (N. Y.) 168; *Hodges v. Hunt*, 22 Barb. (N. Y.) 150.

⁷⁴ *Goulding v. Davidson*, 26 N. Y. 604, 25 How. Prac. (N. Y.) 483; *Wilson v. Burr*, 25 Wend. (N. Y.) 386.

⁷⁵ *Hemphill v. McClimans*, 24 Pa. St. 367; *Leonard v. Duffin*, 94 Pa. St. 218; *Brooks v. Merchants' Nat. Bank*, 125 Pa. St. 394, 17 Atl. 418; *Holden v. Banes*, 140 Pa. St. 63, 21 Atl. 239; *Rathfon v. Locher*, 215 Pa. 571, 64 Atl. 790; *Kelly v. Eby*, 141 Pa. St. 176, 21 Atl. 512; *Geiselbrecht v. Geiselbrecht*, 8 Pa. Super. Ct. 183; *Lyons v. Burns*, 8 Pa. Co. Ct. 359; *In re Root*, 11 Lanc. L. Rev. (Pa.) 225. She may ratify a contract to convey real estate in case after discovery she accepts an installment due under the contract. *Brown v. Bennett*, 75 Pa. St. 420; *Trout v. McDonald*, 83 Pa. St. 144. It will be remembered that Pennsylvania holds a moral consideration sufficient. See, ante, § 211. See also, *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27 (which contains an obiter

and also in Louisiana⁷⁶ on the ground that the nullity of the contract made during coverture was not such as rendered it absolutely non existent, and that it simply remained during the marriage without effect. The doctrine of the foregoing cases is contrary to the general rule, it being held that the moral obligation resting upon a woman to make good her promise made during coverture is not a sufficient consideration to uphold an affirmation of the promise made after she becomes discoverd.⁷⁷ But if an express promise is given after discoverdure, when the original obligation, though not legally enforceable, was binding on the wife's separate estate, she is bound thereby.⁷⁸ In some jurisdictions it is held that the new promise will be binding if the original promise was binding in equity upon the wife's separate estate.⁷⁹

In case a contract is entered into which is usurious under the then existing law, and the law declaring the rate of interest charged usurious is subsequently repealed and a new contract is

statement supporting the doctrine of *Goulding v. Davidson*, supra); *Franklin v. Beatty*, 27 Miss. 247 (in support of the New York doctrine, which was in effect later overruled); *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329.

⁷⁶ *Laffitte v. Delogny*, 33 La. Ann. 659. In this case the original note was given as surety for the husband's debt. *Brownson v. Weeks*, 47 La. Ann. 1042, 17 So. 489.

⁷⁷ *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Dixie v. Worthy*, 11 U. C. Q. B. 328; *Watson v. Dunlap*, 2 Cranch (U. S.) 14 Fed. Cas. No. 17282; *Loyd v. Lee*, 1 Str. 94; *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 156; *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632; *Hetherington v. Hixon*, 46 Ala. 297; *Waters v. Bean*, 15 Ga. 358; *Maher v. Martin*, 43 Ind. 314; *Putnam v. Tennyson*, 50 Ind. 456; *Thomas v. Passage*, 54 Ind. 106; *Long v. Brown*, 66 Ind. 160; *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. 456; *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539; *Davis v. Schmidt* (Ind.) 31 N. E. 840; *Gilbert v. Brown*, 29 Ky. L. 1248, 97 S. W. 40, 7 L. R. A. (N. S.) 1053;

Ruppel v. Kissel, 24 Ky. L. 2371, 74 S. W. 220; *Trimble v. Rudy* (sub nomine *Holloway v. Rudy*), 22 Ky. L. 1406, 60 S. W. 650, 53 L. R. A. 353; *Lyell v. Walbach*, 113 Md. 574, 77 Atl. 1111, 33 L. R. A. (N. S.) 741n; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382 (these last two cases overruling *Franklin v. Beatty*, 27 Miss. 347); *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Kennerly v. Martin*, 8 Mo. 698; *Bragg v. Israel*, 86 Mo. App. 338; *Kent v. Rand*, 64 N. H. 45, 5 Atl. 760; *Parker v. Cowan*, 1 Heisk. (Tenn.) 518 (obiter); *Manard v. Cawood*, 1 Tenn. Ch. App. 36 (obiter); *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251.

⁷⁸ *Vance v. Wells*, 8 Ala. 399; *Doss v. Peterson*, 82 Ala. 253, 2 So. 644; *Viser v. Bertrand*, 14 Ark. 267; *Craft v. Rolland*, 37 Conn. 491; *Cleland v. Low*, 32 Ga. 458; *Hubbard v. Bugbee*, 55 Vt. 506, 45 Am. Rep. 637; *Sherwin v. Sanders*, 59 Vt. 499, 9 Atl. 239, 59 Am. Rep. 750.

⁷⁹ *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614; *Felton v. Reid*, 52 N. Car. 269; *Long v. Rankin*, 108 N. Car. 333, 12 S. E. 987; *Wilcox v.*

then entered into, carrying what was formerly the usurious rate of interest, the new contract or promise will be binding.⁸⁰ So in case a usurious contract is entered into which is subsequently abandoned, and a new promise is given to repay the principal at a legal rate of interest, the latter is held binding.⁸¹ So a new promise made on a week day to pay a note, invalid because entered into on Sunday, is supported by a sufficient consideration.⁸² And where goods were purchased on credit on Sunday and a promise was subsequently made on a day other than Sunday to pay for such goods, the new promise was held to be based on sufficient consideration, and to be binding.⁸³ There are many other cases in which the consideration may be distinguished as an equitable consideration, rather than a naked moral consideration, and deemed sufficient to support a contract.⁸⁴

Arnold, 116 N. Car. 708, 21 S. E. 434; Hubbard v. Bugbee, 58 Vt. 172, 2 Atl. 594.

⁸⁰ Flight v. Reed, 1 H. & C. 703; Houser v. Planters' Bank, 57 Ga. 95; Campbell v. Linder, 50 S. Car. 169, 27 S. E. 648. This would seem to be an exception to the general rule. A sale of liquor in violation of law will not be a consideration sufficient to support a new promise to pay for the same after the repeal of the law. Ludlow v. Hardy, 38 Mich. 690. To the same effect, Dever v. Corcoran, 8 N. B. 338. Contra, Carr v. Louisiana Nat. Bank, 29 La. Ann. 258. And where the contract was void at its inception there was no consideration to support the promise, notwithstanding the fact that the act making such contract void was subsequently repealed. Puckett v. Alexander, 102 N. Car. 95, 8 S. E. 767, 3 L. R. A. 43. In this case it does not appear whether or not a new promise was given subsequent to the repealing of the act, but the court intimates that this would have made no difference.

⁸¹ Barnes v. Hedley, 2 Taunt. 184; Garvin v. Linton, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; Kilbourn v. Bradley, 3 Day (Conn.) 356, 3 Am. Dec. 273; Sanford v. Kunz, 9 Idaho 29, 71 Pac. 612; Kassing v. Ordway, 100 Iowa 611, 69 N. W. 1013; Phillips v. Columbus City & C. Assn., 53

Iowa 719, 6 N. W. 121; Vermeule v. Vermeule, 95 Maine 138, 49 Atl. 608; Peters Shoe Co. v. Arnold, 82 Mo. App. 1; Early v. Mahon, 19 Johns. (N. Y.) 147, 10 Am. Dec. 204; Hammond v. Hopping, 13 Wend. (N. Y.) 505.

⁸² Tucker v. West, 29 Ark. 386; Gwinn v. Simes, 61 Mo. 335; Clough v. Davis, 9 N. H. 500. Contra, Pope v. Linn, 50 Maine 83, on the ground that a void or illegal contract cannot be ratified. However, the payment of interest on a note so made does not amount to a new promise. Reeves v. Butler, 31 N. J. L. 224. Contra, Russell v. Murdock, 79 Iowa 101, 44 N. W. 237, 18 Am. St. 348; Sargeant v. Butts, 21 Vt. 99.

⁸³ Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605.

⁸⁴ See Wright v. Jones, 105 Ind. 17, 4 N. E. 281; Pierce v. Walton, 20 Ind. App. 66, 50 N. E. 309; Linz v. Schuck, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 124 Am. St. 481; King v. Duluth & C. R. Co., 61 Minn. 482, 63 N. W. 1105; Stuht v. Sweesy, 48 Nebr. 767, 67 N. W. 748; Mohr v. Rickgauer, 82 Nebr. 398, 47 N. W. 950, 26 L. R. A. (N. S.) 533; Elson v. Poffe, 24 S. Dak. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534; Muir v. Kane, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519 and note. Equitable Consideration, 15 Cent. L. J. 386.

The protection of a statute barring a valid obligation may be waived and a new promise given, in which case the old obligation barred by the statute is a sufficient consideration for the new promise. Thus, in case a new promise is given after the bar of the statute of limitations has attached, the new promise is binding and needs no additional consideration to support it.⁸⁵ But the rule is general in America that a promise

- ⁸⁵ *Barnes v. Hedley*, 2 Taunt. 184; *Chapman v. Barnes*, 93 Ala. 433. 9 So. 589; *Grimball v. Mastin*, 77 Ala. 553; *Turlington v. Slaughter*, 54 Ala. 195; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Chabot v. Tucker*, 39 Cal. 434; *Hoover v. Wasson*, 11 Cal. App. 589, 105 Pac. 945; *Biddell v. Brizzolara*, 56 Cal. 374, 64 Cal. 354, 30 Pac. 609; *Wilcox v. Gregory*, 135 Cal. 217, 67 Pac. 139; *Rose v. Foord*, 96 Cal. 152, 30 Pac. 1114; *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Newlin v. Duncan*, 1 Har. (Del.) 204, 25 Am. Dec. 66; *Bean v. Wheatley*, 13 App. (D. C.) 473, 26 Wash. L. 805; *Pittman v. Elder*, 56 Ga. 371; *Comer v. Allen*, 72 Ga. 1; *Brewster v. Hardeman*, Dud. (Ga.) 138; *Kelly v. Leachman*, 3 Idaho 629, 33 Pac. 44; *Keener v. Crull*, 19 Ill. 189; *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595; *Boone v. Colehour*, 165 Ill. 305, 46 N. E. 253; *Ennis v. Pullman Car Co.*, 165 Ill. 161, 46 N. E. 439; *Drury v. Henderson*, 36 Ill. App. 521, affd. 143 Ill. 315, 32 N. E. 186; *Waldron v. Alexander*, 136 Ill. 550, 27 N. E. 41; *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Harts v. Emery*, 84 Ill. App. 317; *Norton v. Colby*, 52 Ill. 198; *Hulse v. Hulse*, 155 Ill. App. 343; *Carey v. Hess*, 112 Ind. 398, 14 N. E. 235; *Hellman v. Kiene*, 73 Iowa 448, 35 N. W. 516; *Stewart v. McFarland*, 84 Iowa 55; *Emmons v. Overton*, 18 B. Mon. (Ky.) 643; *Head v. Manners*, 5 J. J. Marsh. (Ky.) 255; *Harrison v. Handley*, 1 Bibb (Ky.) 443; *French v. Motley*, 63 Maine 326; *Hall v. Bryan*, 50 Md. 194; *Stewart v. Garrett*, 65 Md. 392; *Ingersoll v. Martin*, 58 Md. 67, 4 Ky. L. 79, 42 Am. Rep. 322; *Georgetown College v. Perkins*, 74 Md. 72, 21 Atl. 551; *Ilsley v. Jewett*, 3 Metc. (Mass.) 439; *Foster v. Shaw*, 2 Gray (Mass.) 148; *Bangs v. Hall*, 2 Pick. (Mass.) 368, 13 Am. Dec. 437; *Perkins v. Cheney*, 114 Mich. 567, 72 N. W. 595, 68 Am. St. 495; *Brisbin v. Farmer*, 16 Gil. (Minn.) 187; *Young v. Perkins*, 29 Minn. 173; *Bowmer v. Peine*, 64 Miss. 99, 8 So. 166; *Tennessee Brewing Co. v. Hendricks*, 77 Miss. 491, 27 So. 526; *Chambers v. Rubey*, 47 Mo. 99, 4 Am. Rep. 318; *Fourth Nat. Bank v. Craig*, 1 Nebr. 849, 96 N. W. 185; *Nelson v. Becker*, 32 Nebr. 99, 48 N. W. 962; *Trumbull v. Tilton*, 21 N. H. 128; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Murray v. Coster*, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333; *McNamee v. Tenny*, 41 Barb. (N. Y.) 495; *Jackson v. Hunt*, 6 Johns. (N. Y.) 16; *Adams v. Orange County Bank*, 17 Wend. (N. Y.) 514; *Morrow v. Morrow*, 12 Hun (N. Y.) 336; *Bryan v. Willcocks*, 3 Cow. (N. Y.) 159; *Ross v. Ross*, 6 Hun (N. Y.) 80; *Davis v. Noyes*, 61 Hun (N. Y.) 87, 39 N. Y. St. 632, 15 N. Y. S. 431; *Harper v. Fairley*, 53 N. Y. 442; *Simonton v. Clark*, 65 N. Car. 525; *Turner v. Chrisman*, 20 Ohio 332; *Davis v. Davis*, 20 Ore. 78, 25 Pac. 140; *Shreiner v. Cummings*, 63 Pa. St. 374; *Levy v. Cadet*, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650; *Brown v. Campbell*, 1 Serg. & R. (Pa.) 176; *In re Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24; *Wells v. Wilson*, 140 Pa. St. 645, 21 Atl. 445; *Linderman v. Pomeroy*, 142 Pa. St. 168, 21 Atl. 820, 24 Am. St. 494; *Lowrey v. Robinson*, 141 Pa. St. 189, 21 Atl. 513; *Wesner v. Stein*, 97 Pa. St. 322; *Fleming v. Fleming*, 33 S. Car. 505, 12 S. E. 257, 26 Am. St. 694; *Savage v. Gaut* (Tenn. Ch. App.) 57 S. W. 170; *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Bell v. Mor-*

waiving the statute must be in writing, or that there must be such a written acknowledgment of the barred debt as will support an implied promise to pay it.⁸⁰ And the acknowledgment or admission must be a clear and unambiguous recognition of an existing debt, and so distinct and express as to preclude all doubt as to the debtor's meaning, and as to the particular debt to which it applies,

rison, 1 Pet. (U. S.) 351; Wetzell v. Bussard, 11 Wheat. (N. S.) 309; Clementson v. Williams, 8 Cranch (U. S.) 72, 3 L. ed. 491; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. 209; Giddings v. Giddings, 51 Vt. 227, 31 Am. Rep. 682; Farmers & Mechanics Bank v. Flint, 17 Vt. 508, 44 Am. Dec. 351; Ray v. Rood, 62 Vt. 293, 19 Atl. 226; Lonsdale v. Brown, 4 Wash. C. C. 86, Fed. Cas. No. 8493; Walker v. Henry, 36 W. Va. 100, 14 S. E. 440; Marshall v. Holmes, 68 Wis. 555, 32 N. W. 685; Pritchard v. Howell, 1 Wis. 131, 60 Am. Dec. 363. In Earle v. Oliver, 2 Ex. 71, 90, the court said: "Where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." It is to be observed that the rule goes no further than a debtor may renew his liability by a promise to pay the debt without further consideration. A barred debt does not constitute a consideration for any other promise than of a promise to pay it. A number of the foregoing cases base the cause of action arising from the new promise on the moral obligation of the promise to discharge the barred debt. No doubt the moral element has had much to do with the shaping of the law on this question, but the real ground for the decisions is that the promisor has received all he bargained for. The remedy of the promisee is merely denied and in case a new promise is given, the statutory bar is waived and the past consideration is sufficient to support the new promise.

Moulton v. Williams, 6 Idaho 424, 55 Pac. 1019.

⁸⁰In re River Steamer Co., L. R. 6 Ch. App. 822; Chapman v. Barnes, 93 Ala. 433, 9 So. 589; Chabot v. Tucker, 39 Cal. 434. The court here said: "An acknowledgement or promise contained in writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of the statute of limitations." Southern Pac. Co. v. Prosser, 122 Cal. 413, 52 Pac. 836, 55 Pac. 145; Paille v. Plant, 109 Ga. 247, 34 S. E. 274; Cleveland Paper Co. v. Mauk, 8 Kans. App. 562, 54 Pac. 1035; Frisbee v. Seaman, 49 Iowa 95; Johnston v. Hussey, 92 Maine 92, 42 Atl. 312; Browmar v. Peine, 64 Miss. 99, 8 So. 166; City Nat. Bank v. Phelps, 86 N. Y. 484; Morrow v. Morrow, 12 Hun (N. Y.) 336; Clark v. Van Amburgh, 14 Hun (N. Y.) 557; Kincaid v. Archibald, 73 N. Y. 189; Sturges v. Burton, 8 Ohio St. 215; Fleming v. Fleming, 33 S. Car. 505, 12 S. E. 257, 26 Am. St. 694; Ray v. Rood, 62 Vt. 293, 19 Atl. 226. See statutes of Arkansas, California, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, Ohio, Oregon, Texas, Vermont, Virginia. A written acknowledgement is unnecessary in Maryland. Beeler v. Clarke, 90 Md. 221, 44 Atl. 1038. Under such a statute an oral promise has no validity. Morehouse v. Morehouse (Cal.), 69 Pac. 625; Hughes v. Treadaway, 116 Ga. 663, 42 S. E. 1035; Adams v. Mills, 49 La. Ann. 775, 22 So. 257; King v. Davis, 168 Mass. 133, 46 N. E. 418; Shapley v. Abbott, 42 N. Y. 443, 1 Am. Rep. 548; Whitehill v. Lowe, 10 Utah 419, 37 Pac. 589. Unless the acknowledgement is delivered it has no effect. Abercombie v. Butts, 72 Ga. 74, 53 Am. Rep. 832;

and must be consistent with a promise to pay.⁸⁷ Moreover, an admission or acknowledgment made to a stranger, not intended to be communicated to, or to influence the conduct of, the creditor, is not effectual to revive a debt barred by the statute of limitations.⁸⁸ In some jurisdictions it is held that when the creditor

Merriam v. Leonard, 6 Cush. (Mass.) 151; *Allen v. Collier*, 70 Mo. 138, 35 Am. Rep. 416. An oral promise cannot be considered in connection with a writing which fails to show an express promise, in aid of the writing. *Johnson v. Hussey*, 92 Maine 92, 42 Atl. 312. A deposition by the maker of a note and signed by him in a case where the obligee was not a party, for which he was allowed a credit, is an acknowledgment of the debt which will defeat the plea of the statute of limitations in an action on the note. *Dinguid v. Schoolfield*, 32 Grat. (Va.) 803. Although that statute provides that a promise to pay a debt barred by the statute of limitations must be in writing, still the promise, if in parol, is not illegal; the only effect of the statute is to take away the right to prove the promise save by written evidence, and if a party permits the promise to be shown by parol evidence, he waives the statutory objection, and the promise is effective to prevent the operation of the statute. *Ray v. Rood*, 62 Vt. 293, 19 Atl. 226.

⁸⁷ *Green v. Humphreys*, 26 Ch. Div. 474; *Kelly v. Telle*, 66 Ark. 464, 51 S. W. 633; *Biddel v. Brizzolara*, 64 Cal. 354; *Pierce v. Merrill*, 128 Cal. 473, 61 Pac. 67, 79 Am. St. 63; *Weinberger v. Weidmann*, 134 Cal. 599, 66 Pac. 869; *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093; *Blackmore v. Neale*, 15 Colo. App. 49, 60 Pac. 952; *Blakeman v. Fonda*, 41 Conn. 561; *Mann v. McDonald*, 6 App. D. C. 548; *Le Roy v. Crownshield*, Fed. Cas. No. 8269, 2 Mason (U. S.) 151; *Lanier v. McCabe*, 2 Fla. 32, 48 Am. Dec. 173; *Slack v. Sexton*, 113 Ga. 617, 38 S. E. 946; *Kirven v. Thornton*, 110 Ga. 276, 34 S. E. 848; *Moulton v. Williams*, 6 Idaho 424, 55 Pac. 1019; *Boone v. Colehour*, 165 Ill. 305, 46 N. E. 253; *Ennis v. Pullman & Co.*, 165 Ill. 161, 46 N. E. 439; *Carroll v. Forsyth*, 69 Ill. 127; *Schmidt v. Pfau*, 114 Ill. 494, 2 N. E. 522; *Nelson v. Hanson*, 92 Iowa 356, 60 N. W. 655,

54 Am. St. 568; *Johnston v. Hussey*, 89 Maine 488, 36 Atl. 993; *Krebs v. Olmsted*, 137 Mass. 504; *Weston v. Hodgkins*, 136 Mass. 326; *Westinghouse Co. v. Boyle*, 126 Mich. 677, 86 N. W. 136, 8 Detroit Leg. N. 180; *Rumsey v. Settle's Est.*, 120 Mich. 372, 79 N. W. 579; *Halladay v. Weeks*, 127 Mich. 363, 86 N. W. 799, 8 Detroit Leg. N. 316, 89 Am. St. 478; *Yarbrough v. Gillard*, 77 Miss. 139, 24 So. 170; *Harms v. Freytag*, 59 Nebr. 359, 80 N. W. 1039; *Holt v. Gage*, 60 N. H. 536; *Kahn v. Crawford*, 28 Misc. (N. Y.) 572, 59 N. Y. S. 853; *Marcum v. Marshall*, 129 Pa. St. 506, 15 Am. St. 730; *Marshall v. Marcum* (Pa.), 18 Atl. 640; *Ward v. Jack*, 172 Pa. St. 416, 51 Am. St. 744; *Wesner v. Stein*, 97 Pa. St. 322; *Randolph v. Thomas*, 107 Tenn. 132, 64 S. W. 5; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636, 5 Sup. Ct. 56. But see *Warren v. Cleveland*, 111 Tenn. 174, 76 S. W. 910, 102 Am. St. 749n; *Clayton v. Watkins*, 19 Tex. Civ. App. 133, 47 S. W. 810; *Cann v. Cann's Heirs*, 45 W. Va. 563, 31 S. E. 923; *Stiles v. Laurel F. O. & Co.*, 47 W. Va. 838, 35 S. E. 986; *Pierce v. Seymour*, 52 Wis. 272, 9 N. W. 71, 38 Am. Rep. 737. The rule as it exists in Maryland is more liberal than as stated generally. *Beeler v. Clarke*, 90 Md. 221, 44 Atl. 1038.

⁸⁸ *Ringo v. Brooks*, 26 Ark. 540; *Biddel v. Brizzolara*, 64 Cal. 354; *Wachter v. Albee*, 80 Ill. 47; *Carroll v. Forsyth*, 69 Ill. 127; *Collard v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Sibert v. Wilder*, 16 Kans. 176, 22 Am. Rep. 280; *Trousdale v. Anderson*, 72 Ky. 276; *Hargis v. Sewell's Admr.*, 87 Ky. 63, 7 S. W. 557, 9 Ky. L. 920; *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706, 70 Am. St. 315; *Williamson v. Williamson*, 50 Mo. App. 194; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *In re Kendrick*, 107 N. Y. 104, 13 N. E. 762; *Bloodgood v.*

sues after the statute has run on the original contract, his cause of action is not on the original contract, for his action thereon is barred, but is on the new promise.⁸⁹ Other authorities hold that the new promise merely takes the case out of the statute, others that it removes the bar of the statute, others still that it renews the original contract and that the creditor's cause of action is on the original contract.⁹⁰

Bruen, 8 N. Y. 362, Seld. notes 129; Fletcher v. Updike, 3 Hun (N. Y.) 350; Hussey v. Kirkman, 95 N. Car. 63; Parker v. Shuford, 76 N. Car. 219; Spangler v. Spangler, 122 Pa. St. 358, 15 Atl. 436, 9 Am. St. 114; Kyle v. Wells, 17 Pa. St. 286, 55 Am. Dec. 555; Parker v. Remington, 15 R. I. 300, 3 Atl. 590, 2 Am. St. 897; Trammel v. Salmon, 2 Bail. (S. Car.) 308; Robbins v. Farley, 2 Strob. (S. Car.) 348; Bachman v. Roller, 9 Baxt. (Tenn.) 409, 40 Am. Rep. 97; Houson v. Jankowskie, 76 Tex. 368, 13 S. W. 369, 18 Am. St. 57; Ft. Scott v. Hickman, 112 U. S. 150, 28 L. ed. 636, 5 Sup. Ct. 56; Cowhick v. Shingle, 5 Wyo. 87, 37 Pac. 689, 25 L. R. A. 608, 63 Am. St. 17. It may be used to corroborate an acknowledgment to the creditor. Cape Girardeau Co. v. Harbison, 58 Mo. 90; Paty v. Davis, 12 Lea. (Tenn.) 286. The acknowledgment, if binding when made to a third person, must be made by the debtor to the third person as agent to convey the acknowledgment to the creditor. O'Hara v. Murphy, 196 Ill. 599, 63 N. E. 1081. As to the creditor himself being agent, see Wolford v. Cook, 71 Minn. 77, 73 N. W. 706, 70 Am. St. 315. The following cases hold that an acknowledgment may be made to a stranger: St. John v. Garrow, 4 Port. (Ala.) 223, 29 Am. Dec. 280; Newkirk v. Campbell, 5 Har. (Del.) 380; In re Succession of Harrell, 3 La. Ann. 323; Utz v. Utz, 34 La. Ann. 752; Oliver v. Gray, 1 Harr. & G. (Md.) 204; Stewart v. Garrett, 65 Md. 392, 5 Atl. 324, 57 Am. Rep. 333n; Whitney v. Bigelow, 4 Pick. (Mass.) 110; Mastin v. Branham, 86 Mo. 643; Philips v. Peters, 21 Barb. (N. Y.) 351; Collett v. Frazier, 56 N. Car. 80. The moral duty which rests upon one to pay an antecedent legal obligation [dormant judgment] which has been extinguished but never performed is

sufficient consideration to support a new promise. Brown v. Akeson, 74 Kans. 301, 86 Pac. 299.

⁸⁹ Southern Pac. R. Co. v. Prosser, 122 Cal. 413, 52 Pac. 836, 55 Pac. 145; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Chabot v. Tucker, 39 Cal. 434; Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42; Biddel v. Brizzolara, 56 Cal. 374; Harrell v. Davis, 108 Ga. 789, 33 S. E. 852; Howe v. Saunders, 38 Maine 350; Little v. Blunt, 9 Pick. (Mass.) 488; Shackelford v. Douglass, 31 Miss. 95; Van Alen v. Feltz, 32 Barb. (N. Y.) 139; Sturges v. Burton, 8 Ohio St. 215, 72 Am. Dec. 582n; Hill v. Henry, 17 Ohio 9; Martin v. Jennings, 52 S. Car. 371, 29 S. E. 807; Fleming v. Fleming, 33 S. Car. 505, 12 S. E. 257, 26 Am. St. 694; Walters v. Kraft, 23 S. Car. 578, 55 Am. Rep. 44n; Smith v. Caldwell, 15 Rich. (S. Car.) 365; McKelvey v. Tate, 3 Rich. (S. Car.) 339; Dickson v. Gordin, 29 S. Car. 343, 7 S. E. 510, 1 L. R. A. 628; Reigne v. Desportes, Dud. L. (S. Car.) 118; Colvin v. Phillips, 25 S. Car. 228; Interstate Building & Loan Assn. v. Goforth, 94 Tex. 259, 59 S. W. 871; Howard v. Windom, 86 Tex. 560, 26 S. W. 483; Womack v. Womack, 8 Tex. 397, 58 Am. Dec. 119; Ireland v. Mackintosh, 22 Utah 296, 61 Pac. 901; Ray v. Rood, 62 Vt. 293, 19 Atl. 226; Walker v. Henry, 36 W. Va. 100, 14 S. E. 440.

⁹⁰ Newlin v. Duncan, 1 Harr. (Del.) 204, 25 Am. Dec. 66; Keener v. Crull, 19 Ill. 189; Frisbee v. Seamen, 49 Iowa 95; Cleveland Paper Co. v. Mauk, 8 Kans. App. 562, 54 Pac. 1035; Stewart v. Garrett, 65 Md. 392, 5 Atl. 324, 57 Am. Rep. 333n; Fiske v. Needham, 11 Mass. 452; Soulden v. Van Rensselaer, 9 Wend. (N. Y.) 203; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Watkins v. Stevens, 4 Barb. (N. Y.) 168; Car-

The same rule applies when a person has been discharged as a bankrupt. A promise to pay a debt barred by such discharge is binding.⁹¹ By the weight of authority the promise may be given at any time after the promisor has been adjudged a bankrupt. He is bound, therefore, even though the promise is given before he has received his discharge in bankruptcy.⁹² In order

shore v. Huyck, 6 Barb. (N. Y.) 583; Philips v. Peters, 21 Barb. (N. Y.) 351; Winchell v. Bowman, 21 Barb. (N. Y.) 448; Esselstyn v. Weeks, 12 N. Y. 635, 2 Abb. Prac. (N. Y.) 272; Wadsworth v. Thomas, 7 Barb. (N. Y.) 445. In Wesner v. Stein, 97 Pa. St. 322, the court says: "The debt is not destroyed by the statute of limitations, but the right of action is lost; when that is restored the declaration is still on the original contract and not on the promise." Suter v. Sheeler, 22 Pa. St. 308; Burr v. Burr, 26 Pa. St. 284; Yaw v. Kerr, 47 Pa. St. 333; Patton v. Hassinger, 69 Pa. St. 311; In re Barclay's Appeal, 64 Pa. St. 69.

⁹¹ Trueman v. Fenton, 2 Cowp. 544; Griel v. Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; Smith v. Richmond, 19 Cal. 476; Lambert v. Schmalz, 118 Cal. 33, 50 Pac. 13; In re Merriam's Estate, Fed. Cas. No. 9479, 44 Conn. 587, 26 Pitts. Leg. J. 120; Mutual Reserve Fund &c. Assn. v. Beatty, 93 Fed. 747, 35 C. C. A. 573; Anderson v. Clark, 70 Ga. 362; Meinhard, Schaul & Co. v. Folsom Bros., 3 Ga. App. 251, 59 S. E. 830; Katz v. Moessinger, 110 Ill. 372; St. John v. Stephenson, 90 Ill. 82; Willis v. Cushman, 115 Ind. 100, 17 N. E. 168; Carey v. Hess, 112 Ind. 398, 14 N. E. 235; Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196; Ford v. Sidebottom, 5 Ky. L. 316; Telle v. Smith's Ex'r, 98 Ky. 464, 33 S. W. 410; Ogden v. Redd, 13 Bush (Ky.) 581; Rosenfield v. Goldsmith, 11 Ky. L. 662, 12 S. W. 928, 13 S. W. 3; Andrien's Succession, 44 La. Ann. 103, 10 So. 388; Webster v. Le Compte, 74 Md. 249, 22 Atl. 232; Baltimore &c. R. Co. v. Clark, 19 Md. 509; Maxim v. Morse, 8 Mass. 127; Lerow v. Wilmarth, 7 Allen (Mass.) 463; Way v. Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Edwards v. Nelson, 51 Mich. 121, 16 N. W. 261; Craig v. Seitz, 63 Mich. 727, 30 N.

W. 347; Higgins v. Dale, 28 Minn. 126, 9 N. W. 583; Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; McWillie v. Kirkpatrick, 28 Miss. 802, 74 Am. Dec. 125; Second National Bank v. Wood, 59 N. H. 407; Christie v. Bridgman, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429; Stewart v. Reckless, 24 N. J. L. 427; Briggs v. Sutton, 20 N. J. L. 581; Shippey v. Henderson, 14 Johns. (N. Y.) 178; Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543; Kull v. Farmer, 78 N. Car. 339; Turner v. Chrisman, 20 Ohio 332; Earnest v. Parke, 4 Rawle (Pa.) 452, 27 Am. Dec. 280; Bolton v. King, 105 Pa. St. 78; Hobough v. Murphy, 114 Pa. 358, 7 Atl. 139; Murphy v. Crawford, 114 Pa. 496, 7 Atl. 142; Kenyon v. Worsley, 2 R. I. 341; Allen v. Ferguson, 18 Wall. (U. S.) 1; Farmers' &c. Bank v. Flint, 17 Vt. 508, 44 Am. Dec. 351; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926. A member of a partnership can only revive debts so as to bind himself. Meinhard, Schaul & Co. v. Folsom, 3 Ga. App. 251, 59 S. E. 830.

⁹² Earle v. Oliver, 2 Exch. 71; Kirkpatrick v. Tattersall, 13 Mees. & Wels. 766; Griel v. Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; Wheeler v. Wheeler, 28 Ill. App. 385; Knapp v. Hoyt, 57 Iowa 591, 10 N. W. 925, 42 Am. Rep. 59; Otis v. Gazlin, 31 Maine 567; Lerow v. Wilmarth, 7 Allen (Mass.) 463; Cook v. Shearman, 103 Mass. 21; Wiggin v. Hodgdon, 63 N. H. 39; Stilwell v. Coope, 4 Denio (N. Y.) 225; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338. But, see Ogden v. Redd, 76 Ky. 581; Thornton v. Nichols & Lemon, 119 Ga. 50, 45 S. E. 785; Meinhard, Schaul & Co. v. Folsom Bros., 3 Ga. App. 251, 59 S. E. 830. Payment on a note to the plaintiff by defendant during pendency of proceedings in bankruptcy does not constitute a new promise within Gen. St. c. 105, § 3 or

to revive the discharged debt, the new promise to pay must be clear, distinct and unequivocal.⁹³ There must be an expression by the discharged debtor of a clear intention to bind himself to pay the debt.⁹⁴ In case the discharged bankrupt promises to pay upon the happening of a contingency it must be shown that the contingency has arisen. Thus "A promise to pay as soon as the bankrupt is able" can be upheld only on satisfactory proof of the discharged bankrupt's ability to pay.⁹⁵ If he promises to pay on certain conditions such conditions must be accepted by the creditor before the promise becomes binding.⁹⁶ The creditor, it has been held, may sue on the old obligation and need not sue on the new promise.⁹⁷ Other cases hold that the new promise creates a new debt for which the prior indebtedness is the consideration merely and that the declaration must be on the new promise.⁹⁸ Likewise a new promise by the debtor to pay the remainder of his obligation, given after he has been discharged from his debt by insolvency proceedings is based upon sufficient consideration

Pub. St. c. 78, § 3. *Heim v. Chapman*, 171 Mass. 347, 50 N. E. 529. The promise may be by parol. *Mutual Reserve Fund &c. Assn. v. Beatty*, 93 Fed. 747; *Lambert v. Schmaltz*, 118 Cal. 33, 50 Pac. 13; *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917. By statute in New York the promise must be in writing. *Bair v. Hilbert*, 82 N. Y. S. 1010, 84 App. Div. (N. Y.) 621; *Mandell v. Levy*, 93 N. Y. S. 545, 47 Misc. (N. Y.) 147; *Tompkins v. Hazen*, 165 N. Y. 18, 58 N. E. 762. A subsequent promise by a third person to pay a discharged bankrupt's debts does not come within the rule, and such promise, if without any other consideration, is void. *McElven v. Sloan*, 56 Ga. 208. See also, *Rice v. Maxwell*, 13 S. & M. (Miss.) 289, 53 Am. Dec. 85; contra, *Webster v. Le Compte*, 74 Md. 249.

⁹³ *Thornton v. Nichols & Lemon*, 119 Ga. 50, 45 S. E. 785; *Shockey v. Mills*, 71 Ind. 288, 36 Am. Rep. 196; *Hubbard v. Farrell*, 87 Ind. 215; *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917; *Mandell v. Levy*, 47 Misc. 147, 93 N. Y. S. 545; *Allen v. Fergu-*

son, 18 Wall. (U. S.) 1; *McDougall v. Page*, 55 Vt. 187.

⁹⁴ *Meech v. Lamon*, 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540. By the above case, *Hubbard v. Farrell*, 87 Ind. 215, is overruled. *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347; *Brewer v. Boynton*, 71 Mich. 254, 39 N. W. 49; *In re Appeal of Canfield*, 4 Walk. (Pa.) 457.

⁹⁵ *Kraus v. Torry*, 146 Ala. 548, 40 So. 956; *Baltimore &c. R. Co. v. Clark*, 19 Md. 509; *Yates Admrs. v. Hollingsworth*, 5 Har. & J. (Md.) 216; *Wiggin v. Hodgdon*, 63 N. H. 39.

⁹⁶ *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917; *International Harvester Co. v. Lyman*, 90 Minn. 275, 96 N. W. 87.

⁹⁷ *Gruenberg v. Treanor*, 40 Misc. (N. Y.) 232, 81 N. Y. S. 675.

⁹⁸ *Katz v. Moessinger*, 110 Ill. 372; *Higgins v. Dale*, 28 Minn. 126, 9 N. W. 583; *Shippey v. Henderson*, 14 Johns. (N. Y.) 178; *Deputy v. Swart*, 3 Wend. (N. Y.) 135; *Murphy v. Crawford*, 114 Pa. St. 496, 7 Atl. 142.

and binding.⁹⁹ But if it was optional with the creditor whether he would receive his share of assets and discharge the debt or refuse his pro rata share and hold the debtor liable in full, and he voluntarily elects to share in the assets and give a discharge in full, such discharge being voluntary is binding and a subsequent promise by the debtor to pay the balance due is without consideration and void.¹

There is a conflict of authority as to whether a new promise, valid under the statute of frauds, is enforceable and needs no new consideration to support it when the original contract is void or unenforceable under the statute, even though the consideration moving from the promisee has already been received. In certain jurisdictions it is held that such new promise cannot be enforced because the original contract was void and not merely voidable and will not sustain a subsequent valid promise. They hold that a precedent sufficient consideration can give no original right of action if the obligation on which it is founded could never have been enforceable at law.² Other cases hold to the con-

⁹⁹ *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13 (holding that an oral promise sufficient to revive the debt and that when an action is brought to recover such a debt it must be based on the new promise).

¹ *Ex parte Hall*, 1 Beacon, 171; *Samuel v. Fairgrieve*, 21 Ont. App. 418; *Rasmussen v. State Nat. Bank*, 11 Colo. 301, 18 Pac. 28; *Montgomery v. Lampton*, 3 Metc. (Ky.) 519; *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406; *Phelps v. Dennett*, 57 Maine 491; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322; *Hale v. Rice*, 124 Mass. 292. "If a debt is voluntarily released by the creditor, a subsequent promise to pay it made by the debtor is without consideration." *Cole v. Bedford*, 97 Mass. 326n; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Valentine v. Foster*, 1 Metc. (Mass.) 520; *Grant v. Porter*, 63 N. H. 229; *Crans v. Hunter*, 28 N. Y. 389; *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366; *Zoebis v. Von Minden*, 47 Hun (N. Y.) 213; *Lewis v. Simons*, 1 Handy (Ohio) 82; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec.

573; *Evans v. Bell*, 15 Lea (Tenn.) 569; contra, *McPherson v. Rees*, 2 Penr. & W. (Pa.) 521; contra, *Willing v. Peters*, 12 Serg. & R. (Pa.) 177. But see, *Snevily v. Read*, 9 Watts (Pa.) 396; *Callahan v. Ackley*, 9 Phila. (Pa.) 99. The rule is otherwise in those jurisdictions where a moral obligation is sufficient to support a subsequent promise. *Baeder v. Barton*, 11 W. N. C. 165, 25 Alb. L. J. 377.

² Antenuptial promise to settle wife's property upon her. *Lloyd v. Fulton*, 91 U. S. 479, 23 L. ed. 363. Antenuptial agreement void under statute. *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305. Verbal agreement to pay debt of another subsequently put in writing. *Hall v. Soule*, 11 Mich. 494. Promise to pay real estate broker commission. *Stout v. Humphries*, 69 N. J. L. 436, 55 Atl. 281. Promise to pay real estate broker commission. *Bagnole v. Madden*, 76 N. J. L. 255, 69 Atl. 967. Oral contract for sale of wheat void under statute of frauds. *Hooker v. Knab*, 26 Wis. 511; *Nichols v. Mitchell*, 30 Wis. 329.

trary on the ground that the statute of frauds does not render a contract void but merely makes it unenforcible and that such contract, though unenforcible so long as it remained in a form prohibited by the statute of frauds is a sufficient consideration for a new and valid promise.³ Still other authorities upholding such contracts base their decision on the moral obligation resting on the promisor to discharge his contract.⁴

§ 213. **Past or antecedent consideration.**—As was pointed out in the paragraph relative to executed considerations,⁵ the general rule is that a past or antecedent consideration is not sufficient to support a subsequent promise.⁶ The reason for this rule is that a past consideration is in law no consideration, and in many instances another sufficient reason would be that one man cannot make another his debtor without his consent.⁷ It

³ *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279. A promise to convey land originally unenforcible because of uncertainty of subject-matter. In this case the promisor received his consideration prior to the making of the new and valid promise. The executed consideration is the basis of the decision. *Daily v. Minnick*, 117 Iowa 563, 91 N. W. 913, 60 L. R. A. 840. Original contract not to be performed within a year. *Stout v. Ennis*, 28 Kans. 706. Promise to pay commission to real estate broker. *Mohr v. Rickgauer*, 82 Nebr. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533; *Anderson v. Best*, 176 Pa. St. 498, 35 Atl. 194. See post, Ch. 30, Statute of Frauds.

⁴ Oral contract to reconvey land. *Brown v. Latham*, 92 Ga. 280, 18 S. E. 421; *Sedgwick v. Tucker*, 90 Ind. 271. Oral promise to answer for debt of another. *Rogers v. Stevenson*, 16 Minn. 68; *Anderson v. Best*, 176 Pa. St. 498, 35 Atl. 194; *Rankin v. Matthiesen*, 10 S. Dak. 628, 75 N. W. 196. The decision in this case is controlled by § 3531 Comp. Laws of the above state. Promise to pay real estate broker commission. *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519. If the new promise is fully performed and performance is accepted, the statute does not apply. *Detroit & C. R. Co. v. Forbes*, 30 Mich. 165.

⁵ Ante, § 205.

⁶ *West v. West*, 1 Rolle Abr. 11, 9 Jur. (N. S.) 400, 7 L. T. 779; *Eastwood v. Kenyon*, 11 A. & E. 438; *Leverone v. Hildreth*, 80 Cal. 139, 22 Pac. 72; *Carson v. Clark*, 1 Scam. (Ill.) 113, 25 Am. Dec. 79; *Pittsburgh & C. R. Co. v. Fawcett*, 56 Ill. 513; *Hobbs v. Greifenhagen*, 91 Ill. App. 400, 194 Ill. 73; *Wiggins v. Keizer*, 6 Ind. 252; *Whipperman v. Hardy*, 17 Ind. App. 142; *Marsh v. Chown*, 104 Iowa 556, 73 N. W. 1046; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Massachusetts & C. Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202; *Ludlow v. Hardy*, 38 Mich. 690; *Widiman v. Brown*, 83 Mich. 241, 47 N. W. 231; *Woodburn v. Renshaw*, 32 Mo. 197; *Boney v. Williams*, 55 N. J. Eq. 691, 38 Atl. 189; *Ehle v. Judson*, 24 Wend. (N. Y.) 97; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *Thompson v. Thompson*, 76 App. Div. (N. Y.) 178, 78 N. Y. S. 389; *Whitall v. Morse*, 5 Serg. & R. (Pa.) 358; *Hess' Estate*, 150 Pa. St. 346, 24 Atl. 676; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. ed. 363.

⁷ See also, *Stokes v. Lewis*, 1 T. R. 20; *Jenkins v. Tucker*, 1 Hen. Bl. 90; *Potter v. Potter*, 3 N. J. L. 415; *Dunbar v. Williams*, 10 Johns. (N. Y.) 249; *Everts v. Adams*, 12 Johns. (N. Y.) 352; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am.

is not enough to show that a service has been rendered and that it was beneficial to the party sought to be charged unless such service was rendered at the promisor's special request or under such conditions as the law will imply such request. A promise given in consideration of past services voluntarily rendered without the promisor's privity or request is purely gratuitous and creates no legal liability.⁸ Thus, it has often been held that if buildings have been erected on land without request they cannot be removed, and the use of them by the owner of the land is not such an acceptance of the benefit as raises an implied promise to pay therefor.⁹ For the

Dec. 237 (where a field was afire and a man removed a stack of wheat to save it, no recovery allowed).

⁸ *Lampleigh v. Braithwait*, Hob. 105, 1 Smith's L. Cas. 67; *Bradford v. Roulston*, 8 Ir. C. L. 468, *Langdell* 450. (In these cases, however, the rule was stated broadly that if there was a previous request the past consideration was sufficient and as to this comparison should be made with *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, which is, perhaps, the leading case in this country and in which no recovery was allowed.) To the same effect, *Merrick v. Giddings*, 1 Mackey (D. C.) 394; *Wulff v. Lindsay*, 8 Ariz. 168, 71 Pac. 963. But see, *Bradford v. Roulston*, 8 Ir. C. L. 468; *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Conant v. Evans*, 202 Mass. 34, 88 N. E. 438; *Bond v. Corbett*, 2 Gil. (Minn.) 209; *Gardner v. Schooley*, 25 N. J. Eq. 150. In *Force v. Haines*, 17 N. J. L. 385, the court said: "The world abounds with acts of this kind, done upon no request; but would more abound with ruinous litigation, and the overthrow of personal rights, and civil freedom, if the law was otherwise." *Sharp v. Hopes*, 74 N. J. L. 191, 64 Atl. 989; *Thompson v. Thompson*, 76 App. Div. (N. Y.) 178, 78 N. Y. S. 389; *Strevel v. Jones' Estate*, 106 App. Div. (N. Y.) 334, 92 N. Y. S. 719, 94 N. Y. S. 627; In re *Pinkerton's Estate*, 49 Misc. (N. Y.) 363, 99 N. Y. S. 492; *Critch v. Watson*, 146 N. Car. 150, 59 S. E. 544, 18 L. R. A. (N. S.) 270, 125 Am. St. 470; *Glenn v. Savage*, 14

Ore. 567, 13 Pac. 442, to recover for goods furnished, the court saying: "The great and leading rule of law is to deem an act done for the benefit of another without his request as a voluntary act of courtesy, for which no action can be sustained." *James v. O'Driscoll*, 2 Bay (S. Car.) 101, 1 Am. Dec. 632; *Austin & Co. v. Swisher*, 1 White & W. Civ. Cas. Ct. App. (Tex.) §75. See also, *Elmore v. Snow* (Ark.), 146 S. W. 476. If the agreement to pay for past services is but the merger or consummation of a prior agreement entered into before the services were rendered the promisor cannot escape liability on the ground that the consideration had passed prior to the execution of the latter contract. *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063.

⁹ *Burn v. Miller*, 4 Taunt. 745; *Ellis v. Hamlen*, 3 Taunt. 52; *Munro v. Butt*, 8 El. & Bl. 738; *Ranger v. Great Western R. Co.*, 5 H. L. C. 72; *Pattinson v. Luckley*, L. R. 10 Ex. 330; *Farnsworth v. Garrard*, 1 Camp. 38; *Graham v. Connersville R. Co.*, 36 Ind. 463, 10 Am. Rep. 56; *Boston v. Dodge*, 1 Blackf. (Ind.) 19, 12 Am. Dec. 205; *Meriam v. Brown*, 128 Mass. 391. (Railroad company laying rails on land, held it could not remove them.) *First Parish v. Jones*, 8 Cush. (Mass.) 184; *Oakman v. Dorchester*, 98 Mass. 57; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371, the court saying: "If one erects a permanent building, like a dwelling house, upon the land of another voluntarily and without any contract

same reason a past forbearance of a creditor to prosecute a claim is no consideration for a new promise.¹⁰ So a note given by a candidate for an elective office in payment of services in promoting his election, but which were not rendered at his request, is void for want of consideration.¹¹ And where chattels are sold without warranty and after sale is completed the seller warrants the thing sold, the warranty so given is void since it is a separate and independent contract not supported by a consideration.¹² A writing which recites that it is given "in consideration of your having endorsed the undermentioned notes" is insufficient because based on a past consideration.¹³ A promise by an administrator to pay for board gratuitously furnished a child since deceased is

with the owner, it becomes a part of the realty, and belongs to the owner of the soil." *Guernsey v. Wilson*, 134 Mass. 482; *Drake v. Bell*, 46 App. Div. 275, 61 N. Y. S. 657; *Crest v. Jack*, 3 Watts (Pa.) 238, 27 Am. Dec. 353; *West v. Stewart*, 7 Pa. St. 122. Compare *Cincinnati R. Co. v. Bensley*, 51 Fed. 738, the court saying: "Thus, if a man build a house upon the land of another, with his assent, the law raises an obligation on his part to pay its value, since he has been benefited to that extent, and, if he did not intend to pay, it was his duty to forbid its construction, or, at least, to give notice that he would not be chargeable. * * * So, if A promises to pay B for a house to be built upon the land of C, provided it be built within a certain time, and the house be not completed within the time named, it is difficult to see how A could be held liable in any form of action, since he has received no benefit from the subsequent performance of the contract. In such case, however, if C should accept the house, he would undoubtedly be bound to pay its value; but, if he failed to do so, the builder would have no recourse but to remove the house from the land." Compare also, *Critcher v. Watson*, 146 N. Car. 150, 59 S. E. 544, 125 Am. St. 470.

¹⁰ *Shealy v. Toole*, 56 Ga. 210; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

¹¹ *Dearborn v. Bowman*, 3 Metc. (Mass.) 155.

¹² Horse sold and afterward war-

ranted sound, *Roscorla v. Thomas*, 3 Q. B. 234; *Roswel v. Vaughan*, Cro. Jac. 196; *Pope v. Lewyns*, Cro. Jac. 630; *Thornton v. Jenyns*, 1 Man. & G. 166. Warranty of saw-mill, *Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 741. "Any subsequent or collateral contract of warranty must arise from an express promise to warrant, and that upon a new consideration distinct from that of the sale itself." *Hodgins v. Plympton*, 11 Pick. (Mass.) 97; *Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. 528 (machinery warranted); *Halchell v. Odom*, 19 N. Car. (2 Dev. & B.) 302 (promise to cure slave or refund money); *Fletcher v. Nelson*, 6 N. Dak. 94, 69 N. W. 53 (horse sold and then warranty given); *Bloss v. Kittridge*, 5 Vt. 28; *Morehouse v. Comstock*, 42 Wis. 626. But where an auctioneer has sold a horse, if before the money is paid and the horse delivered it is agreed that words of warranty shall be written in the bill of sale and the money is then paid and the horse delivered, this warranty rests upon a present consideration. *McGaughey v. Richardson*, 148 Mass. 608, 20 N. E. 202. See also, *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Eastern Ice Co. v. King*, 86 Va. 97, 9 S. E. 506.

¹³ *Bulkley v. Landon*, 2 Conn. 404. An agreement entered into immediately after the execution and delivery of a mortgage that it should not be recorded has been held unsupported by consideration. *Robinson v. Randall* (Ky.), 143 S. W. 769.

without consideration.¹⁴ A note by a wife given to a builder for the price of a structure already built on her land by the order and on the credit of her husband is within the rule that a past consideration is insufficient to support a promise.¹⁵ A promise made after the assignment of a lease to pay the assignee the sum due for breaches of covenant on the part of the former holder of the lease,¹⁶ or a promise by lessors to pay for lumber furnished to lessee, if made after the lumber is furnished;¹⁷ or an agreement to pay additional compensation made after the services are rendered;¹⁸ or a promise made after marriage in consideration thereof;¹⁹ or a promise given after the making of a contract of sale by the purchaser to pay a sum additional to that mentioned in the contract;²⁰ or an agreement after sale not to engage in the same business in that vicinity for a stated period;²¹ or a promise to indemnify a surety made after he became bound,²² are none of them supported by a sufficient consideration because of its being past. However, where the signing of the contract is a part of the preceeding transaction it is supported by a consideration.^{22a}

§ 214. Exceptions to rule that past consideration will not support a subsequent promise.—It is frequently stated that a past consideration will support a promise in case the service or services are rendered on request, no promise or remuneration being made at the time but subsequently an express promise being made to pay for them.²³ It was so held by the early cases on the ground that the past consideration continued until the making of

¹⁴ *Shepherd v. Young*, 74 Mass. (8 Gray) 152, 69 Am. Dec. 242. A promise to pay the past indebtedness of another must be supported by a consideration moving to the promisor. *Kephart v. Buddecke*, 20 Colo. App. 546, 80 Pac. 501.

¹⁵ *Morse v. Mason*, 103 Mass. 560.

¹⁶ *Woodburn v. Renshaw*, 32 Mo. 197.

¹⁷ *Bailey v. Rutjes*, 86 N. Car. 517.

¹⁸ *Fisher v. Harrisburg Gas Co.*, 1 Pears. (Pa.) 118.

¹⁹ *Lloyd v. Fulton*, 91 U. S. 479, 23 L. ed. 363. Such an agreement will not bar the right of creditors of one of the parties. *Albert v. Minn*, 5 Md. 66.

²⁰ *Howard v. McNeil*, 25 Ky. L. 1394, 78 S. W. 142.

²¹ *Cleaver v. Lenhart*, 182 Pa. St. 285, 37 Atl. 811; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199.

²² *Holloway's Assignee v. Rudy*, 22 Ky. L. 1406, 60 S. W. 650, 53 L. R. A. 353.

^{22a} *Bennett v. Baum*, 90 Nebr. 320, 133 N. W. 439.

²³ *Osborne v. Rogers*, 1 Saund. 264; *Hayes v. Warren*, 2 Stra. 933; *Lamp-leigh v. Brathwait*, Hob. 105, 1 Smith's L. Cas. 141; *Hunt v. Bate*, 3 Dyer, 272a; *Bradford v. Roulston*, 8 Ir. Com. Law. 468; *Field v. Dale*, 1 Rolle

the promise by the recipient of the benefit,²⁴ and that the promise when given related back to the previous request and was connected with it.²⁵ But the unqualified statement of the alleged exception is misleading for the reason that in many instances services are rendered upon request and it is either mutually understood that such services are to be gratuitous or the circumstances negative any intention or expectation of reward.²⁶ The rule as commonly stated and as given above is not only open to the objection that it includes matters not properly within the rule but it is also subject to criticism for the further reason that it seems to exclude cases that should be included, for under the rule as stated it would be necessary in all cases to allege and prove a previous request before any recovery could be had.²⁷ There are many cases in which services are rendered on request which should be paid for regardless of a subsequent promise to do so, also there are services rendered without request but under such circumstances that a request and promise to pay should be implied. For the reasons stated the English courts seem to have abandoned the doctrine of "previous request" and "subsequent promise," and they incline to the doctrine that the subsequent promise is admissible in evidence as tending to show that the services were not in-

Abr. 11 pl. 8; *Marsh v. Rainsford*, 2 Leon. 111; *Bosden v. Thinne*, Yelv. 40; *Riggs v. Bullingham*, Cro. Eliz. 715; *Oliverson v. Wood*, 3 Lev. 366; *Friedman v. Suttle*, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 933; *Carson v. Clark*, 1 Scam. (Ill.) 113, 25 Am. Dec. 79; *Pool v. Horner*, 64 Md. 131, 20 Atl. 1036; *Gleason v. Dyke*, 22 Pick. (Mass.) 390; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Wilson v. Edmonds*, 24 N. H. 517; *Allen v. Woodward*, 22 N. H. 544; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Brightly v. McAleer*, 3 Pa. Super. Ct. 442, 40 Week. No. Cas. 107; *Holden v. Banes*, 140 Pa. St. 63, 21 Atl. 239. See also, *Spencer v. Potter's Estate* (Vt.), 80 Atl. 821, holding that "though no legal obligation ever previously existed, yet, if the consideration, even without request, moves directly from the plaintiff to the defendant, and inures directly to the

defendant's benefit, the promise is binding though made upon a past consideration," citing *Boothe v. Fitzpatrick*, 36 Vt. 681. *Lonsdale v. Brown*, 4 Wash. C. C. 148, Fed. Cas. No. 8494.

²⁴*Langdell on Contracts*, § 92. See also, *Wolford v. Powers*, 85 Ind. 294, 306, 307.

²⁵*Lampleigh v. Brathwait*, Hob. 105, 1 Smith L. Cas. 141.

²⁶See, *Osier v. Hobbs*, 33 Ark. 215; *Forbes v. Williams*, 13 Ill. App. 280, 117 Ill. 167; *Allen v. Bryson*, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; *Stone v. Gerrish*, 1 Allen (Mass.) 175; *James v. O'Driscoll*, 2 Bay. (S. Car.) 101, 1 Am. Dec. 632.

²⁷*Hayes v. Warren*, 2 Strange 933. See also, *Victors v. Daviess*, 12 M. & W. 758; *Goldsby v. Robertson*, 1 Blackf. (Ind.) 247; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237. *Broom's Leg. Mat.* *759.

tended to be gratuitous but is not of itself sufficient to form a binding obligation.²⁸

The recognition of implied promises might well be made the test by which to govern all cases. It is sufficiently broad to enforce a liability in every case where the ends of justice will be subserved by so doing. Thus if a benefit is preceded by a request and the request reasonably implies a promise of remuneration the implied promise may be enforced.²⁹ Even if beneficial services are rendered without request the circumstances may be such that a subsequent promise to pay therefor will imply a previous request, the legal effect of which is the same as if it had existed from the beginning and the promise will be enforced.³⁰ This is especially true if it is evident that the services were not intended to be gratuitous.³¹ In practically every case which holds that a past service will support a subsequent promise if the service was rendered upon request it will be found that the previous request virtually amounted to a promise or contemplated a subsequent promise to pay.³² It is submitted therefore that the only true rule that can be universally applied is the one enunciated

²⁸ *Stewart v. Casey*, 1 Ch. (1892) 104; *Paynter v. Williams*, 1 C. & M. 810; *Kennedy v. Broun*, 13 C. B. (N. S.) 677. See also, *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329. But compare *Bradford v. Roulsten*, 8 Ir. C. L. 468.

²⁹ *Powell v. McCord*, 121 Ill. 330, 12 N. E. 262; *Allen v. Bryson*, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259. *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558, 2 N. E. 892, the court saying: "A promise to pay for services is sometimes implied by law; but this is done only when the court can see that they were rendered under such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party soliciting the performance." *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251.

³⁰ *Forbis v. Inman, Paulson & Co.*, 23 Ore. 68, 31 Pac. 204.

³¹ *Edson v. Poppe*, 24 S. D. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534. See also, *Pittsburg Vitrified*

&c. Co. v. Cerebus Oil Co., 79 Kans. 603, 100 Pac. 631. *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Snyder v. Castor*, 4 Yeates (Pa.) 353; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Dec. 100; *Silverthorne v. Wylie*, 96 Wis. 69, 71 N. W. 107.

³² *Friedman v. Suttle*, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 933; "A voluntary courtesy moved by a previous request is a good consideration for an express promise. It is not sufficient, in the absence of benefits conferred, to raise an implied promise." *Clark v. Nat. Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930; *Montgomery v. Downey*, 116 Iowa 632, 88 N. W. 810; *Daily v. Minnick*, 117 Iowa 563, 91 N. W. 913, 60 L. R. A. 840; *Pool v. Horner*, 64 Md. 131, 20 Atl. 1036; *O'Connor v. Beckwith*, 41 Mich. 657, 3 N. W. 166; *Stuht v. Sweesy*, 48 Nebr. 767, 67 N. W. 748; *Wilson v. Edmonds*, 24 N. H. 517; *Hicks v. Burhams*, 10 Johns. (N. Y.) 243; *Paul v. Stackhouse*, 38 Pa. 302; *Seymour v. Marlboro*, 40 Vt. 171; *Silverthorne v. Wylie*, 96 Wis. 69, 71 N. W. 107.

by the English courts to the effect that "a past consideration will support no other promise than such as would be implied by law."³³

One other alleged exception to the general rule that a past consideration will not support a contract is that where one has voluntarily done for another what that other was legally bound to do, it is sufficient consideration to support a subsequent promise given by the person benefited by such voluntary act.³⁴ The reason for the rule seems to be, however, that the subsequent ratification of an act done by a voluntary agent of another without authority from the principal, is equivalent to a previous authority.³⁵ The law will not allow a party to maintain an action for money paid to discharge the debt of another without his consent; for, to allow this would subject every debtor to the power of those who might be disposed to injure him, and who might harass him with suits and burden him with costs, in the most unreasonable and oppressive manner. But if the debtor assents to the payment, the reason for the rule fails; and whether this assent be given before or after the payment is immaterial. Thus if a person pay a mortgage without request of the mortgagor,³⁶ judgment,³⁷ or other form of indebtedness,³⁸ it will support a subsequent promise of reimbursement therefor. But to say generally that the promise to recompense a person who has performed a duty which the promisor was under a legal obligation to perform, is binding although made subsequently to the doing of the act

³³ *Roscorla v. Thomas*, 3 Q. B. 234; *N. E.* 202; *Price v. Towsey*, 3 Litt. (Ky.) 423, 14 Am. Dec. 81.

³⁴ *Osborne v. Rogers*, 1 Saund. 264; *Watson v. Turner*, Bull N. P. 147n; *Paynter v. Williams*, 1 C. & M. 810; *Wing v. Hill*, 1 B. & Ald. 104; *Atkins v. Banwell*, 2 East 505; *Gleason v. Dyke*, 22 Pick. (Mass.) 390.

³⁵ *Watson v. Turner*, Bull N. P. 147n.; *Wing v. Mill*, 1 B. & Ald. 104. The voluntary payment of a judgment against a defendant in favor of a third person, which wholly discharges the same will support a subsequent promise by defendant to repay the same. *Wright v. Farmer's National Bank* (Tex. Civ. App.), 72 S. W. 103.

³⁶ *Gleason v. Dyke*, 22 Pick. (Mass.) 390; but see *Massachusetts Mut. Life Ins. Co. v. Green*, 185 Mass. 306, 70

N. E. 202; *Price v. Towsey*, 3 Litt. (Ky.) 423, 14 Am. Dec. 81.

³⁷ *Osborne v. Rogers*, 1 Saund. 264; *Watson v. Turner*, Bull N. P. 147n; *Paynter v. Williams*, 1 C. & M. 810; *Wing v. Hill*, 1 B. & Ald. 104; *Atkins v. Banwell*, 2 East 505; *Gleason v. Dyke*, 22 Pick. (Mass.) 390.

³⁸ *Bevan v. Tomlinson*, 25 Ind. 253; *Doty v. Wilson*, 14 Johns. (N. Y.) 378; *Wright v. Farmer's Nat. Bank*, 31 Tex. Civ. App. 406, 72 S. W. 103.

³⁹ *Roundtree v. Holloway*, 13 Ala. 357; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Ingraham v. Gilbert*, 20 Barb. (N. Y.) 151; *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. (N. Y.) 450; *Hassinger v. Solms*, 5 Serg. & R. (Pa.) 4.

done without request, is to state the rule too broadly. For if the payment is made gratuitously the subsequent promise would be without consideration. The person making the payment must do so as the voluntary agent of the other and must assume to act on behalf of that other.³⁹

§ 215. **Doing what one is legally bound to do.**—Neither the promise to do, nor the actual doing, of that which the promisor is, by law or subsisting contract, bound to do, is a sufficient consideration to support a promise made to the person upon whom the legal liability rests, either to induce him to perform what he is bound to do or to make a promise so to do.⁴⁰ For

³⁹ See *Massachusetts Mut. Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202.

⁴⁰ *Deacon v. Gridley*, 15 C. B. 295; *Byrd v. Hickman*, 167 Ala. 351, 52 So. 426; *Worthen v. Thompson*, 54 Ark. 151, 15 S. W. 192; *Killough v. Payne*, 52 Ark. 174, 12 S. W. 327; *Sullivan v. Sullivan*, 99 Cal. 187, 33 Pac. 862; *Averill v. Sawyer*, 62 Conn. 560, 27 Atl. 73; *Littlepage v. Neale Pub. Co.*, 34 App. D. C. 257; *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886; *Gardner v. Watson*, 13 Ill. 347; *Hennessey v. Hill*, 52 Ill. 281; *Dennis v. Piper*, 21 Ill. App. 169; *Strange v. Carrington & Co.*, 116 Ill. App. 410; *Freeman v. Brehm* (Ind. App.), 30 N. E. 712, 31 N. E. 545; *Reynolds v. Nugent*, 25 Ind. 328; *Shortle v. Terre Haute & Co.*, 131 Ind. 338, 30 N. E. 1084; *Harris v. Cassady*, 107 Ind. 158, 8 N. E. 29; *Spencer v. McLean*, 20 Ind. App. 626, 50 N. E. 769, 67 Am. St. 271; *Mader v. Cool*, 14 Ind. App. 299, 42 N. E. 945, 56 Am. St. 304; *Runkle v. Kettering*, 127 Iowa 6, 102 N. W. 142; *Grant v. Green*, 41 Iowa 88; *Newton v. Chicago & C. R. Co.*, 66 Iowa 422, 23 N. W. 905; *Ayres v. Chicago & C. R. Co.*, 52 Iowa 478, 3 N. W. 522; *Schuler v. Myton*, 48 Kans. 282, 29 Pac. 163; *Eblin v. Miller*, 78 Ky. 371; *Kernion v. Hills*, 1 La. Ann. 419; *Warren v. Hodge*, 121 Mass. 106; *Trombly v. Klersy* (Mich.), 104 N. W. 419; *Widiman v. Brown*, 83 Mich. 241, 47 N. W. 231; *Keith v. Miles*, 39 Miss. 442, 77 Am. Dec. 685; *Wendover v. Baker*,

121 Mo. 273, 25 S. W. 918; *Esterly & Co. Machine Co. v. Pringle*, 41 Nebr. 265, 59 N. W. 804. ("The rule is elementary that neither the promise to do, nor the actual doing, of that which the promisor is, by law or subsisting contract, bound to do, is a sufficient consideration to support a promise in his favor.") *Billings v. Filley*, 21 Nebr. 511, 32 N. W. 567 (second appeal, 26 Nebr. 537, 42 N. W. 713); *Allen v. Plasmeyere*, 3 Nebr. 187, 90 N. W. 1125; *In re Lehnhoff's Estate* (Nebr.), 109 N. W. 164, 112 N. W. 563; *Conover v. Stillwell*, 34 N. J. L. 54; *Gardner's Admrs. v. Schooley*, 25 N. J. Eq. 150; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Crosby v. Wood*, 6 N. Y. 369; *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160; *Arend v. Smith*, 151 N. Y. 502, 45 N. E. 872; *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53; *Seybolt v. New York & C. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Callagan v. Hallett*, 1 Caines (N. Y.) 104; *Bartlett v. Wyman*, 14 Johns. (N. Y.) 260; *Bickart v. Hoffmann* (Com. Pl. N. Y.), 19 N. Y. S. 472; *Gaar, Scott & Co. v. Green*, 6 N. Dak. 48, 68 N. W. 318; *Withers v. Ewing*, 40 Ohio St. 400; *Sherwin v. Brigham*, 39 Ohio St. 137; *Snyder v. Schardt*, 29 Ohio C. C. 714 (plaintiff had already agreed with another to do the work for a valuable consideration, which he was subsequently requested to perform by de-

this reason if one does, or promises to do merely that which the law requires of him, it is no consideration for a return promise. The principle is illustrated in many cases.

An agreement to pay a nonexpert witness duly subpoenaed and legally bound to attend a trial an additional sum if he will attend such trial as witness is not supported by a consideration.⁴¹ The same is true of a contract whereby the owner of stolen property bargains to repay the sheriff certain of his expenses in case the recovered property is turned over by the sheriff;⁴² or of a promise to pay a constable an amount in excess of his statutory fee, if he will make an arrest,⁴³ or of a promise to pay an executor for the

fendant who promised to pay for such work); *Meyer v. Livesley*, 56 Ore. 383, 107 Pac. 476, 108 Pac. 121; *Erb v. Brown*, 69 Pa. 216; *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195; *Heisch v. Adams*, 81 Tex. 94, 16 S. W. 790; *Chase v. Soule*, 76 Vt. 353, 57 Atl. 754; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Merrill v. Pease*, 51 Vt. 556; *Smith v. Phillips*, 77 Va. 548; *Wadhames v. Page*, 1 Wash. 420, 25 Pac. 462. See also, *Petze v. Leary*, 117 App. Div. 829, 102 N. Y. S. 960. "While it is settled that the promising to do, or the doing of, that which the promisor is already legally bound to do, does not, as a rule, constitute a consideration for a reciprocal promise, or support a reciprocal undertaking given by the promisee, it by no means follows that such promise may not be enforced against such promisor by the promisee, although its enforcement compels the performance of that which was already a legal obligation." *Ward v. Goodrich*, 34 Colo. 369, 82 Pac. 701, 2 L. R. A. (N. S.) 201n, 114 Am. St. 167. Where the defendant, to induce the plaintiff to pay for stock for which he had subscribed, agreed to repurchase such stock or pay the plaintiff a certain sum in case it failed to yield a certain dividend, the promise could not be enforced since it was without consideration. *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303. Where the promotor of a corporation gave it a license to use a patent owned by him, in order to induce one who had subscribed for capital

stock to agree to pay therefor, it was held that the license was without consideration, since the subscriber merely promised to do what he was legally bound to do. *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873.

⁴¹ *Collins v. Godefroy*, 1 Barn. & Ad. 950; *Dodge v. Stiles*, 26 Conn. 463; *Hargarten v. Berz*, 126 Ill. App. 368; *Sweany v. Hunter*, 5 N. Car. (1 Murph.) 181. But if the witness could not be compelled to attend, the agreement to pay extra fees is binding. *Armstrong v. Prentice*, 86 Wis. 210.

⁴² *Worthen v. Thompson*, 54 Ark. 151, 15 S. W. 192. See also, *Killough v. Payne*, 52 Ark. 174, 12 S. W. 327; *Erny v. Sauer* (Pa.), 83 Atl. 205.

⁴³ *Hatch v. Mann*, 15 Wend. (N. Y.) 44. But a public officer may perform services in the detection and punishment of crime and recovery of stolen property which it is not his official duty to perform, and such services will constitute a consideration for a promise. *England v. Davidson*, 11 Ad. & El. 856; *Matthews v. United States*, 32 Ct. Cl. (U. S.) 123, affd. 173 U. S. 381; *Russell v. Stewart*, 44 Vt. 170; *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315. In *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315, the court said: "This case is broadly distinguished from *Pool v. Boston*, 5 Cush. (Mass.) 219." *Warner v. Grace*, 14 Minn. 487; *Gregg v. Pierce*, 53 Barb. (N. Y.) 387. See also, *Brown v. Godfrey*, 33 Vt. 120. And the perform-

performance of duties which by law he was bound to perform,⁴⁴ or an agreement signed in order to induce the executor to perform an act which, as executor, he was bound to perform.⁴⁵ For the same reason an agreement to pay an assistant county clerk extra for the performance of the duties required by his employment is a nudum pactum.⁴⁶ Where the wife, for a consideration, agreed to care for her insane husband, she cannot enforce it, as she owes that duty to her husband regardless of any contract.⁴⁷ Likewise a contract by which the husband agrees to live as a husband should live is not supported by a consideration since the husband agrees to do nothing more than he was already bound to do.⁴⁸ The same is true of contracts by the husband to compensate the wife for the performance of duties rendered obligatory by the marriage relation;⁴⁹ a contract whereby the husband bound himself to pay the wife a certain sum if she will discontinue living apart from him;⁵⁰ an agreement by wife to give all her property to the husband in consideration of his caring for her during her life;⁵¹ and an agreement by a father to pay his minor daughter wages if she will stay at home and help her mother take care of the house.⁵² Where the president of a railway company takes a lease for its benefit in his own name, without assent of the

ance of any service which a constable, policeman or other public officer is not bound to render may be consideration for a contract. *England v. Davidson*, 11 Ad. & El. 856. The plaintiff, a constable, gave information leading to a conviction of a felon, it not being in the line of his duties to furnish such information. It was held he could recover on a promise supported by such a service. *Studley v. Ballard*, 169 Mass. 295, 47 N. E. 1000, 61 Am. St. 286; *Northrop v. Ballard*, 169 Mass. 295, 47 N. E. 1000.

⁴⁴ *Orr v. Sanford*, 74 Mo. App. 187.

⁴⁵ *Slater v. Slater*, 94 N. Y. S. 900, *affd.*, 114 App. Div. (N. Y.) 160, 99 N. Y. S. 564, *affd.*, 188 N. Y. 633, 81 N. E. 1176.

⁴⁶ *Bloodgood v. Wuest*, 69 App. Div. (N. Y.) 356, 74 N. Y. S. 913.

⁴⁷ *Grant v. Green*, 41 Iowa 88. See also, *Foxworthy v. Adams*, 136 Ky. 403, 124 S. W. 381, *Ann. Cas.* 1912 A, 327, holding that services rendered

in caring for and nursing her husband did not furnish consideration for a check given to her by the husband.

⁴⁸ *Miller v. Miller*, 78 Iowa 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. 431.

⁴⁹ *Lee v. Savannah Guano Co.*, 99 Ga. 572, 27 S. E. 159, 59 Am. St. 243; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334, 58 Am. St. 490. This is true even though the wife is by statute given the individual ownership of her earning. *Mewhirter v. Hatten*, 42 Iowa 288, 20 Am. Rep. 618.

⁵⁰ *Copeland v. Boaz*, 9 Baxt. (Tenn.) 223, 40 Am. Rep. 89.

⁵¹ *Ryan v. Dockery*, 134 Wis. 431, 114 N. W. 820, 126 Am. St. 820. See also, *Corcoran v. Corcoran*, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. 390.

⁵² *Bolton v. Terpeny*, 14 N. Y. Week. Dig. 533.

corporation, he is bound to transfer the lease to it upon demand, and any promise such corporation makes to secure the transfer is void for the reason that the president only does what he is legally bound to do.⁵³ Equally a surrender of mortgaged premises by the mortgagor, after condition broken, "to save the mortgagee trouble in getting possession of the mortgaged premises," is no consideration for the mortgagee's agreement to cancel notes secured thereon.⁵⁴ Nor is the release of the mortgaged debt after payment of the debt which it secured, consideration for an agreement allowing the mortgagee to retain certain rents,⁵⁵ nor the surrender of stolen property to the owner, consideration for a promise.⁵⁶

§ 216. Same—Refusal to perform without further recompense.—And the same principle applies to contractual obligations in general where one party to a contract refuses to perform it unless promised some further pay or benefit than the contract provides for, and if the promise is made, it is without consideration and unenforcible for the reason that the party performing the contract in return for the promised additional compensation or benefit agrees to do nothing more than that which he was already bound to do.⁵⁷ While this is undoubtedly

⁵³ Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224.

⁵⁴ Wendover v. Baker, 121 Mo. 273, 25 S. W. 918. An agreement by the mortgagor when in default to surrender possession upon a release from further liability is not supported by a consideration nor is the consideration supplied by the fact that the mortgagor went to the trouble of moving to another residence. Erny v. Sauer (Pa.), 83 Atl. 205.

⁵⁵ Chilson v. Bank of Fairmount, 9 N. Dak. 96, 81 N. W. 33; Jones v. Risley, 91 Texas 1, 32 S. W. 1027.

⁵⁶ Worthen v. Thompson, 54 Ark. 151, 15 S. W. 192; Fink v. Smith, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750. Nor does the return of such property support a promise to permit the holder to retain a portion of it. Morgan v. Hodges, 89 Mich. 404, 50 N. W. 876, 15 L. R. A. 438. Nor is the return of the property to the owner consideration for a promise to

give the property back to the holder in case the thief is not convicted of its theft. Fink v. Smith, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750.

⁵⁷ Harris v. Watson, Peake 102; Stilk v. Myrick, 2 Campb. 317, 6 Esp. 129; Frazer v. Hatton, 2 C. B. (N. S.) 512; Shriner v. Craft, 166 Ala. 146, 51 So. 884, 28 L. R. A. (N. S.) 450n; Alaska Packers Assn. v. Domenico, 117 Fed. 99, 54 C. C. A. 485; Willingham Sash & Co. v. Drew, 117 Ga. 850, 45 S. E. 237; Nelson v. Pickwick Assn. Co., 30 Ill. App. 333; Moran v. Peace, 72 Ill. App. 135; Ritenour v. Mathews, 42 Ind. 7; Reynolds v. Nugent, 25 Ind. 328; Ayers v. Chicago & C. R. Co., 52 Iowa 478, 3 N. W. 522; King v. Duluth & C. R. Co., 61 Minn. 482, 63 N. W. 1105; Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844; Wear Bros. v. Schmelzer, 92 Mo. App. 314; Esterty Harvester Mach. Co. v. Pringle, 41 Nebr. 265, 59 N.

the general rule the courts have given it strict construction and have declared it inapplicable in many cases apparently within its provisions. It will be readily recognized that the general rule does not apply where the promisee has broken either an express or an implied condition of the original contract and agrees to give the contractor additional compensation if he will disregard the breach and perform the contract. Thus where one party to a contract has by his acts so delayed the other party in the performance of his part of the contract that he is not legally bound to complete the contract within the stipulated time, and thereupon the former promises him extra pay if he will complete the contract within such time, and he so promises and performs, the promise of extra pay is supported by a valid consideration.⁵⁸ And under a building contract when the owner fails to pay the instalments when they are due, and the contractor refuses to perform the work without security, the agreement for security is valid.⁵⁹ Nor is it applicable where additional compensation is promised in consideration of the contractor rendering additional services,⁶⁰ or assuming extra risks not contemplated in the original contract.⁶¹

But the various courts have rendered decisions declaring the rule inapplicable which rest on more technical and less obvious grounds. These rulings may be classified under two general heads the first consisting of those cases which hold that the new

W. 804; *Marten v. Brown*, 80 N. J. L. 143, 76 Atl. 1009; *Galway & Co. v. Prignano*, 134 N. Y. S. 571; *Bartlett v. Wyman*, 14 Johns. (N. Y.) 260; *Schneider v. Heinscheimer*, 26 Misc. (N. Y.) 11, 55 N. Y. S. 630; *Price v. Press Pub. Co.*, 117 App. Div. 854, 103 N. Y. S. 296; *Snyder v. Monroe Eckstein Brewing Co.*, 107 App. Div. 328, 95 N. Y. S. 144, *affd.*, 188 N. Y. 576, 80 N. E. 1120; *Cosgray v. New Eng. Piano Co.*, 10 App. Div. 351, 75 N. Y. St. 1254, 41 N. Y. S. 886; *Nesbitt v. Louisville & C. R. Co.*, 2 Speers (S. Car.) 697. See also, *Bell v. Oates* (Miss.) 53 So. 491.

⁵⁸ *King v. Duluth & C. R. Co.*, 61 Minn. 482, 63 N. W. 1105. To same effect, *Lindsly v. Kansas City & C.*

R. Co., 152 Mo. App. 221, 133 S. W. 389 (also holding that an agreement on the part of the contractor to finish the work more rapidly than they would have been bound to do under the old contract is a sufficient consideration to support the new promise).

⁵⁹ *Byington v. Simpson*, 134 Mass. 145. See also, *Turner v. Owen*, 3 Fost. & F. 176.

⁶⁰ *Maxwell v. Graves*, 59 Iowa 613, 13 N. W. 758; *Richardson v. Hooper*, 13 Pick. (Mass.) 446; *Corrigan v. Detsch*, 61 Mo. 290; *Marten v. Brown*, 80 N. J. L. 143, 76 Atl. 1009.

⁶¹ *Hartley v. Posenby*, 7 El. & Bl. 872; *Turner v. Owen*, 3 Fost. & F. 176.

promise is a rescission of the old contract and the formation of a new and different agreement by the parties. The courts in the second class of cases rest their decisions on equitable grounds.

The reasoning in the first class of cases may be summarized as follows: where a party has broken his contract and refused to perform it, it is optional with the adverse party to sue him for damages, or waive the breach and enter into a new contract with the delinquent party. Parties competent to contract can abrogate or rescind the contract and enter into a new contract touching the same subject-matter to be performed in the same or a different way, upon a different consideration. This is true even though no unforeseen difficulties arose in the performance of the original contract. The release of one from the stipulations of the original agreement is the consideration for the release of the other; and the mutual releases are the consideration for the new contract and are sufficient to give it full legal effect.⁶² The correctness of this rule may be conceded but the difficulty arises as to what amounts to a rescission. In some cases it is held that the new promise is presumptive evidence that the original contract has been rescinded by the parties and the subsequent promise stands as a new contract.⁶³ It is held by other courts "that where the parties agree to rescind the contract, and each one gives up the provision for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them. Where one piece of work is substituted for another, the contractor is released from doing one, in

⁶² Connelly v. Devoe, 37 Conn. 570; Cook v. Murphy, 70 Ill. 96; Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925; Coyner v. Lynde, 10 Ind. 282; Abbott v. Doan, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. 465. In this case the extra compensation was promised by a third person who would be benefited by the performance of the contract. Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Rollins v. Marsh, 128 Mass. 116; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Parrot v. Mexican Cent. R. Co., 207 Mass. 184, 93 N. E. 590; Moore v. Detroit Locomotive Works, 14 Mich. 266; Blodgett v. Foster, 120 Mich. 392, 79 N.

W. 625; Scanlon v. Northwood, 147 Mich. 139, 110 N. W. 493; Wilhelm v. Voss, 118 Mich. 106, 76 N. W. 308; Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; Koerper v. Royal Invest. Co., 102 Mo. App. 543, 77 S. W. 307; Lattimore v. Harsen, 14 Johns. (N. Y.) 330; Foley v. Storrie, 4 Tex. Civ. App. 377, 23 S. W. 442; Morrison v. Heath, 11 Vt. 610; Lawrence v. Davey, 28 Vt. 264; Agel & Levin v. F. R. Patch Mfg. Co., 77 Vt. 13, 58 Atl. 792; Evans v. Oregon & C. R. Co., 58 Wash. 429, 28 L. R. A. (N. S.) 455, 108 Pac. 1095.

⁶³ Bishop v. Busse, 69 Ill. 403; Cooke v. Murphy, 70 Ill. 96.

consideration that he will do the other. But where one party refuses to do the work which his contract requires him to do, or even threatens to abandon the work, unless he is paid more, and the other promises to pay more, the original contract still remaining subsisting, we consider it merely a promise to pay for what he was already obligated to do, and a nudum pactum."⁶⁴ As indicated by the cases last cited it would seem that the general rule announced in the first class of cases under discussion should be applied with caution, for as was said in the leading case on this subject,⁶⁵ "The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party."⁶⁶

⁶⁴ *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, 28 L. R. A. (N. S.) 450n. To same effect, *Alaska Packer's Assn. v. Domenico*, 117 Fed. 99, 54 C. C. A. 485; *Davis & Co. v. Morgan*, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. 171; *Willingham Sash & Co. v. Drew*, 117 Ga. 850, 45 S. E. 237; *Widiman v. Brown*, 83 Mich. 241, 47 N. W. 231; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S. W. 844. See also, *Wendling v. Snyder*, 30 Ind. App. 330, 65 N. E. 1041; *Combs v. Burt & Brabb Lumber Co.*, 27 Ky. L. 439, 85 S. W. 227.

⁶⁵ *King v. Duluth & C. R. Co.*, 61 Minn. 482, 63 N. W. 1105.

⁶⁶ "If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of the work, that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to pro-

ceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action. It is claimed, however, by the respondent that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform its contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recov-

This brings us to the second class of cases which hold, that where the refusal to perform was equitable and fair and the difficulties in the way of its performance were substantial, unforeseen and not within the contemplation of the parties when the original contract to pay was made, a new promise to pay an additional sum or grant a further benefit than the original contract provided will be upheld.⁶⁷ The distinction which is sought to be drawn is well illustrated by two early English cases. In the first case during the course of a voyage from London to the Baltic and back two seamen deserted, and the captain promised the rest of the crew that if they would work the vessel home the wages of the two deserters should be divided among them. The promise was held void for want of consideration. Lord Ellenborough said, "Before they (the mariners) sailed from London they had undertaken to do all they could under all the emergencies of the voyage. * * * The desertion of a part of the crew is to be considered an emergency of the voyage as much as death; and those who remain are bound by the terms of their original contract to

ery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one." *King v. Duluth & C. R. Co.*, 61 Minn. 482, 63 N. W. 1105.

⁶⁷ *Bishop v. Busse*, 69 Ill. 403. In *Moran v. Peace*, 72 Ill. App. 135, the above case is said to have been overruled by later cases. *Pierce v. Walton*, 20 Ind. App. 66, 50 N. E. 309; *Ayres v. Chicago & C. R. Co.*, 52 Iowa 478, 3 N. W. 522; *McCarty v. Hampton & C. Assn.*, 61 Iowa 287, 16 N. W. 114; *Linz v. Schuck*, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 124 Am. St. 481, 14 Am. & Eng. Ann. Cas. 495. This case adopts the reasoning of the court in the case of *King v. Duluth & C. R. Co.*, 61 Minn. 482, 63 N. W. 1105; *Shipman v. Butterfield*, 47 Mich. 487, 11 N. W. 283; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; *King v. Duluth & C. R. Co.*, 61 Minn. 482, 63 N. W. 1105; *Bryant v. Lord*, 19 Gil. (Minn.) 342; *Michaud v. McGregor*, 61 Minn. 198, 63 N. W. 479; *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. 209; *Meech v. Buffalo*, 29 N. Y. 198; *Galveston*

v. Galveston City R. Co., 46 Tex. 435. The cases of *Meech v. Buffalo*, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and *Michaud v. McGregor*, 61 Minn. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule. Compare the foregoing cases with *Stees v. Leonard*, 20 Minn. 494; *Trustees of Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373 (building fell on account of latent defect in the soil); *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 78 Atl. 718 (latent defect in the soil made necessary the putting in of a foundation for a cellar wall. Contractor held not entitled to extra compensation). See post, §§ 224, 225, Im-possible Consideration.

bring the ship in safety to her destined port."⁶⁸ But in the second case,⁶⁹ it was held that such a contract as the one entered into in the previous case contained an implied condition that the ship was seaworthy, so that in case the ship proved unseaworthy a promise of extra reward to induce a mariner to abide by his contract was binding. Here a risk arose which was not contemplated by the contract. The true test by which to determine whether the new promise is binding or not is this: if a court of equity might, under the circumstances, have relieved the promisor from the execution of the original contract the new contract will be binding. What the court might have done the parties can do voluntarily.⁷⁰ There is no necessary conflict in these two classes of cases. In one it is merely held that the original contract, while it remained executory in whole or in part, was rescinded and a new contract formed. And so long as the contract is executory it may be rescinded by the parties thereto. The other line of cases simply hold that the original contract was not in fact rescinded on account of coercion, bad faith or some other element vitiating the new promise.

§ 217. Same—Part payment of liquidated liability.—And to this principle is referable the doctrine that part payment by a debtor of a liquidated liability already due with the understanding that such payment is to be received in satisfaction of the whole amount due is not supported by a consideration. It was originally held that such an agreement was binding on the parties.⁷¹ But in the year 1562 it was held that a receipt by the debtor of 20 lbs. in full satisfaction of a debt amounting to 100 lbs. is ineffectual as a release unless under seal.⁷² And ever since the year 1601, it has been consistently, even if reluctantly, held that part payment of a debt is not good as a discharge of the whole.⁷³ It

⁶⁸ *Stilk v. Myrick*, 2 Camp. 317.

⁶⁹ *Hartley v. Ponsonby*, 7 El. & Bl. 872.

⁷⁰ *John King Co. v. Louisville & N. R. Co.* (Ky.), 114 S. W. 308; *New Jersey Trust & Co. v. Nat. Gas & Co.*, 71 N. J. L. 29, 58 Atl. 104.

⁷¹ *Y. B. 33 Hen. VI*, 48a, pl. 32; *Y. B. 10 Hen. VII*, 4, pl. 4; *Perkins Prof. Book*, § 749.

⁷² *Dalison* 49, pl. 13. See also, *Anonymous*, 4 Leon. 81; *Richards v. Bartlet*, 1 Leon. 19.

⁷³ *Pinnel's Case*, 5 Coke 117a; *Cumber v. Wane*, 1 Strange 426; *Foakes v. Beer*, 9 L. R. App. Cas. 605; *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37; *Down v. Hatcher*, 10 Ad. & El. 121; *Pearson & Fant v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Scott v. Rawls*,

has, indeed, been said that there is no respectable authority to

159 Ala. 339, 48 So. 710; Cavaness v. Ross, 33 Ark. 572; Reynolds v. Reynolds, 55 Ark. 369, 18 S. W. 377; De-land v. Hielt, 27 Cal. 611, 87 Am. Dec. 102; Holton v. Noble, 83 Cal. 7, 23 Pac. 58; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Gates v. Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. 268; Spann v. Baltzell, 1 Fla. 301, 46 Am. Dec. 346; Jones v. Grantham, 80 Ga. 472, 5 S. E. 764; Flaningham v. Hogue, 59 Ill. App. 315, affd., 162 Ill. 129, 44 N. E. 394; Farmers' & Mechanics' Life Assn. v. Caine, 224 Ill. 599, 79 N. E. 956; Titsworth v. Hyde, 54 Ill. 386; Pusheck v. Frances E. Willard & Co. Assn., 94 Ill. App. 192; Heintz v. Pratt, 54 Ill. App. 616; State Sav. Loan & Co. v. Stewart, 65 Ill. App. 391; Capital City Mut. Fire Ins. Co. v. Detwiler, 23 Ill. App. 656; Curtiss v. Martin, 20 Ill. 557; Reynolds v. Nugent, 25 Ind. 328; Ford v. Garner, 15 Ind. 298; Peelman v. Peelman, 4 Ind. 612; Miller v. Eldridge, 126 Ind. 461, 27 N. E. 132. A promise to pay one for what he is obliged to render has no consideration to support it. Laboyteaux v. Swigart, 103 Ind. 596, 3 N. E. 373; Fletcher v. Wurgler, 97 Ind. 223; Smith v. Tyler, 51 Ind. 512; Ritenour v. Mathews, 42 Ind. 7; Markel v. Spitler, 28 Ind. 488; Stone v. Lewman, 28 Ind. 97; Cameron v. Warbritton, 9 Ind. 351; Fitzgerald v. Smith, 1 Ind. 310; Bateman v. Daniels, 5 Blackf. (Ind.) 71; Beaver v. Fulp, 136 Ind. 595, 36 N. E. 418, the court saying: "Is the payment of a part of one's liability sufficient consideration to support a promise to cancel the whole liability, where that liability is definitely ascertained and adjudicated? This inquiry is answered in the negative by the numerous and consistent holdings of this court." *Hodges v. Truax*, 19 Ind. App. 651, 49 N. E. 1079; *Sheets v. Russell*, 12 Ind. App. 677, 40 N. E. 30; *Swope v. Bier*, 10 Ind. App. 613, 38 N. E. 340; *Indianapolis R. Co. v. Hyde*, 122 Ind. 188; *Bright v. Coffman*, 15 Ind. 371, 77 Am. Dec. 96; *Bryant v. Brazil*, 52 Iowa 350, 3 N. W. 117; *Bodenhofer v. Hogan*, 142 Iowa 321, 120 N. W. 659; *Keller v. Strong*, 104 Iowa 585, 73 N. W. 1071; *American Bridge Co. v. Murphy*, 13 Kans. 35; *St. Louis R. Co. v. Davis*, 35 Kans. 464, 11 Pac. 421; *Cox v. Adelsdorf*, 21 Ky. L. 421, 51 S. W. 616; *Russell v. Meek*, 22 Ky. L. 498, 58 S. W. 373; *Louisville & C. R. Co. v. Helm*, 109 Ky. 388, 59 S. W. 323; *Huff v. Logan*, 22 Ky. L. 1314, 60 S. W. 483; *Schminke v. Creditors*, 50 La. Ann. 511, 23 So. 712; *Glaze v. Duson*, 40 La. Ann. 692, 4 So. 861; *Austin v. Smith*, 39 Maine 203; *Bird v. Smith*, 34 Maine 63, 56 Am. Dec. 635; *Geiser v. Kershner*, 4 Gill & J. (Md.) 305, 23 Am. Dec. 566; *Ermittsburg R. Co. v. Donoghue*, 67 Md. 383, 10 Atl. 233, 1 Am. St. 396; *Commercial & Nat. Bank v. McCormick*, 97 Md. 703, 55 Atl. 439; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; *Gilman v. Cary*, 198 Mass. 318, 84 N. E. 312; *Gilson v. Nesson*, 198 Mass. 598, 84 N. E. 854, 17 L. R. A. (N. S.) 1208; *Attorney-General v. Supreme Council A. L. H.*, 196 Mass. 151, 81 N. E. 966; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Harriman v. Harriman*, 12 Gray (Mass.) 341; *Pease v. Saginaw*, 126 Mich. 436, 95 N. W. 1082; *Leeson v. Anderson*, 99 Mich. 247, 58 N. W. 72, 41 Am. St. 597; *Wherley v. Rowe*, 106 Minn. 494, 119 N. W. 222; *Hoidale v. Wood*, 93 Minn. 190, 100 N. W. 1100; *Duluth Chamber Commerce v. Knowlton*, 22 Minn. 229, 44 N. W. 2; *Helling v. United Order*, 29 Mo. App. 309; *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738; *C. H. Brown Co. v. Baker*, 99 Mo. App. 660, 70 S. W. 454; *Hanson v. Crawford*, 130 Mo. App. 232, 109 S. W. 98; *New Amsterdam Casualty Co. v. Mesker*, 128 Mo. App. 183, 106 S. W. 561; *McIntosh v. Johnson*, 51 Nebr. 33, 70 N. W. 522; *Sheibley v. Dixon County*, 61 Nebr. 409, 85 N. W. 399; *Fremont Foundry & Co. v. Norton*, 3 Nebr. (Unof.) 804, 92 N. W. 1058; *Pasewalk v. Bollman*, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. 399; *Blanchard v. Noyes*, 3 N. H. 518; *Daniels v. Hatch*, 21 N. J. L. 391, 47 Am. Dec. 169; *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365; *Eckert v. Wallace*, 75 N. J. L. 171, 67 Atl. 76; *Chambers v. Niagara Fire Ins. Co.*, 58 N. J. L. 216, 33 Atl. 283; *Gussow v. Beineson*, 76

the contrary.^{73a} Nor will an executory agreement to accept less than the amount due as payment in full or for an assignment of the whole be upheld.⁷⁴ Nor will it support an agreement to

N. J. L. 209, 68 Atl. 907; *New York v. New York City R. Co.*, 126 App. Div. (N. Y.) 36, 110 N. Y. S. 720, affd. 193 N. Y. 680, 87 N. E. 117; *Evers v. Ostheimer*, 37 Misc. (N. Y.) 163, 74 N. Y. S. 872; *Fake v. Eddy's Exrs.*, 15 Wend. (N. Y.) 76; *Miller v. Coates*, 66 N. Y. 609; *Redfield v. Holland & Co. Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424; *Bliss v. Shwartz*, 65 N. Y. 444; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *People v. Board of Supervisors*, 17 N. Y. S. 314; *Hills v. Sommer*, 53 Hun (N. Y.) 392, 25 N. Y. St. 1003, 6 N. Y. S. 469; *Jaffray v. Davis*, 48 Hun (N. Y.) 500, 1 N. Y. S. 814, 16 N. Y. St. 32; *Jones v. Wilson*, 104 N. Car. 9, 10 S. E. 79; *Griffin v. Petty*, 101 N. Car. 380, 7 S. E. 729; *Hayes v. Davidson*, 70 N. Car. 573; *Martin v. Frantz*, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. 859; *Girard F. & M. Ins. Co. v. Canvan*, 195 Pa. St. 589, 46 Atl. 115; *Commonwealth v. Cummins*, 155 Pa. St. 30, 25 Atl. 996; *Rose v. Daniels*, 8 R. I. 381; *Bowden v. Robinson*, 4 Tex. Civ. App. 636, 23 S. W. 816; *Rising v. Cummings*, 47 Vt. 345; *Wheeler v. Wheeler*, 11 Vt. 60; *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142; *Smith v. Phillips*, 77 Va. 548; *Weidner v. Standard Life & Co.*, 130 Wis. 10, 110 N. W. 246; *Prairie Grove Cheese Mfg. Co. v. Luder*, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085; *Otto v. Klauber*, 23 Wis. 471; *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52. Contra, *Clayton v. Clark*, 74 Miss. 499, 21 So. 565, 22 So. 189, 37 L. R. A. 771, 60 Am. St. 521. Contra, *Napoleon B. Frye v. Abbie A. Hubbell*, 74 N. H. 358, 68 Atl. 325, 17 L. R. A. (N. S.) 1197. But where money is offered in satisfaction of a claim and the offer is accompanied with such acts and declarations as amount to conditions that if the money is accepted it is accepted in satisfaction, and such that the party to whom this offer is made is bound to understand therefrom that he takes it upon such conditions if the creditor accepts the amount so ten-

dered, it acts as a discharge of an entire debt. When the tender or offer is thus made the party to whom it is made has no alternative but to refuse it or to accept it, upon the conditions if he takes it his claim is canceled and no protest, declaration or denial of his, so long as the condition is insisted on can vary the result. *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785n; *Preston v. Grant*, 34 Vt. 201.

^{73a} In *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, the court says: "One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in *Pinnel's case* (5 Coke R. 117) 'that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole,' and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticize and condemn its reasonableness, justice, fairness or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnel's case*."

⁷⁴ A father's agreement to discharge a son from a debt on the son's paying a smaller sum to his sister after the father's death, is unenforceable for want of consideration. *Judgment 75 Ill. App. 503, modified.—Jennings v. Neville*, 180 Ill. 270, 54 N. E. 202; *Isham v. Therasson*, 53 N. J. Eq. 10, 30 Atl. 969; *Day v. Gardner*, 42 N.

forbear to sue upon a debt already due and payable,⁷⁶ as in making such payment the debtor does no more than he was already bound to do.

§ 218. The rule against satisfaction by payment of a lesser sum strictly construed.—While the courts have steadfastly adhered to this doctrine they seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger and find if possible from the circumstances of each case a consideration for the new agreement. While not able to escape the logic back of the rule, criticism of it is a favorite pastime and courts have resorted to very technical distinctions to escape its application.⁷⁶ It is strictly construed.⁷⁷ Numerous cases have been declared outside the scope of the rule, some on grounds the validity of which will be readily recognized, others on grounds more fictitious than real. It is obvious of course that the rule does not apply where the claim is unliquidated or is in good faith disputed.⁷⁸

J. Eq. 199, 7 Atl. 365; *Tulane v. Clifton*, 47 N. J. Eq. 351, 20 Atl. 1086.

⁷⁶ *Liening v. Gould*, 13 Cal. 598; *Holliday v. Poole*, 77 Ga. 159; *Warren v. Hodge*, 121 Mass. 106; *Gibson v. Renne*, 19 Wend. (N. Y.) 389; *Tryon v. Jennings*, 22 How. Pr. (N. Y.) 421; *Farmers' Bank v. Blair*, 44 Barb. (N. Y.) 641; *Parmelee v. Thompson*, 45 N. Y. 58, 6 Am. Rep. 33; *Reynolds v. Ward*, 5 Wend. (N. Y.) 501; *Pfeiffer v. Campbell*, 111 N. Y. 631, 19 N. E. 498; *Turnbull v. Brock*, 31 Ohio St. 649.

⁷⁶ *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Ex parte Zeigler*, 83 S. Car. 78, 64 S. E. 513, 21 L. R. A. (N. S.) 1005n.

⁷⁷ *Chicago M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. ed. 1099; *Little v. Koerner*, 28 Ind. App. 625, 63 N. E. 766; *First Nat. Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338; *Rotan Grocery Co. v. Noble*, 36 Tex. Civ. App. 226, 81 S. W. 586; *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798; *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. 922;

⁷⁸ *Warren v. Skinner*, 20 Conn. 559; *Bull v. Bull*, 43 Conn. 455; *In re D. H. McBride & Co.*, 132 Fed. 285; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, 46 N. E. 439, affg. 60 Ill.

App. 398; *Bingham v. Browning*, 97 Ill. App. 442, affd. in 197 Ill. 122, 64 N. E. 317; *Harland v. Staples*, 79 Ill. App. 72; *Little v. Koerner*, 28 Ind. App. 625, 63 N. E. 766; *Storch v. Dewey*, 57 Kans. 370, 46 Pac. 698; *Union Bank of Georgetown v. Geary*, 5 Pet. (U. S.) 114, 8 L. ed. 66; *United States v. Child*, 12 Wall. (U. S.) 232, 20 L. ed. 360; *Fisher v. May's Heirs*, 2 Bibb (Ky.) 448, 5 Am. Dec. 626; *Taylor v. Patrick*, 1 Bibb (Ky.) 168; *Cunningham v. Standard Construction Co.*, 134 Ky. 198, 119 S. W. 765; *Reed v. Bartlett*, 19 Pick. (Mass.) 273; *Tuttle v. Tuttle*, 12 Metc. (Mass.) 554, 46 Am. Dec. 701; *Chamberlain v. Smith*, 110 Mo. App. 657, 85 S. W. 645; *H. C. Pollman & Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *Brink v. Garland*, 58 Mo. App. 356; *Maack v. Schneider*, 51 Mo. App. 92; *Slade v. Swedeburg Elevator Co.*, 39 Nebr. 600, 58 N. W. 191; *Palmerton v. Huxford*, 5 Denio (N. Y.) 166; *Pierce v. Pierce*, 25 Barb. (N. Y.) 243; *Laroe v. Sugar Loaf Dairy Co.*, 87 App. Div. (N. Y.) 585, 84 N. Y. S. 609, revd. on another ground, 180 N. Y. 367, 73 N. E. 61; *Riggs v. Home Mut. Fire Protective Assn.*, 61 S. Car. 448, 39 S. E. 614; *Hussey v. Crass*

§ 219. **Other consideration—Receiving property in addition to the sum paid.**—Although the claim is a liquidated money demand and cannot be satisfied with a smaller sum of money, yet if any property other than money is received in addition to the sum paid, or if there is no payment of money and other property is accepted in satisfaction of the debt, it will operate as a full discharge, no matter what the value in case it is received as such.⁷⁹

§ 220. **Other consideration—Payment of debt before due, or at different place.**—If payment of less than the whole debt is made before it is due, if received as payment in full, it will discharge the entire obligation.⁸⁰ Even if payment is made at a

(Tenn. Ch. App.), 53 S. W. 986; Connecticut River Lumber Co. v. Brown, 68 Vt. 239, 35 Atl. 56. The rule will not apply where there was a bona fide dispute between the parties as to whether the contracts are payable in United States currency or in Porto Rico currency. San Juan v. St. Johns Gas Co., 195 U. S. 510. In case there was no dispute at the time of the payment the agreement will not be upheld, although the dispute did arise as to the amount due subsequent to the payment. Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126. The rule is restored in South Dakota by the act of 1893, eliminating the words "or less than" from § 4383, Comp. L. 1887, to the effect that "an accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled." Egglund v. South, 22 S. Dak. 467, 118 N. W. 719.

⁷⁹ Foakes v. Beer, L. R. 9 App. Cas. 605 ("gift of a horse hawk or robe in satisfaction is good"); Gavin v. Annan, 2 Cal. 494; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Bull v. Bull, 43 Conn. 455; Missouri Am. Elect. R. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283; Neal v. Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784; Very v. Levy, 54 U. S. (13 How.) 345. But where the lessee at the request of the lessor performed certain work on the lessor's premises

of the agreed value of \$700, and such work and labor were received by the lessor in payment of a conceded indebtedness for a larger amount, it was held that the \$700 due the lessee could satisfy only the same amount of indebtedness due from him to the lessor. Morrill v. Baggott, 157 Ill. 240, 41 N. E. 639. The giving of an order on a merchant for a less sum than a judgment owed by the giver of the order, though paid in merchandise, will not sustain an agreement to discharge the judgment. Flenor v. Flenor, 30 Ky. L. 543, 99 S. W. 258; Howard v. Norton, 65 Barb. (N. Y.) 169. This case states the rule well, and harmonizes the cases of Morrill v. Baggott, 157 Ill. 240, 41 N. E. 639, and Flenor v. Flenor, 30 Ky. L. 543, 99 S. W. 258. And see Williams v. Stanton, 1 Root (Conn.) 426; Blinn v. Chester, 5 Day (Conn.) 360; Anderson v. Highland Tpk. Co., 16 Johns. (N. Y.) 86; Gaffney v. Chapman, 4 Robt. (N. Y.) 275; Dimmick v. Sexton, 125 Pa. St. 334, 125 Atl. 334.

⁸⁰ Pearson v. Thomason, 15 Ala. 700, 50 Am. Dec. 159; Martin-Alexander Lumber Co. v. Johnson, 70 Ark. 215, 66 S. W. 924; Spann v. Balzell, 1 Fla. 301, 46 Am. Dec. 346; Hutton v. Stoddart, 83 Ind. 539; Boyd v. Moats, 75 Iowa 151, 39 N. W. 237; Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 481; Brooks v. White, 2 Metc. (Mass.) 283, 37

place other than that originally stipulated it will support an accord and satisfaction based on a part payment of the obligation.⁸¹

§ 221. Other consideration—Additional security.—Giving further security for part of a debt or other security, although for a less sum than the debt, and the acceptance of it in full of all demands, extinguishes the whole.⁸² Akin to this exception is the doctrine that where the creditor receives in full satisfaction of the debt a note endorsed by a third person, for a less sum than the debt, this transaction supports a promise to remit the excess.⁸³ And the applying of property exempt from execution or which for any reason could not be levied on in satisfaction of the debt to the payment thereof, is sufficient consideration to sustain a satisfaction of the entire amount due.⁸⁴

Am. Dec. 95; *Sonnenberg v. Riedel*, 16 Minn. 83; *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Weiss v. Marks*, 206 Pa. 513, 56 Atl. 59; *First Nat. Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338; *Mayfield Woolen Co. v. Long* (Tex. Civ. App.), 119 S. W. 908; *Russell v. Stevenson*, 34 Wash. 166, 75 Pac. 627.

⁸¹ *Cavaness v. Ross*, 33 Ark. 572; *Fenwick v. Phillips*, 3 Metc. (Ky.) 87; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Blanchard v. Noyes*, 3 N. H. 518; *McKenzie v. Culbreth*, 66 N. Car. 534; *Harper v. Graham*, 20 Ohio 115; *Seymour v. Goodrich*, 80 Va. 303. But see *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192 (dishonored bill paid at a place other than that provided in the bill).

⁸² *In re Black Diamond Copper Mining Co.*, 11 Ariz. 415, 95 Pac. 117; *Kemmerer v. Kokendifer*, 65 Ill. App. 31; *Post v. First Nat. Bank*, 138 Ill. 559, 28 N. E. 978; *Mason v. Campbell*, 27 Minn. 54, 1 Ky. L. 301, 6 N. W. 405; *Pulliam v. Taylor*, 50 Miss. 251; *Fred v. Fred* (N. J. Eq.), 50 Atl. 776; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469.

⁸³ *Steinman v. Magnus*, 11 East 390; *Varner v. Conery*, 77 Maine 527; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Gill v. Butler*, 127 Mass. 386; *Schmidt v. Ludwig*, 26 Minn. 85; *Mason v. Campbell*, 27

Minn. 54, 6 N. W. 405; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; *Dolsen v. Arnold*, 10 How. Pr. (N. Y.) 528; *Partridge v. Moynihan*, 59 Misc. (N. Y.) 234, 110 N. Y. S. 539; *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366; *Dryden v. Stephens*, 19 W. Va. 1. Or if part payment is made by a third person the rule does not apply. *Whipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. 537; *Marshall v. Bullard*, 144 Iowa 462, 87 N. W. 427, 54 L. R. A. 862; *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192; *Clark v. Abbott*, 53 Minn. 88, 55 N. W. 542, 39 Am. St. 577; *Ebert v. Johns*, 206 Pa. St. 395, 55 Atl. 1064. However, if the debtor merely borrows the money with which to make the part payment this fact alone does not sustain the promise to release the remainder, at least where this fact is not known to the creditor when the payment was made. *Schlesinger v. Schlessinger* (Colo.), 88 Pac. 970, 8 L. R. A. (N. S.) 863; *Specialty Glass Co. v. Daley*, 172 Mass. 460, 52 N. E. 633; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546. But see *Rotan Grocer Co. v. Noble*, 36 Tex. Civ. App. 226, 81 S. W. 586.

⁸⁴ *Lincoln Savings & Co. v. Allen*, 82 Fed. 148, 27 C. C. A. 87; *McNealey v. Baldrige*, 106 Mo. App. 11, 78 S. W. 1031; *Meeker v. Requa*, 94 App. Div. (N. Y.) 300, 87 N. Y. S. 959; *Ward v. Young*, 40 Tex. Civ. App. 294, 89 S. W. 456.

§ 222. **Miscellaneous exceptions.**—It is held by some courts that, if an unsecured note or check is given by the debtor as payment in full of a greater indebtedness, it will act as a discharge in full in case the creditor agrees to accept it as such.⁸⁵ Likewise, if the part payment is made by a joint debtor who has been discharged in bankruptcy, which is accepted by the creditor, it will operate as a discharge of the whole debt in favor of both the one making the payment and his joint debtor.⁸⁶ If part payment is made and a release under seal is given the rule does not apply, since want of consideration cannot be shown in such case.⁸⁷ And where the debtor contemplates taking advantage of the bankruptcy law, and the creditor dissuades him from so doing and agrees to accept in satisfaction of his debt a sum less than the entire amount, in case the debtor would not go through bankruptcy, the agreement is supported by a sufficient consideration.⁸⁸

⁸⁵ In *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37, Huddelson, J., approved the language of the opinion in *Sibree v. Trippe*, 15 M. & W. 23, "that a negotiable security may operate if so given and taken in satisfaction of a debt of a greater amount." *Bidder v. Bridges*, 37 Ch. Div. 406; *Jackson v. Brown*, 102 Ga. 87, 29 S. E. 149, 66 Am. St. 156; *In re Dixon*, 2 McCreary (U. S.) 556, 13 Fed. 109. But see *Shanley v. Koehler*, 80 App. Div. (N. Y.) 566, 80 N. Y. S. 679, *affd.* without opinion in 178 N. Y. 556, 70 N. E. 1109, which holds that a promise to satisfy a judgment upon payment of an amount in cash and the giving of an unendorsed note of the debtor for an additional amount is not binding where the amount in cash and the note given together aggregate less than the amount of the judgment.

⁸⁶ *Ex parte, Zeigler* (sub nomine, T. T. Haydock Carriage Co.), 83 S. Car. 78, 64 S. E. 513, 21 L. R. A. (N. S.) 1005n.

⁸⁷ *Wood v. Bangs*, 2 Pennew. (Del.) 435, 48 Atl. 189; *Jackson v. Security Mutual Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198. The rule as stated in some courts would imply that where the distinctions between sealed and unsealed instruments have been abol-

ished any formal discharge or release in writing will take the case out of the rule. *Dreyfus v. Roberts*, 75 Ark. 334, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. 67; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393.

⁸⁸ *Hinckley v. Arey*, 27 Maine 365; *Melroy v. Kemmerer* (Pa.), 67 Atl. 699, 11 L. R. A. (N. S.) 1018; *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. 922. See also, the following cases for various circumstances taking them out of the general rule: *Price's Admx. v. Price's Admx.*, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529; *Lewis v. Donohue*, 27 Misc. (N. Y.) 514, 58 N. Y. S. 319; *Tucker v. Dolan*, 109 Mo. App. 442, 84 S. W. 1126; *Chicago & c. R. Co. v. Brown*, 70 Nebr. 696, 97 N. W. 1038; *Roberts v. Banse*, 78 N. J. L. 57, 72 Atl. 452; *Bendix v. Ayers*, 21 App. Div. (N. Y.) 570, 48 N. Y. S. 211. As to insolvent debtor, see *Curtiss v. Martin*, 20 Ill. 557; *Engbretson v. Seiberling*, 122 Iowa 522, 98 N. W. 319, 64 L. R. A. 75, 101 Am. St. 279. *Contra*, *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Robert v. Barnum*, 80 Ky. 28, 3 Ky. L. 529. As to waiving right of appeal, see *In re Freeman*, 117 Fed. 680; *Bofinger v. Tuyes*, 120 U. S. 198, 30 L. ed. 649, 7 Sup. Ct. 529; *Williams v. Blumen-*

But the payment of the smaller sum, without any release, will not constitute a satisfaction of the residue. It must be tendered on condition that it be accepted as payment in full, and accepted with that understanding and under those conditions.⁸⁹ And the mere retention by the creditor of money to which he is entitled unconditionally will not amount to a release, or constitute an accord and satisfaction, although he knows that it is tendered as such.⁹⁰

§ 223. Rule deducible from the authorities.—The rule upon this subject, under the modification of later decisions, both in England and America, seems to be that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum, because the debtor only does what he is legally bound to do; but if there be any benefit, or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support a promise to forego the balance.

§ 224. Impossible consideration.—Impossibility of performance of the consideration does not necessarily relieve the promisor from his liability on the contract.⁹¹ Mere difficulty⁹² or expense is not such an impossibility as will relieve the promisor from liability on his contract.⁹³ "If the covenant be within the range of possibility, however absurd or improbable the idea of execution may be, it will be upheld, as where one covenants it shall rain tomorrow, or that the Pope shall be at Westminster on a certain

thal, 27 Wash. 24, 67 Pac. 39. As to payment after suit commenced, see *Mitchell v. Wheaton*, 46 Conn. 315, 33 Am. Rep. 24; *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474, 18 Am. St. 268; *Baum v. Buntyn*, 62 Miss. 110.

⁸⁹ *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229, 44 N. W. 2.

⁹⁰ *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229, 44 N. W. 2; *People v. Board of Supervisors*, 40 Hun (N. Y.) 353. For distinction in this class of cases, see *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785.

⁹¹ *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 36 Am. St. 642; *Middle-*

sex Water Co. v. Knappmann Whiting Co., 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Dexter v. Norton*, 47 N. Y. S. 62, 7 Am. Rep. 415.

⁹² *Dewey v. Alpena School District*, 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. 627; *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621; *McKay v. Barnett*, 21 Utah 239, 60 Pac. 1100, 50 L. R. A. 371.

⁹³ *Cornell v. Rodabaugh*, 117 Iowa 287, 90 N. W. 599, 94 Am. St. 298.

day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it be only probable or out of the power of the obligor it is not deemed in law impossible."⁹⁴ However, if the consideration for the promise is obviously and absolutely impossible of performance, and such fact is apparent upon the face of the promise and is known to the parties, the consideration is unreal and will not support the contract.⁹⁵

§ 225. **Physical and legal impossibility.**—The consideration may be physically or legally impossible. It is physically impossible of performance if "according to the state of knowledge of the day" the consideration is incapable of fulfilment.⁹⁶ Thus, "if a man is bound in an obligation with condition that, if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, then the obligation shall be void, the condition is void and impossible, and the obligation standeth not";⁹⁷ and so with an agreement entered into by sixteen men to purchase 6,400 shares of stock out of a certificate for 5,000 shares.⁹⁸ If the impossibility exists at the time the contract is entered into, but such fact is unknown to the contracting parties, this mistake may avoid the contract.⁹⁹ In case the impossibility arises after the contract is made it will, in certain cases, operate as a discharge of the contract. For there may be in the nature of an agreement an implied condition by which the promisor will be relieved from his unqualified obligation; and when in such case, without his fault, performance is rendered impossible it may be excused,¹ as where the continued existence of something essential to its performance is an implied condition in the

⁹⁴ *Supt. of Public Schools v. Bennett*, 3 Dutch. (N. J. L.) 513, 72 Am. Dec. 373; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518. See, ante, *Refusal to Perform Without Further Recompense*.

⁹⁵ *Haslam v. Sherwood*, 10 Bing. 540; *Nerot v. Wallace*, 3 Term. R. 17; *Bennett v. Morse*, 6 Colo. App. 122, 39 Pac. 582; *Stevens v. Coon*, 1 Pin. (Wis.) 356.

⁹⁶ *Clifford v. Watts*, L. R. 5 C. P. 577.

⁹⁷ *Coke's Littleton*, 206b; *In re The Harriman*, 9 Wall. (U. S.) 172.

⁹⁸ *Bennett v. Morse*, 6 Colo. App. 122, 39 Pac. 582. See also *Hall v. Cazenove*, 4 East 477; *Doe v. Lean*, 1 Q. B. 229.

⁹⁹ *Nordyke & Co. v. Kehlor*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. 600.

¹ *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215n; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415.

contract;² or where the life and health of the contracting party is essential to the execution of the contract, performance is excused by the death or illness of the contracting party.³ The question as to what will discharge an agreement is not involved in the discussion and will be taken up more fully in another part of this work.

§ 226. **Illegal consideration.**—When a positive rule of law renders the consideration impossible it will not support a contract, as where a person being indebted to another agreed with the servant of his creditor that, in consideration of the servant discharging him for the debt, he would do certain work, it was held that, as the servant could not legally discharge the debt of his master, the proposed consideration was impossible and the contract void.⁴ This is also applicable to a promise that another's land shall sell for a certain sum on a given day, since one cannot compel the sale of another's property,⁵ or a promise to marry by one already married and known so to be by the other.⁶ In case the consideration is rendered impossible by a subsequent disability imposed by law it may, as in the case of physical impossibilities arising subsequent to the contract, discharge the agreement,⁷ or as when war is declared between two countries of which the par-

² Taylor v. Caldwell, 3 B. & S. 826; Siegel v. Eaton & Co., 165 Ill. 550, 46 N. E. 449; Walker v. Tucker, 70 Ill. 527; Knight v. Bean, 22 Maine 531; Angus v. Scully, 176 Mass. 357, 57 N. E. 674, 79 Am. St. 318; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 25 Am. St. 654; Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 142 L. R. A. 215n; Powell v. Dayton R. Co., 12 Ore. 488, 8 Pac. 544; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578. In case the subject-matter of an entire contract has been destroyed without the fault of either party, before the contract is fully performed, there can be no recovery of a quantum meruit, or otherwise for a part performance thereof. Huyett & C. Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384, 59 Am. St. 272.

³ Robinson v. Davison, 40 L. J. Ex. 172, L. R. 6 Eq. 269; Cooke v. Colcraft, 2 W. Bl. 856; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. 370; Powell v. Newell, 59 Minn. 406, 61 N. W. 335; Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467; Blakely v. Sousa, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. 821.

⁴ Harvey v. Gibbons, 2 Lev. 161.

⁵ Stevens v. Coon, 1 Pin. (Wis.) 356.

⁶ Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Haviland v. Halstead, 34 N. Y. 643.

⁷ Atkinson v. Ritchie, 10 East 530; Bailey v. De Crespigny, L. R. 4 Q. B. 180; Macon & C. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. 135; Middlesex & C. Co. v. Knappmann Whiting Co., 64 N. J. L. 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. 467.

ties severally are inhabitants, which makes the performance of the contract illegal.⁸

§ 227. **Voluntary subscription.**—A voluntary subscription is not supported by a sufficient consideration. It is merely a gratuitous promise, to furnish a sum of money, or its equivalent for a designated purpose and cannot be enforced.⁹ There are some few decisions that contain obiter statements to the contrary,¹⁰ but they do not give expression to any generally recognized rule.

§ 228. **Voluntary subscription valid when supported by a consideration.**—But while it is well established that voluntary subscriptions are, when considered alone and unsupported by any other element, unenforceable the necessary consideration to support such contracts is usually found in the expenditure of money,¹¹ the

⁸ *Esposito v. Bowden*, 7 El. & Bl. 763; *Hillyard v. Mutual Benefit Life Ins. Co.*, 35 N. J. L. 415, *affd.*, 37 N. J. L. 444; *Mutual &c. Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741.

⁹ *Pratt v. Baptist Society Trustees*, 93 Ill. 475; *Augustine v. Methodist Episcopal Society*, 79 Ill. App. 452; *Bucklen v. Johnson*, 19 Ind. App. 406, 49 N. E. 612; *University of Des Moines v. Livingston*, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42; *Simpson College v. Tuttle*, 71 Iowa 596, 33 N. W. 74; *Williams v. Barton*, 13 La. 405; *Foxcroft Academy v. Favor*, 4 Maine 382; *Bridgewater Academy v. Gilbert*, 2 Pick. (Mass.) 579, 13 Am. Dec. 457; *Boutell v. Cowdin*, 9 Mass. 254; *Phillips Limerick Academy v. Davis*, 11 Mass. 113, 6 Am. Dec. 162; *Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201; *Cottage St. Methodist Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Methodists &c. Assn. v. Sharp's Exr.*, 6 Mo. App. 150; *Hull v. Pearson*, 38 App. Div. 588, 56 N. Y. S. 518; *Hamilton College v. Stewart*, 1 N. Y. 581. But see *Barnes v. Perine*, 12 N. Y. 18; *Stewart v. Trustees of Hamilton College*, 2 Denio (N. Y.) 403; *First Presby. Church v. Cooper*, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. 767; *Twenty-Third St. Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A.

807; *Stoddard v. Cleveland*, 4 How. Pr. (N. Y.) 148; *Johnson v. Otterbein Univ.*, 41 Ohio St. 527. But see *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. 727; *Hassenzahl v. Bevins*, 24 Ohio C. C. 173; *Sutton v. Otterbein University*, 7 Ohio C. C. 343; *In re Lippincott's Estate*, 21 Pa. Super. Ct. 214; *In re Thum's Estate*, 5 Pa. Dist. 739. The moral obligation to fulfil the agreement is sufficient to support it. *Caul v. Gibson*, 3 Barr. (Pa.) 416. In Pennsylvania a moral consideration is sufficient to uphold a contract. See, however, *Reimensnyder v. Gans*, 110 Pa. St. 17, 2 Atl. 425; *Montpelier Seminary v. Smith's Estate*, 69 Vt. 382, 38 Atl. 66. A subscription, like any other contract, must be supported by a consideration. *Galt's Exr. v. Swain*, 9 Grat. (Va.) 633, 60 Am. Dec. 311.

¹⁰ *Garrigus v. Home &c. Missionary Soc.*, 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. 262; *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. 727.

¹¹ Expenditure of money in maintaining an institution of learning. *Burlington University v. Barrett*, 22 Iowa 60, 92 Am. Dec. 376; *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. 727; *Irwin v. Webster*, 7 Ohio C. C. 269, 4 Ohio C. D. 590; *Ohio Wes-*

performance of work,¹² or the incurring of some liability¹³ by the promisee on the faith of the subscription. But if the money has been expended, the work performed or the liability incurred prior to the giving of the subscription such subscription is not supported by a consideration, for the reason that the consideration is past. Thus a subscription to pay an existing debt is not enforceable when no new liability or obligation is assumed on the faith of it.¹⁴

Ieyan College v. Love, 16 Ohio St. 20; Commissioners Canal Fund v. Perry, 5 Ohio 56.

¹² Services performed upon the strength of the promise. Trustees &c. Soc. v. Carter, 72 Ill. 247. But see Augustine v. Methodist &c. Soc., 79 Ill. App. 452; Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325; Cottage Hospital v. Merrill, 92 Iowa 649, 61 N. W. 490 (erecting a hospital); Kansas City School Dist. v. Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. 576 (library building); Howell v. Church, 61 Ill. App. 121 (church); Central Presbyterian Church v. Thompson, 75 N. Y. 305, 8 App. Div. (N. Y.) 565, 40 N. Y. S. 912; Judson v. Gage, 91 Cal. 304, 27 Pac. 676 (railroad); Cook v. McNaughton, 128 Ind. 410, 24 N. E. 361, 28 N. E. 74; Wright v. Irwin, 35 Mich. 347; Robinson v. Nutt, 185 Mass. 345, 70 N. E. 198 (not materially increasing current expenses of the parish for five years); Miller v. Western College, 71 Ill. App. 587, *affd.*, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. 242 (building a hall to be used by a certain college); Town of Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130 (building a bridge); Armann v. Buel, 40 Nebr. 803, 59 N. W. 515 (depot); Hassenzahl v. Bevins, 24 Ohio C. C. 173 (road); Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. 197 (factory); Fearnley v. De Mainville, 5 Colo. App. 441, 39 Pac. 73 (locating post-office); Rogers v. Burr, 105 Ga. 432, 31 S. E. 438, 70 Am. St. 50 (factory); Bohn Mfg. Co. v. Lewis, 45 Minn. 164, 47 N. W. 652; Davis &c. Mfg. Co. v. Cagle (Tenn. Ch. App.), 53 S. W. 240; Rogers v. Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636 (college);

Schuler v. Myton, 48 Kans. 282, 29 Pac. 163; Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325; Kansas City School Dist. v. Sheidley (sub nomine, Stocking), 138 Mo. 672, 40 S. W. 656, 60 Am. St. 576, 37 L. R. A. 406 (holding an election); La Fayette County Monument Corp. v. Magoon, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761 (taxing people in order to raise money to meet the terms of the subscription); Woodworth v. Veitch, 29 Ind. App. 589, 64 N. E. 932 (continuing to teach certain religious doctrine); Lasar v. Johnston, 125 Cal. 549, 58 Pac. 161 (giving a ball); Williams College v. Danforth, 29 Mass. 541 (keeping a college on the same location).

¹³ Trustees of the institution becoming individually liable therefor. First M. E. Church v. Donnell, 110 Iowa 5, 81 N. W. 171, 46 L. R. A. 858; United Presbyterian Church v. Baird, 60 Iowa 237, 14 N. W. 303; Augustine v. Methodist Episcopal Soc., 79 Ill. App. 452 (trustees advancing money). Obligations incurred in maintaining a college. Albert Lea College v. Brown's Estate, 88 Minn. 524, 60 L. R. A. 870, 93 N. W. 672; Trustees &c. University v. Hoffman, 95 Mo. App. 488, 69 S. W. 474; Baptist Female Univ. v. Borden, 132 N. Car. 476, 44 S. E. 47, 1007; Philomath College v. Hartless, 6 Ore. 158, 25 Am. Rep. 510 (expense of construction college buildings); Presbyterian Board &c. Missions v. Smith, 209 Pa. 361, 58 Atl. 689 (sending a missionary into the foreign field).

¹⁴ University of Des Moines v. Livingston, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42; Johnson v. Otterbein Univ., 41 Ohio St. 527.

§ 229. **Mutual promises as a consideration therefor.**—Voluntary subscriptions are also upheld on the ground that one gratuitous subscription is the consideration for the other. In many cases it is stated that when several agree to contribute to a common object which they wish to accomplish the promise of each is a good consideration for the promise of the others.¹⁵ This is, however, too broad a statement of the rule unless the courts which give it expression have, without so stating, adopted the holding of Michigan's supreme tribunal to the effect that "where subscribers sign the same paper it is not necessary to prove that the subscription was made in consideration of each of the other subscribers. This is presumed."¹⁶ For the mere fact that all sign the same subscription list or that the promise of any one particular subscriber has led others to subscribe does not necessarily make this promise mutual and therefore binding. Unless the promises are given in consideration of each other, they do not constitute a contract.¹⁷

§ 230. **Obligation to apply the funds in a certain way as a consideration.**—There are some cases holding that, where the funds raised by the subscriptions are required to be applied in a certain way, the obligation to so apply them is sufficient consideration to uphold the promise to pay.¹⁸ "Nor is it necessary that

¹⁵ *Christian College v. Hendley*, 49 Cal. 347; *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *Higert v. Indiana Asbury Univ.* 53 Ind. 326; *Pierce v. Ruley*, 5 Ind. 69; *Curry v. Kentucky Western R. Co.*, 25 Ky. L. 1372, 78 S. W. 435; *New Lindell Hotel Co. v. Smith*, 13 Mo. App. 7; *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446. But see *Curry v. Rogers*, 21 N. H. 247; *Congregational Soc. v. Perry*, 6 N. H. 164, 25 Am. Dec. 455; *Stewart v. Trustees of Hamilton College*, 2 Denio (N. Y.) 403, repudiated in *First Presbyterian Church v. Cooper*, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468n, 8 Am. St. 767; *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. 727; *Lathron v. Knapp*, 27 Wis. 214. See post, § 231, *Promise for Promise*.

¹⁶ *Waters v. Union Trust Co.*, 129

Mich. 640, 89 N. W. 687; *Comstock v. Howd*, 15 Mich. 236.

¹⁷ *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Methodists Orphans' Home Assn. v. Sharp's Exr.*, 6 Mo. App. 150; *Curry v. Rogers*, 21 N. H. 247; *First Presbyterian Church v. Cooper*, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. 767.

¹⁸ *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427; *Collier v. Baptist &c. Soc.*, 8 B. Mon. (Ky.) 68; *Kentucky &c. School v. Fleming*, 10 Bush (Ky.) 234; *Parsonage Fund v. Ripley*, 6 Greenl. (Maine) 442; *Maine Cent. Inst. v. Haskell*, 73 Maine 140. In *Ladies' Institute v. French*, 16 Gray (Mass.) 196, which was a suit upon a college subscription, the court said: "The second objection is that the promises of the defendants, being

the obligation of the trustee should be performed in advance of the payment of the fund, for the very purpose of the subscription is to enable such party to perform the duty imposed. Courts of equity have ample power to coerce the application of the funds arising from the subscription to the accomplishment of the purpose in the contract."¹⁹ This doctrine is not, however, in accord with the principle that doing or promising to do what one is already legally bound to do is not a sufficient consideration to uphold a contract, whether the previous obligation arises by contract or by law independently of it. When funds are raised or subscribed to be applied in a certain way the trustees of the funds are bound to so apply them. This legal obligation could not be a consideration for the subscription.²⁰ Moreover, it would seem that the obligation to apply funds in a certain way can only arise when there are funds to apply. This would necessitate the payment of the subscription in order that the obligation may attach. After the payment of the subscription the question then becomes academic.

§ 231. Promise for promise.—A promise given in consideration and because of the fact that another promise is given, is

mere subscriptions to the funds of the institute, are without consideration, and therefore void. Subscriptions of this character have been made the subject of litigation in many instances, and the earlier cases in our reports contain dicta some of which have not been sanctioned by later decisions. But in the cases of *Amherst Academy v. Cows*, 6 Pick. (Mass.) 427; *Williams College v. Danforth*, 12 Pick. (Mass.) 541, and *Thompson v. Page*, 1 Metc. (Mass.) 565, their validity is established, and the ground of it is definitely stated. It is held that by accepting such a subscription the promisee agrees on his part with the subscribers that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are thus held to rest upon a well-settled principle in respect to

concurrent promises." In *Troy Academy v. Nelson*, 24 Vt. 189, which was also a suit upon a college subscription, it was said: "A legal consideration may consist in loss, damage or inconvenience, sustained by the party to whom the promise is made, or of benefit or advantage to the party promising. The amount of the consideration is unimportant, nor is it necessary, in this state, that it should appear upon the face of the contract or agreement, as it may be proved by testimony aliunde. The consideration for this agreement is found in the obligation imposed upon, and assumed by the trustees of this academy to see to, and make the application of this money as directed to the subscribers to this fund, so as to enable this institution to prosecute its duties of public instruction, for which it was incorporated."

¹⁹ *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427.

²⁰ *Montpelier Seminary v. Smith's*

binding provided the promise given is for the performance of some act which, if executed, would be a sufficient consideration for an obligatory unilateral contract.²¹ Concisely stated, a promise may constitute the consideration for another promise.²²

Estate, 69 Vt. 382, 38 Atl. 66. See ante, § 215, Doing what one is legally bound to do.

²¹ *McKell v. Chesapeake &c. R. Co.*, 186 Fed. 39, 108 C. C. A. 41 (agreement by owner of coal land to develop mines thereon, coke a certain part of the coal produced, and contribute free right of way in consideration of a railroad company building the line and taking the coal produced at the ruling price); *Beauchamp v. Couch*, 54 Tex. Civ. App. 471, 117 S. W. 924. Mutual obligations imposed by the contract form a sufficient consideration for entering into it, and the reciprocal release from such obligations likewise form sufficient consideration for rescission. *Kilgore Lumber Co. v. Thomas*, 98 Ark. 219, 135 S. W. 858. See also, *Hodges v. Bankers' Surety Co.*, 152 Ill. App. 372; *Minehan v. Hill*, 144 App. Div. (N. Y.) 854, 129 N. Y. S. 873 (mutual promises to share decedent's property equally); *Holden v. Gilfeather*, 78 Vt. 405, 63 Atl. 144 (mutual promises of the parties to release a lien on a horse and take in lieu thereof a lien on oxen).

²² *Gower v. Capper*, *Cro. Eliz.* 543; *Nichols v. Raynbred*, *Hob.* 88; *Strangborough's Case*, 4 Leon. 3; *In re Fuller's Case*, *Godb.* 94; *Thomason v. Dill*, 30 Ala. 444; *Davis v. Williams*, 121 Ala. 542, 25 So. 704; *Wells Fargo &c. Co. v. Enright*, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; *Barringer v. Warden*, 12 Cal. 311; *Siddall v. Clark*, 89 Colo. 321, 26 Pac. 829; *New Haven Mfg. Co. v. New Haven Pulp &c. Co.*, 76 Conn. 126, 55 Atl. 604; *Mason v. Terrell*, 3 Ga. App. 348, 60 S. E. 4; *Ferst v. Blackwell*, 39 Fla. 621, 22 So. 892; *Van Housen v. Copeland*, 180 Ill. 74, 54 N. E. 161; *Gray v. Bloomington &c. R. Co.*, 120 Ill. App. 159; *Murphy v. Murphy*, 93 Ill. App. 671; *Funk v. Hough*, 29 Ill. 145; *Thayer v. Allison*, 109 Ill. 180; *Downey v. Hinchman*, 25 Ind. 453; *Bruce v. Smith*, 44 Ind. 1; *Ohio Farmers' Ins. Co. v. Stowman*, 16

Ind. App. 205, 44 N. E. 940; *Steves v. Frazee*, 19 Ind. App. 284, 49 N. E. 385; *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *Boies v. Vincent*, 24 Iowa 387; *Leach v. Keach*, 7 Iowa 232; *Crawford v. Paine*, 19 Iowa 172; *Spencer v. Taylor*, 69 Kans. 493, 77 Pac. 276; *Cowan v. Hite*, 2 A. K. Marsh. (Ky.) 238; *Pike v. Thomas*, 4 Bibb (Ky.) 486, 7 Am. Dec. 741; *Kernan v. Carter*, 31 Ky. L. 865, 104 S. W. 308; *Harper v. Cincinnati &c. R. Co.*, 15 Ky. L. 223, 22 S. W. 849; *Stovall v. McCutchen*, 107 Ky. 577, 21 Ky. L. 1317, 54 S. W. 969, 47 L. R. A. 287; *Babcock v. Wilson*, 17 Maine 372, 35 Am. Dec. 263; *Prebel v. Hunt*, 85 Maine 267, 27 Atl. 151; *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397; *Barnett v. Block*, 94 Minn. 138, 102 N. W. 392; *Ames-Brooks Co. v. Ætna Ins. Co.*, 83 Minn. 346, 86 N. W. 344; *Steele v. Johnson*, 96 Mo. App. 147, 69 S. W. 1065; *Baker v. Kansas City &c. R. Co.*, 91 Mo. 152, 3 S. W. 486; *Lamb v. Wilson* (Nebr.), 97 N. W. 325; *Pryor v. Hunter*, 31 Nebr. 678, 48 N. W. 736; *Doolittle v. Callender* (Nebr.), 130 N. W. 436 (contract between merchant and advertising agency); *Congregational Society v. Perry*, 6 N. H. 164, 25 Am. Dec. 455; *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446; *Buckingham v. Ludlum*, 40 N. J. 422, 2 Atl. 265; *Livingston v. Rogers*, 1 Caines (N. Y.) 583; *Tradesman's Nat. Bank v. Curtis*, 167 N. Y. 194, 60 N. E. 429, 52 L. R. A. 430; *Coleman v. Eyre*, 45 N. Y. 38; *Briggs v. Tillotson*, 8 Johns. (N. Y.) 304; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Gould v. Banks*, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90; *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10; *Maloney v. Nelson*, 12 App. Div. (N. Y.) 545, 42 N. Y. S. 418, affd., 158 N. Y. 351, 53 N. E. 31; *Roussel v. Mathews*, 171 N. Y. 634, 63 N. E. 1122, affg. 62 App. Div. (N. Y.) 1; *Shannon v. Hawley*, 32 Misc. (N. Y.) 623, 66 N. Y. Supp. 471; *White v. Demilt*, 2 Hall (N. Y.) 405; *Forney*

Cases illustrating and showing the application of this principle are numerous, and the facts involved in a number of them are briefly stated in the note below.^{22a} But a promise is not a good consideration for a promise unless there is absolute mutuality of the engagement, so that each party has the right to hold the other

v. Shipp, 49 N. Car. 527; Whitehead v. Potter, 4 Ired. L. (N. Car.) 257; Howe v. O'Mally, 1 Murphy (N. Car.) 287, 3 Am. Dec. 693; Shields v. Titus, 46 Ohio St. 528, 22 N. E. 717; Commissioners v. Perry, 5 Ohio 56; Nott v. Johnson, 7 Ohio St. 270; McFeasters v. Pattison, 188 Pa. St. 270, 41 Atl. 609; McNish v. Reynolds, 95 Pa. St. 483; Aldrich v. Lyman, 6 R. I. 98; Rice v. Sims, 8 Rich. (S. Car.) 416; Seward v. Mitchell, 1 Cold. (Tenn.) 87; Arnold v. Chamberlain, 14 Tex. Civ. App. 634, 39 S. W. 201; James v. Fulcrod, 5 Texas 512, 55 Am. Dec. 743; Flanders v. Wood, 83 Tex. 277, 280, 18 S. W. 572; Beauchamp v. Couch, 54 Tex. Civ. App. 471, 117 S. W. 924; Phillips v. Preston, 5 How. (U. S.) 278, 12 L. ed. 152; Abba v. Smyth, 21 Utah 109, 59 Pac. 756; Missisquoi Bank v. Sabin, 48 Vt. 239; Patton v. Cardiner, 72 Vt. 47, 47 Atl. 110; Richmond U. P. R. Co. v. Richmond, 96 Va. 670, 32 S. E. 787; Carnegie Trust Co. v. Security Life Ins. Co., 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186 (voting trust agreement); Hawes v. Woolcock, 26 Wis. 629; Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459; Cramer v. Redman, 10 Wyo. 328, 68 Pac. 1003.

^{22a} Mutual subscription contracts are upheld on this ground (Brown v. Marion Commercial Club (Ind. App.), 97 N. E. 958). "A promise may be a sufficient consideration for a promise. * * * And it is the promise, and not the performance thereof, that constitutes the consideration, except where by the terms or necessary intentment of the agreement between the parties, performance on one side is made a condition precedent to performance on the other." United and Globe Rubber Mfg. Co. v. Conard, 80 N. J. L. 286, 78 Atl. 203. The promise given for a promise may be dependent upon a

condition. Chappell v. McMillan (N. M.), 113 Pac. 611. When promises are made in the alternative, and one alternative becomes impossible of performance, this does not impair the obligation of the other alternative promise. Chappell v. McMillan (N. Mex.), 113 Pac. 611. An agreement whereby one promises to sell and deliver a certain number of cattle and another to receive and pay for them at a future time and designated place, is binding on the parties. Funk v. Hough, 29 Ill. 145; Boies v. Vincent, 24 Iowa 387. Where the seller agreed to deliver corn at a designated place and at an agreed price and the purchaser contracted to supply the seller with sacks and the corn was not to be delivered until the sacks were furnished, the respective undertakings of each are a sufficient consideration to support the promise of the other. Low v. Forbes, 18 Ill. 568. An agreement to furnish board to non-union men in consideration of defendants furnishing a certain number of such men for a designated period of time is supported by a consideration. Marr v. Burlington & C. R. Co., 121 Iowa 117, 96 N. W. 716. A written agreement entered into by the merchants of a town whereby they agreed to close their places of business at 6:30 o'clock during the summer months is binding, the mutual promises being a sufficient consideration. Stovall v. McCutchen, 107 Ky. 577, 54 S. W. 969, 47 L. R. A. 287, 92 Am. St. 373. An agreement to annul a contract on one side is sufficient consideration for an agreement to annul on the other. Proctor Coal Co. v. Strunk, 29 Ky. L. 995, 96 S. W. 603. Where an officer agreed not to move the property levied on by him to satisfy an execution on condition that the holder thereof keep the property safely, and have it forthcoming at the sale on execution, there is a

to a positive agreement.²³ This statement must not, however, be misunderstood. While the contract must be mutual in obligation

sufficient consideration for the mutual promises. *Ames v. Taylor*, 49 Maine 381. A promise by the abutting property owners on a street to pay the costs of curb stones, if city would not destroy a row of trees standing in the street, is binding. *Springfield v. Harris*, 107 Mass. 532. And a promise to share in the expense of an enterprise is sufficient consideration for a promise to receive a portion of the proceeds. *Britenstool v. Michaels*, 56 N. Y. 607. An agreement to grind corn at a reasonable price in satisfaction of a judgment has been held sufficient consideration to support an agreement on the part of the judgment creditor to deliver him sufficient corn for that purpose. *Oldham v. Kerchner*, 79 N. Car. 106, 28 Am. Rep. 302. And an agreement that if defendants would hire two negroes of plaintiff as boat hands, he would deliver to the defendant his cotton crop to be transported to market, is supported by sufficient consideration. *Rice v. Sims*, 8 Rich. (S. Car.) 416. A demand for and a promise to furnish a sleeping-car berth constitutes a contract and the mutual obligations are binding. *Pullman Palace Car Co. v. Booth* (Tex. Civ. App.), 28 S. W. 719. Where a shipper agreed to load and ship cattle on a certain day and the railroad contracts to furnish the cars and receive the cattle on that day, there is a sufficient consideration for the contract of shipment where the shipper has the cattle ready for shipment at the time agreed. *Gulf & C. R. Co. v. Combes* (Tex. Civ. App.), 80 S. W. 1045. An agreement by the parties to exchange their promissory notes is supported by a consideration, the note of each being a consideration for the note of the other. *Dockray v. Dunn*, 37 Maine 442. *Williams v. Banks*, 11 Md. 198; *Eaton v. Carey*, 10 Pick. (Mass.) 211; *Higginson v. Gray*, 6 Metc. (Mass.) 212; *Whittier v. Eager*, 1 Allen (Mass.) 499; *Backus v. Spaulding*, 116 Mass. 418; *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Baldwin v. Van Deusen*, 37 N. Y. 487; *Newman v. Frost*, 52 N. Y. 422. Mutual prom-

ises to deliver and pay for goods are binding. *Bettisworth v. Champion Yelv.* 133; *Morris v. Lagerfelt*, 103 Ala. 608, 15 So. 895; *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 16 C. C. A. 400; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *Appleton v. Chase*, 19 Maine 74; *Jones v. Binford*, 74 Maine 439; *White v. Demilt*, 2 Hall (N. Y.) 405; *Cherry v. Smith*, 3 Humph. (Tenn.) 19, 39 Am. Dec. 150. See also, *Nicholson v. Acme Cement Plaster Co.* (Mo. App.), 122 S. W. 773 (promise by one party to pay for replastering ceilings of a building).

²³ *Miners v. Fox*, 3 Eng. L. & Eq. 420; *Eustice v. Meytrott* (Ark.), 140 S. W. 590; *Stiles v. McClellan*, 6 Colo. 89; *Hoagland v. Murray*, (Colo.), 123 Pac. 664 (contract for purchase and sale of real estate upheld); *Vellie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324; *Mason v. Terrell*, 3 Ga. App. 348, 60 S. E. 4; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Cooley v. Moss*, 123 Ga. 707, 51 S. E. 625; *McKinley v. Watkins*, 13 Ill. 140; *Bean v. Burbank*, 16 Maine 458, 33 Am. Dec. 681; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417; *Dresel v. Jordan*, 104 Mass. 407; *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 666, 19 Am. St. 205; *Bailey v. Austrian*, 19 Gil. (Minn.) 465; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Ewins v. Gordon*, 49 N. H. 444; *Townsend v. Fisher*, 2 Hilt. (N. Y.) 47; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Burnet v. Bisco*, 4 Johns. (N. Y.) 235; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484; *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 749; *Hirschhorn, Mack & Co. v. Nelden-Judson Drug Co.*, 26 Utah 110, 72 Pac. 386; *Smokeless Fuel Co. v. W. E. Seaton & Sons*, 105 Va. 170, 52 S. E. 829; *American Agricultural Chemical Co. v. Kennedy*, 103 Va. 171, 48 S. E. 868; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. 103. See also, *Foulds*

and remedy²⁴ there need not be the same remedy to both parties.²⁵ Furthermore, if the contract is voidable at the option of one of the parties the one with whom the option rests may enforce the contract, notwithstanding he himself might avoid it. Thus, an infant's promise may be the consideration for a promise, although the infant may enforce the contract against the adult, while the adult might not be able to enforce it against the infant.²⁶ And

v. Watson, 116 Ill. App. 130; *El Paso &c. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922. A new promise by a party to do less than he has already agreed to do has been held an insufficient consideration for the promise of another party to do more than he is obliged to do. *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10. A party against whom redress by specific performance could not be maintained, cannot himself successfully seek it. *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 So. 449, 3 Am. St. 758; *Cooper v. Pena*, 21 Cal. 403; *Lattin v. Hazard*, 91 Cal. 87, 27 Pac. 515; *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934; *Sterling v. Klepsattle*, 24 Ind. 94, 87 Am. Dec. 319; *Rogers v. Saunders*, 16 Maine 92, 33 Am. Dec. 635; *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030; *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 749; *Decordova v. Smith's Admx.*, 9 Tex. 129, 58 Am. Dec. 136. A unilateral contract binding in law may, however, be specifically enforced. *Rogers v. Saunders*, 16 Maine 92, 33 Am. Dec. 635.

²⁴ *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. 892. See also, *Utica R. Co. v. Brinckerhoff*, 21 Wend. (N. Y.) 139, 34 Am. Dec. 220.

²⁵ "The legal principle that contracts must be mutual, that they must bind both parties or neither, does not then mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one, when only assumpsit can be maintained against the other. Nor does the principle mean that when a contract is written each party must sign it. It is true that when a contract consists of mutual promises, both parties must be bound, or neither is; but in no case, when the consideration is a covenant or a

promise, is the form of the undertaking material. It is its substance." *Grove v. Hodges*, 55 Pa. St. 504. See also, the case of *James Macalium Printing Co. v. Graphite Compendius Co.*, 150 Mo. App. 383, 130 S. W. 836, in which it is said, "We do not understand that a contract, supported when it is made by a full consideration moving to both parties, is unilateral, because one of the parties is accorded the privilege to do or not to do certain things in the future, if he agrees to render a consideration for the privilege. * * * If that were so, most or all contracts allowing an option to buy property within a stated period would be treated as invalid."

²⁶ "The numerous decisions which have been had in this country justify the settlement of the following definite rule, as one that is subject to no exceptions. The only contract binding on an infant, is the implied contract for necessities; the only act which he is under a legal incapacity to perform, is the appointment of an attorney; all other acts and contracts, executed or executory, are voidable or confirmable by him at his election." 1 Am. Lead. Cas. (5th ed.) 300. See also, *Williams v. Moor*, 11 M. & W. 256; *Shropshire v. Burns*, 46 Ala. 108; *Vaughan v. Parr*, 20 Ark. 600; *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148; *Murphy, Thompson & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am. St. 259; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Hinely v. Margaritz*, 3 Pa. St. 428; *Scott v. Buchanan*, 11 Humph. (Tenn.) 467; *Cummings v. Powell*, 8 Tex. 80; *Patchin v. Cromach*, 13 Vt. 330; *Mustard v. Wohlford's Heirs*, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

a contract may be unenforcible as to one party, it being as to him within the statute of frauds, while the same contract is enforcible as to the other because he has signed such contract in writing.²⁷

Except in the case of voidable contracts, in order that one promise may be consideration for another, the promises must be concurrent and obligatory upon each at the same time in order to render them binding.²⁸ It is evident from a reading of the cases cited that this does not mean that the promises, like any other offer and acceptance, cannot be made at different times, but they must become concurrent or obligatory at the same time, i. e., on the acceptance of the offer. The law regards the offer as continuing in force until it is accepted, at which time the promises become binding upon both parties, provided of course the offer is not revoked or extinguished before acceptance.²⁹

Although a promise may constitute the consideration for a promise and the law will give effect to a consensual agreement, it must be borne in mind that the promise must be for the perform-

²⁷ *Parton v. Crofts*, 16 C. B. (N. S.) 11; *Farwell v. Lowther*, 18 Ill. 252; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452. The weight of authority from adjudicated cases will be found to fully sustain the doctrine that a contract may not bind one party, in consequence of his omitting to sign it according to the statute of frauds; and yet he may sue the other party who has complied with the act. *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 294. See *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, where a great many authorities on both sides of this question are collected and discussed. But this subject is more germane to the statute of frauds, and will be treated thereunder. *Clason's Exrs. v. Baley*, 14 Johns. (N. Y.) 484; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330n; *Hodson v. Carter*, 3 Pinney (Wis.) 212, 3 Chand. (Wis.) 234; *Cheney v. Cook*, 7 Wis. 413.

²⁸ *Stiles v. McClellan*, 6 Colo. 89; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Mason v. Terrell*, 3 Ga. App. 348, 60 S. E. 4; *Vogel v. Pakoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Kernan v. Carter*, 31

Ky. L. 865, 104 S. W. 308; *Coleman v. Applegarthe*, 68 Md. 21, 11 Atl. 284; *Steffen v. Mississippi River & C. Co.*, 156 Mo. 322, 56 S. W. 1125; *Buckingham v. Ludlum*, 40 N. J. Eq. 422, 2 Atl. 265; *Chicago & C. R. Co. v. Dane*, 43 N. Y. 240; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Tucker v. Woods*, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; *Utica R. Co. v. Brinckerhoff*, 21 Wend. (N. Y.) 139, 34 Am. Dec. 220 ("the promise of each must be concurrent and obligatory at the same time to render either binding and should be so stated in the declaration"); *Livingston v. Rogers*, 1 Caines (N. Y.) 583; *Macedon & C. Road Co. v. Snediker*, 18 Barb. (N. Y.) 317; *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743; *Flanders v. Wood*, 83 Tex. 277, 18 S. W. 572; *Dorsey v. Packwood*, 12 How. (U. S.) 126, 13 L. ed. 921; *Greve v. Ganger*, 36 Wis. 369. One promise may be in writing and the other may be oral. *Dicken v. Morgan*, 54 Iowa 684, 7 N. W. 145. Or it may be contained in separate instruments. *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Cohn v. Husson*, 119 N. Y. 609, 23 N. E. 573.

²⁹ *Schultz v. Simmons Fur Co.*, 46 Wash. 555, 90 Pac. 917. As to revo-

ance of some act which, upon execution, will result either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility to the other party. If by the terms of the agreement no legal right or forbearance is to be received by the promisor in return for his promise, it is without consideration and cannot be enforced.³⁰ Thus a promise by the payee of a note to cancel the same at his death by will if the maker pays the interest regularly,³¹ or to renew the note when due,³² or give additional time in which to pay the debt,³³ or reduce the rate of interest,³⁴ or an agreement by a landlord after the lease is executed to furnish the house, cut the grass and keep the hedge trimmed,³⁵ are none of them enforceable if no return promise or other consideration exists.

In case the promise of one of the parties imposes no legal duty upon the party making it, such promise furnishes no consideration for a promise.³⁶ Therefore, independent of any other consideration, where a contract of employment fails to bind one of the parties for either a definite or indefinite time but by its terms binds the other, or, in other words, where the continuation or termination of the contract rests with the will or actions of one of the parties, such a contract is not considered a mutual

cation and extinguishment of offers, see ante, Ch. 3, Offer and Acceptance.

³⁰ Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. 244; Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874; Jackson v. Bloom, 66 Ill. App. 473; Houghton v. Milford Pink-Granite Co., 171 Mass. 354, 50 N. E. 646; Rose v. Fall River Bank, 165 Mass. 273, 43 N. E. 93; Hicks v. Hamilton, 144 Mo. 495, 46 S. W. 432, 66 Am. St. 431; Lincoln v. Wright, 23 Pa. St. 76, 62 Am. Dec. 316.

³¹ Trombly v. Klersy, 141 Mich. 73, 104 N. W. 419.

³² Arend v. Smith, 151 N. Y. 502, 45 N. E. 872.

³³ Davis v. Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. 565; Howe v. Klein, 89 Maine 376, 36 Atl. 620; Coleman v. Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417; Bank v. Gay, 114 Mo. 203, 21 S. W. 479; Wolz v. Parker, 134 Mo. 458, 35 S. W. 1149.

³⁴ Harris v. Creveling, 80 Mich. 249, 45 N. W. 85.

³⁵ Leeming v. Duryea, 49 Misc. (N. Y.) 240, 97 N. Y. S. 355.

³⁶ Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Krause v. Kraus, 162 Ill. 328, 44 N. E. 736; Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Weaver v. Weaver, 109 Ill. 225; Allen v. Rouse, 78 Ill. App. 69; Louisville & C. R. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674; Heiland v. Ertel, 4 Kans. App. 516, 44 Pac. 1005; Jackson v. Sessions, 109 Mich. 216, 67 N. W. 315; Davie v. Lumberman's Mining Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; McDonald v. Bewick, 51 Mich. 79, 16 N. W. 240; Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. 205; Rose v. Oliver, 32 Ore. 447, 52 Pac. 176; Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145; Lowber v. Conitt, 36 Wis. 176; Dodge v. Hopkins, 14 Wis. 630.

obligation and therefore not binding upon either unless the element of mutuality is otherwise supplied.⁸⁷ It is obvious that a party not bound by the agreement itself cannot invoke the aid of the court to enforce such a contract. His right does not depend upon the subsequent offer to perform, but upon its original obligatory character. However, if some other consideration is furnished by the employé, as the execution of a release from liability for injuries, the employer is bound to furnish such employment in accordance with the terms of the contract.⁸⁸

§ 232. **Mutuality, options.**—An option is a contract by which the owner agrees with another person that he shall have the right to buy certain designated property, within a certain time, at a stipulated price. It is a continuing offer to sell which may or may not, within the time specified at the election of the optionee, be accepted. The owner parts with the right to sell to another for such time and gives to the optionee the exclusive privilege to buy on the terms set forth in the option.⁸⁹ There are earlier cases

⁸⁷ *St. Louis &c. R. Co. v. Mathews*, 64 Ark. 398, 39 L. R. A. 467; *Louisville &c. R. Co. v. Gaines*, 99 Ky. 411, 36 S. W. 174, 59 Am. St. 465; *Louisville &c. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 59 Am. St. 467; *Benjamin v. Bruce*, 87 Md. 240, 39 Atl. 810; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Hirschhorn, Mack & Co. v. Neldon &c. Drug Co.*, 26 Utah 110, 72 Pac. 386.

⁸⁸ *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. 289; *Kelly v. Peter &c. Stone Co.*, 130 Ky. 530, 113 S. W. 486; *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685; *Sax v. Detroit &c. R. Co.*, 125 Mich. 252, 84 N. W. 314, 84 Am. St. 572; *Stearns v. Lake Shore &c. R. Co.*, 112 Mich. 651, 71 N. W. 148; *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550, 42 N. W. 965; *Smith v. St. Paul &c. R. Co.*, 60 Minn. 330, 62 N. W. 392; *Lake Erie &c. R. Co. v. Tierney*, 75 Ohio St. 565, 80 N. E. 1128, 29 Ohio C. C. 83; *East Line &c. R. Co. v. Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. 758. Or if the contract is definite as to time and each promises something of value in return for the promise, the mutual agreements will

be upheld. *Healy v. Southern States Alcohol Mfg. Co.*, 125 La. 1038, 52 So. 150; *Federal Iron &c. Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *Schultz v. Simmons Fur Co.*, 46 Wash. 555, 90 Pac. 917. See *Gulf &c. R. Co. v. Jackson*, 29 Tex. Civ. App. 342, 69 S. W. 89, in which it is held that the parties might enter into an agreement binding upon one of them for a certain length of time, but which the other might abrogate whenever he chose to do so, and *Newhall v. Journal Printing Co.*, 105 Minn. 44, 117 N. W. 228, 20 L. R. A. (N. S.) 899, where it is stated "it is, however, well settled that a contract for employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for definite period," citing *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. 488. But in the case quoted and in the case it cites there was an independent executed consideration moving from the employé.

⁸⁹ *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403.

holding that such agreements are unenforcible for want of mutuality.⁴⁰ These decisions cannot be taken as authority for it is now universally held that when an option is accepted, no other element entering in, it becomes an executory contract for the sale of the property with mutuality of obligation and remedy.⁴¹ And the acceptance of the option in the manner and within the time specified is sufficient to bind both parties and removes any objection to the enforcement of the agreement based thereon for want of consideration.⁴² The option so given may or may not be supported by a sufficient consideration. If it is not so supported the offer is a mere gratuity which may be withdrawn at any time before its acceptance.⁴³ But if an option unsupported by a consideration is accepted before it expires or is withdrawn, a binding contract is thus formed.⁴⁴ And if the offer to sell is sup-

⁴⁰ *Cooke v. Oxley*, 3 T. R. 653; *Bell v. Howard*, 9 Mod. 302; *Jenkins v. Locke*, 3 App. D. C. 485; *Boucher v. Vanbuskirk*, 2 A. K. Marsh. (Ky.) 346; *Litz v. Goosling*, 93 Ky. 185, 14 Ky. L. 91, 19 S. W. 527, 21 L. R. A. 127. The doctrine of the first case has been repudiated. *Murphy, Thompson & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am. St. 259. The language of the second has been limited so as to make it conform to the general rule. *Murphy, Thompson & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am. St. 259. See also, *Johnson v. Virginia & Co. Lumber Co.*, 163 Fed. 249; *Warren v. Castello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. 669; *Davis v. Petty*, 147 Mo. 374, 48 S. W. 944.

⁴¹ *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. 963.

⁴² *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522n.

⁴³ If the optionee has notice that the optionor has done some act inconsistent with the continuance of the offer, it may amount to a withdrawal of the offer. *Dickinson v. Doods*, L. R. 2 Ch. Div. 463; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Murphy, Thompson & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am.

St. 259; *Boston & M. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Bosshardt & Co. v. Crescent Oil Co.*, 171 Pa. St. 109, 32 Atl. 1120; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Walker v. Bamberger*, 17 Utah 239, 54 Pac. 108; *Cummins v. Beaver*, 103 Va. 230, 48 S. E. 891, 106 Am. St. 881; *Barton v. Spinning*, 8 Wash. 458, 36 Pac. 439; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94. The death of optionee revokes the offer. *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476. But the death of the optionor before the expiration of an option given for a sufficient consideration does not impair the right of the other party to make his election and enforce performance against the heirs and representatives of the giver. *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 Am. St. 997. See also, *Dickson v. Eames*, 134 Mo. App. 373, 114 S. W. 574.

⁴⁴ *Wilks v. Georgia & Co. R. Co.*, 79 Ala. 180; *Perkins v. Hadsell*, 50 Ill. 216; *Murphy, Thompson & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am. St. 259 (the case of *Litz v. Goosling*, 93 Ky. 185, 14 Ky. L. 91, 19 S. W. 527, 21 L. R. A. 127, limited); *Boston & M. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. 17; *Donahue v. Potter & G. Co.*, 63 Nebr. 128, 88 N. W. 171; *Brad-*

ported by a sufficient consideration, it cannot be withdrawn prior to the expiration of the time specified.⁴⁵ As in the case of other contracts, the inadequacy of the consideration given for the option is not sufficient reason for refusing to grant specific performance of the agreement based thereon.⁴⁶ If the consideration given be of an appreciable value, the contract will, as a general rule, be upheld. An option given in consideration of \$1.00 has been held valid.⁴⁷ However, the holding in these cases has not gone unchallenged and the consideration of \$1.00 has been held insufficient.⁴⁸ In case the option given is under seal, the adequacy of the consideration given is immaterial where the common-law rule prevails, since in such jurisdictions want of consideration cannot be set up as a defense to an action in which it is sought to enforce the contract resulting from an acceptance of an option under seal.⁴⁹ In certain cases, however, it is held that since a suit for specific performance is an equitable proceeding, want of consideration may be shown even though the option is under seal, as in

ford v. Foster, 87 Tenn. 4, 9 S. W. 195; *Cheney v. Cook*, 7 Wis. 413; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. 963.

⁴⁵ *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 Am. St. 47; *Linn v. McLean*, 80 Ala. 360; *Murphy, Thompson & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am. St. 259; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. 881; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 929, 104 Am. St. 977; *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 Am. St. 997; *Sixta v. Ontonagon Valley Land Co.*, 148 Wis. 186, 134 N. W. 341; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. 963.

⁴⁶ *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522n.

⁴⁷ *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522n; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. 880. See also, *Lovett v. Eastern Oil Co.*, 68 W. Va. 667,

70 S. E. 707, Ann. Cas. 1912 B. 360, and note; *Rust v. Fitzhugh*, 132 Wis. 549, 112 N. W. 508 (contract for sale of land and division of profits which were uncertain as was also the time when the profit would be realized).

⁴⁸ *Rude v. Levy*, 43 Colo. 482, 96 Pac. 560, 127 Am. St. 123; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Murphy, Thompson & Co. v. Reed*, 125 Ky. 585, 101 S. W. 964, 128 Am. St. 259. See also, *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229, 95 S. W. 57 (oil and gas lease).

⁴⁹ *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Fuller v. Artman*, 69 Hun (N. Y.) 546, 24 N. Y. S. 13; *Willard v. Taylor*, 8 Wall. (U. S.) 557; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 881, 106 Am. St. 881, overruling *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. 894; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. 880; *Donnelly v. Parker*, 5 W. Va. 301; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

equity the real consideration may be inquired into since the parties are not concluded by the recitals in the contract though under seal.⁵⁰ And in case an option has been given for a valuable consideration and there is a promise to extend the time for the exercise of the option which is not based on any additional or new consideration such agreement is a nudum pactum. It is a mere continuing offer to sell at a price previously fixed not based upon any consideration and may be withdrawn at any time before acceptance. The old consideration will not make the promise to extend the option binding.⁵¹

§ 233. **Abandonment of legal right.**—The abandonment of any legal right may be sufficient consideration to support a promise.⁵² Nor is it necessary that a property right be directly or indirectly involved. The abandonment of any legal right though it may not or cannot result in any financial gain or loss to either party may be a valuable consideration. The abandonment may even be beneficial to the one abandoning the right and yet in the eyes of the law be such a detriment as will support the agreement.⁵³ Likewise the waiver or abandonment of privileges which

⁵⁰ *Rude v. Levy*, 43 Colo. 482, 96 Pac. 560, 127 Am. St. 123; *Corbett v. Cronkrite*, 239 Ill. 9, 87 N. E. 874; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. 894, overruled in *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. 881.

⁵¹ *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. 881. See also, note to *Harris v. Murphy*, 119 N. Car. 34, 25 S. E. 708, 56 Am. St. 664.

⁵² *Sikes v. Lafferry*, 27 Ark. 407; *Weston v. Hight*, 18 Maine 281; *Vogel v. Meyer*, 23 Mo. App. 427; *Farmer v. Stewart*, 2 N. H. 97; *McCormick v. Oliver*, 7 Yerg. (Tenn.) 24; *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; *Chapman v. Pittsburgh & C. R. Co.*, 18 W. Va. 184. Thus where acceptance of work and payment therefor is obtained by giving a guaranty, the guaranty is supported by a consideration. *A. M. Campau Realty Co. v. Len-*

hardt (Mich.), 128 N. W. 1078. An agreement by a creditor to withhold from sale securities held by him to secure claims due him held a sufficient consideration. *Bean v. Trust Co. of America*, 136 App. Div. (N. Y.) 69, 120 N. Y. S. 728. An agreement by one to forego his right to prosecute an action for fines and penalties and to merge his evidence with and join defendant in the prosecution of a larger claim, the money to be divided between them, has been upheld. *Overton v. Williams*, 139 App. Div. (N. Y.) 177, 123 N. Y. S. 758.

⁵³ Thus the waiver of a right to use tobacco (*Talbott v. Stemmons*, 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856n, 25 Am. St. 531); intoxicating liquors (*Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395), or to refrain from doing either of the above-mentioned things and, in addition, not to swear or play cards (*Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. 693), have been held valuable considerations. The

may indirectly involve property rights is sufficient to support a return promise.⁵⁴ Thus a promise given in consideration of an agreement to refrain from resisting the probate or contest of a will is enforceable as based on a sufficient consideration.⁵⁵ The waiving of the right to make a defense⁵⁶ or the waiver, dismissal

surrender of the control or possession of a child by the one rightfully possessing or controlling it is a valuable consideration. *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Benge v. Hiatt's Admr.*, 82 Ky. 666, 56 Am. Rep. 912; *Story v. Story* (Ky.), 62 S. W. 865; *Henry v. Dussell*, 71 Nebr. 691, 99 N. W. 488 (consent by parent to the marriage of a minor daughter). Where the husband gives a note to one who had been intimate with his wife on condition that he would try to induce her to return to her husband and himself leave the country there is a consideration for such note. *Lyts v. Keevey*, 5 Wash. 606, 32 Pac. 534. Attending a certain institution of learning is a sufficient consideration for a promise to pay a certain sum toward the expenses of the one attending. *Young v. Boyd*, 107 Md. 449, 69 Atl. 33; *Hoshor v. Kautz*, 19 Wash. 258, 53 Pac. 51. Likewise an agreement to pay for the support, maintenance and education of certain grandchildren, when such agreement is executed on the part of the promisee. *Ellicott v. Turner*, 4 Md. 476. Going to Europe at the request and on the promise of another to reimburse him all money spent on the trip (*Devemon v. Shaw*, 61 Md. 199, 14 Atl. 464, 9 Am. St. 422), attending funeral (*Earle v. Angell*, 157 Mass. 294, 32 N. E. 164), or furnishing information (*Wilkerson v. Oliveira*, 1 Bing. N. C. 490; *Friedman v. Suttle*, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 933; *Green v. Brooks*, 81 Cal. 328, 22 Pac. 849; *Reed v. Golden*, 28 Kans. 632, 42 Am. Rep. 180; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370n). will support a promise to pay therefor. And for a city to grant a cemetery association the right of burial within the city limits is a consideration for a promise by the association not to charge more than a certain sum for its lots. *City of Austin v. Austin City Cemetery Assn.*, 96 Tex. 384, 73 S. W. 525.

⁵⁴ *McKinney v. E. F. Rowson & Co.* (Tex. Civ. App.), 146 S. W. 643 (the giving up of the right of making payments called for by a contract and thus forfeiting all right in a given tract of land held a sufficient consideration).

⁵⁵ *Owen v. Hancock*, 1 Head. (Tenn.) 563; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403, but it is otherwise if there is no agreement to forbear. This was a case where the widow promised to pay if the claimant would forbear to present his claim to her deceased husband's executor. *Fain v. Turner*, 96 Ky. 634, 29 S. W. 628; *Blount v. Wheeler*, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036; *Grochowski v. Grochowski*, 77 Nebr. 506, 109 N. W. 742; *Lawrence v. Cammeyer*, 96 App. Div. (N. Y.) 633, 89 N. Y. S. 220; *Clark v. Lyons*, 38 Misc. (N. Y.) 516, 77 N. Y. S. 967; *Palmer v. North*, 35 Barb. (N. Y.) 282; *Durham v. Wadlington*, 2 Strob Eq. (S. Car.) 258; *Pariss v. Jewell*, 57 Tex. Civ. App. 199, 122 S. W. 399; *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 621. See also, *Lockwood v. Title Ins. Co.*, 73 Misc. (N. Y.) 296, 130 N. Y. S. 824; *Blake v. Robinson*, 129 Iowa 196, 105 N. W. 401 (agreement by administrator to pay a claim if claimant would not press it). To same effect, *Franchi v. Tirelli*, 92 N. Y. S. 784. But if the contract not to oppose the probate of the will is upheld it must appear that the plaintiffs are related to the testator in some degree or had some right to contest which was abandoned. *Sheppey v. Stevens*, 177 Fed. 484. See, however, *Sheppey v. Stevens*, 185 Fed. 147. An agreement to prevent a person from attempting to break a will is without consideration when such person had no right whatever to contest. *House v. Callicott*, 83 Miss. 506, 35 So. 761.

⁵⁶ *Moore v. First Nat. Bank*, 139 Ala. 595, 36 So. 777; *Union Bank v. Geary*, 5 Pet. (U. S.) 99, 8 L. ed. 60; *Timmons v. Boyd*, 89 S. Car. 11,

or discontinuance of an action instituted in good faith is a valuable consideration for a promise,⁵⁷ and will support a compromise of the dispute.⁵⁸ The abandonment by a married woman of her right to dower is a sufficient consideration to uphold a con-

71 S. E. 298 (withdrawing answer and permitting judgment to be revived); *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410. See also, *Renwick v. Wheeler*, 48 Fed. 431.

⁵⁷ *Skeate v. Beale*, 11 A. & E. 983 (distress for rent); *Burne v. Lee*, 156 Cal. 221, 104 Pac. 438 (waiver of right to sue for damages); *Heath v. Potlatch Lumber Co.*, 18 Idaho 42, 108 Pac. 343, 27 L. R. A. (N. S.) 707 (waiver of right to sue); *Booth v. Wiley*, 102 Ill. 84 (dismissal of replevin suits); *Wray v. Chandler*, 64 Ind. 146 (abandonment of appeal); *Matthews v. Merick*, 4 Md. Ch. 364 (abandonment of appeal); *Silver v. Graves*, 210 Mass. 26, 95 N. E. 948 (withdrawal of an appeal from a decree probating will); *Case v. Hawkins*, 53 Miss. 702 (dismissal of appeal); *Commercial Bank of Manchester v. Bonner*, 13 S. & M. (21 Miss.) 649 (dismissal of an action on a promissory note); *Simmons v. Kelsey*, 76 Nebr. 124, 107 N. W. 122 (dismissal of proceedings for appointment of guardian). In this case the court held that it was evident the proceeding was not instituted in good faith and therefore its dismissal was no consideration for a contract. *Weilage v. Abbott*, 3 Nebr. (unof.) 157, 90 N. W. 1128 (the dismissal of a suit will sustain a promise to pay costs and attorneys' fees). "A promise to pay a certain sum upon the discontinuance of a pending suit, by the promisee, is prima facie founded on a good consideration." *Flannagan v. Kilcome*, 58 N. H. 443. *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316, 41 Atl. 264 (discontinuance of attachment proceedings); *Dell v. New England Malt Co.*, 65 N. H. 25, 17 Atl. 1059 (action for damages and failure to transfer certain shares of stock); *Sommer v. Sommer*, 88 App. Div. (N. Y.) 434, 84 N. Y. S. 444 (dismissal of action for a separa-

tion); *Downer v. Church*, 44 N. Y. 647 (withdrawal of proceedings litigating right to property); *Brown v. McCreight*, 187 Pa. St. 181, 41 Atl. 45 (dismissal of the prosecution for removing debtor's goods to prevent levy); *Town of Levis v. Black River Improvement Co.*, 105 Wis. 391, 81 N. W. 669 (dismissal by the town of damage suits).

⁵⁸ *Crowther v. Farrer*, 15 Q. B. 677; *Cooper v. Parker*, 14 C. B. 118; *Longridge v. Dorville*, 5 B. & Al. 117; *Edwards v. Bough*, 11 M. & W. 641; *Longridge v. Dorville*, 5 Barn. & Ald. 117 (damages, collision between vessels at sea); *Bozeman v. Rushing*, 51 Ala. 529; *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822 (title to real estate); *Harland v. Staples*, 79 Ill. App. 72; *Sigsworth v. Coulter*, 18 Ill. 204. In *Moon v. Martin*, 122 Ind. 211, 23 N. E. 668 (bastardy proceedings), the court said: "There is a difference between compromising a suit that has been instituted in good faith and settling a claim asserted by one against another." *Atchison & Co. v. Starkweather*, 21 Kans. 322 (title to land); *McClellan v. Kennedy*, 8 Md. 230 (vacate deed); *Gloucester & Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. 214 (infringement of a patent); *Barlow v. Ocean Ins. Co.*, 4 Met. (Mass.) 270; *Sanford v. Huxford*, 32 Mich. 313, 20 Am. Rep. 647 (withdrawing opposition to bankruptcy proceedings); *Rankin v. McCleery* (Ala.), 57 So. 599 (waiving right to file a claim against bankrupt's estate); *Phillips v. Pullen*, 50 N. J. L. 439, 14 Atl. 222 (damages, invasion of marital rights); *Morey v. Newfane*, 8 Barb. (N. Y.) 645. In *Stewart v. Ahrenfeldt*, 4 Denio (N. Y.) 189, the court said: "The plaintiff is right in his law, that the settlement of a suit, or the compromise of a doubtful claim, is a good consideration for a promise to pay

tract based thereon.⁵⁹ This is true of the releasing of a lien,⁶⁰

money." *Dovale v. Ackerman*, 11 Misc. (N. Y.) 245, 66 N. Y. St. 513, 33 N. Y. S. 13; *Feeter v. Weber*, 78 N. Y. 334; *Barnes v. Ryan*, 66 Hun (N. Y.) 170, 49 N. Y. St. 152, 21 N. Y. S. 127 (damages for obstructing drain). Suit on life insurance policy, after settlement; it developed the insured was still living. Held, the company must settle in accordance with the terms of the agreement where it was entered into in good faith by the parties. *Sears v. Grand Lodge &c.*, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204; *Grasselli v. Lowden*, 11 Ohio St. 349 (damages); *Bennet v. Paine*, 5 Watts (Pa.) 259 (ejectment); *Brown v. Sloan*, 6 Watts (Pa.) 421 (withdrawing contest of administrator's report); *O'Keson v. Barclay*, 2 Penn. & W. (Pa.) 531 (suit for slander); *Hunter v. Lanius*, 82 Tex. 677, 18 S. W. 201; *Green v. Seymour*, 59 Vt. 459, 12 Atl. 206 (suit on debt); *Holcomb v. Stimpson*, 8 Vt. 141 (bastardy proceedings); *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812 (bastardy proceedings); *Griswold v. Wright*, 61 Wis. 195, 21 N. W. 44; *Bolln v. Metcalf*, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. 898 (discontinuance of attachment proceedings). See also, in connection with this last case, *Lamb v. Zundell*, 78 Vt. 232, 62 Atl. 33; *Prater v. Miller*, 25 Ala. 320, 60 Am. Dec. 521 (contesting will); *Murphy v. Murphy*, 84 Ill. App. 292 (withdrawal of suit to contest will); *Adams v. Adams*, 70 Iowa 253, 30 N. W. 795 (agreement not to contest will). Where there is no ground for the contest the abandonment thereof will not support a promise. *Busby v. Conoway*, 8 Md. 55, 63 Am. Dec. 688; *Grandin v. Grandin*, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642. In case it is obvious that no cause of action exists a dismissal of suit is no consideration for a promise by the defendant to pay a sum of money in settlement of action. *Kidder v. Blake*, 45 N. H. 530; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Wilbur v. Crane*, 13 Pick. (Mass.) 284. *Seaman v. Seaman*, 12 Wend. (N. Y.) 381. The dismissal of a suit which could not possibly be suc-

cessful is no consideration for a promise. *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Wade v. Simeon*, 2 C. B. 548; *Tooley v. Windham*, Cro. Eliz. 206; *Loyd v. Lee*, 1 Strange 94; *Bick v. Seal*, 45 Mo. App. 475; *Haynes v. Thom*, 28 N. H. 386; *Duck v. Antle*, 5 Okla. 152, 47 Pac. 1056.

⁵⁹ *Andrews v. Andrews*, 28 Ala. 432; *Pool v. Docker*, 92 Ill. 501; *Clay v. Clay*, 23 Ill. App. 109; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. 385; *Harrow v. Johnson*, 60 Ky. 578; *Farwell v. Johnston*, 34 Mich. 342; *Hart v. Young*, 1 Lans. (N. Y.) 417; *Harvey v. Alexander*, 1 Rand (Va.) 219, 10 Am. Dec. 519. See also, *Kinkead v. Peet* (Iowa), 111 N. W. 48.

⁶⁰ *Buckner v. McIlroy*, 31 Ark. 631; *Wilson v. Samuels*, 100 Cal. 514, 35 Pac. 148, 559; *St. Clair v. Perrine*, 75 Ill. 366; *Allmendinger v. Malcolm McDonald Lumber Co.*, 82 Ill. App. 166; *Luark v. Malone*, 34 Ind. 444; *Sharpe v. Carnody*, 17 Ky. 827, 32 S. W. 749; *Hillenbrand v. Shippen*, 22 Ky. L. 652, 58 S. W. 525; *Mason v. Gass*, 62 Mo. App. 449; *Nicholson v. May* (Wright), Ohio 660; *Hughes v. Lansing*, 34 Ore. 118, 55 Pac. 95, 75 Am. St. 574; *McKinley v. Wilson* (Tex. Civ. App.), 96 S. W. 112 (release of vendor's lien); *Griswold v. Wright*, 61 Wis. 195, 21 N. W. 44. The forbearance to file a mechanic's lien is a valuable consideration. *Ripley v. Friede*, 26 Mo. 523; *Alley v. Turck*, 8 App. Div. (N. Y.) 50, 74 N. Y. St. 865, 40 N. Y. S. 433; *Flanagan v. Mitchell*, 16 Daly (N. Y.) 223, 32 N. Y. St. 303, 10 N. Y. S. 234. "The real consideration here was forbearance on the part of the plaintiff. * * * Plaintiff's theory of this action is that, relying on M's acceptance, he did not take immediate steps to secure himself by a lien. This is certainly ample consideration, etc." The defendants sought to escape liability on the ground that they owed the drawer of the order nothing when they agreed with plaintiff to accept. *Harness v. McKee-Brown Lumber Co.*, 17 Okla. 624, 89 Pac. 1020; *Culver v. Pocono Spring Water Ice Co.*, 206 Pa. 481, 56 Atl. 29; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884.

mortgage,⁶¹ or other security,⁶² in consideration of a promise. The relinquishment of a right to a homestead entry on public land is a valid consideration in a written instrument for the payment of money.⁶³

Compare, however, with *Cleveland &c. R. Co. v. Shea*, 174 Ind. 303, 91 N. E. 1081, and *Dipula v. Green* (Md.), 82 Atl. 205, where there was no right to a lien. In connection with the two cases last cited, see, however, *Wells v. Brown*, 67 Wash. 351, 121 Pac. 828.

⁶¹ *Cliff Foy v. Dawkins*, 138 Ala. 232, 35 So. 41; *Smith v. Boruff*, 75 Ind. 412; *Gaines v. Fitch*, 14 Ky. L. 620; *Blagbourne v. Hunger*, 101 Mich. 375, 59 N. W. 657; *Bradshaw v. McLaughlin*, 39 Mich. 480; *Norris v. Vosburgh*, 98 Mich. 426, 57 N. W. 264; *Smith v. Richardson*, 77 Mo. App. 422; *Henry &c. Co. v. Bond*, 37 Nebr. 207, 55 N. W. 643; *Traders' &c. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094; *Columbia Ave. &c. Co. v. Lewis*, 190 Pa. St. 558, 42 Atl. 1094. Release of a chattel mortgage. *Green v. Hadfield*, 89 Wis. 138, 61 N. W. 310. The discharge of a void chattel mortgage cannot serve as a consideration. *Mandeville v. Avery*, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. 678. A forbearance to redeem property sold under a decree of foreclosure is a sufficient consideration to support a promise to extend the time for redemption. *Bickel v. Wesinger*, 58 Ore. 98, 113 Pac. 34.

⁶² *Rollins v. Hare*, 15 Ind. App. 677, 44 N. E. 374; *Smith v. Taylor*, 39 Maine 242; *Stebbins v. Smith*, 21 Mass. 97; *Smith v. Weed*, 20 Wend. (N. Y.) 184, 32 Am. Dec. 525; *Saunders v. Pope*, 1 Ohio 486; *Mason Lumber Co. v. Buchtel*, 101 U. S. 633, 25 L. ed. 1072.

⁶³ *Hardesty* (sub nomine *Pelham*) v. *Service* (1891), 45 Kans. 614, 26 Pac. 29. ("All [cases] affirm that contracts about the possession, improvements and relinquishment of rights of public land, when free from fraud, can be enforced, and constitute a good consideration.") *Tessendorf v. Lasater*, 10 Kans. App. 19, 61 Pac. 677; *McCabe v. Caner*, 68 Mich. 182, 35 N. W. 901; *Olson v. Orton*, 28 Minn. 36, 8 N. W. 878; *Hooker v.*

McIntosh, 76 Miss. 693, 25 So. 866; *Murray v. White*, 42 Mont. 423, 113 Pac. 754, Ann. Cas. 1912A, 1297 (action for specific performance); *Macy v. Sunderman*, 15 N. Mex. 372, 110 Pac. 511; *Tecumseh State Bank v. Maddox*, 4 Okla. 583, 46 Pac. 563; *Waring v. Loomis*, 35 Wash. 85, 76 Pac. 510. See also, *Sutherland v. Richardson*, 55 Ore. 535, 106 Pac. 1017. Also agreements to refrain from bidding at a sale, (*Wicker v. Hoppock*, 6 Wall. (U. S.) 94; *Heim v. Butin*, 109 Cal. 500, 42 Pac. 138, 50 Am. St. 54; *Garrett v. Moss*, 20 Ill. 549; *Phippen v. Stickney*, 3 Metc. (Mass.) 384; *German v. Gilbert*, 83 Mo. App. 411; *Carter v. Gibson*, 29 Nebr. 324, 45 N. W. 634, 26 Am. St. 381; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731; *Marie v. Garrison*, 83 N. Y. 14; *Tom v. Daily*, 4 Ohio 368; *Allen v. Gregg*, 130 Pa. St. 611, 18 Atl. 1020; *Maffett v. Ijams*, 103 Pa. St. 266; *Brown v. Jackson* (Tex. Civ. App.), 40 S. W. 162. See also, *Rauch v. Donovan*, 126 App. Div. (N. Y.) 52, 110 N. Y. S. 690; *Satterfield v. Kindley*, 144 N. Car. 455, 57 S. E. 145; *Kearney v. Taylor*, 15 How. (U. S.) 494, 14 L. ed. 787; but see *McClelland v. Citizens' Bank*, 60 Nebr. 90, 82 N. W. 319, in which it is held that a contract not to bid at a chattel mortgage sale is void as against public policy, not to compete in business (*Moore v. First Nat. Bank*, 139 Ala. 595, 36 So. 777; *Johnson v. Gwinn*, 100 Ind. 466; *Marshalltown Stone Co. v. Mfg. Co.*, 114 Iowa 574, 87 N. W. 496; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. 480; *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. 797), or to "pool" the stock of various owners (*Green v. Highan*, 161 Mo. 333, 61 S. W. 798), have been held sufficient considerations to support a promise. A waiver of the right to re-

§ 234. **Forbearance.**—An agreement to forbear the exercise of a right for a definite⁶⁴ or a reasonable⁶⁵ time is a sufficient consideration for a promise where the forbearance is granted

scind a contract (*Waters v. White*, 75 Conn. 88, 52 Atl. 401; *Platt v. Coke Co.*, 155 Ill. 530, 40 N. E. 1032; *Sisson v. Kaper*, 105 Iowa 999, 75 N. W. 490; *Globe Fertilizer Co. v. Tenn. Phosphate Co.*, 27 Ky. L. 636, 85 S. W. 1177; *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. 209), to be released from a bond (*Thomson v. Way*, 172 Mass. 423, 52 N. E. 525; *Esch v. White*, 76 Minn. 220, 78 N. W. 1114), to withdraw from an offer (*Manary v. Runyon*, 43 Ore. 495, 73 Pac. 1028), to obtain additional security (*Heitsch v. Cole*, 47 Minn. 320, 50 N. W. 235, see also, *Robinson v. Boyd*, 60 Ohio St. 57, 53 N. E. 494; *Pollock v. Carolina Interstate Building*, 51 S. Car. 420, 29 S. E. 77, 64 Am. St. 683), or the right of exemption (*Gunthur v. Gunthur*, 181 Mass. 217, 63 N. E. 402), to demand and notice (*L'Amoreux v. Gould*, 7 N. Y. 349, 57 Am. Dec. 524), to declare dividends (*Knickerbocker v. Athletic Co.*, 20 Ohio C. C. 655), to destroy an unrecorded assignment of a patent (*Winfrey v. Gallatin*, 72 Mo. App. 191), not to close sales of stock (*Rogers v. Wiley*, 131 N. Y. 527, 30 N. E. 582, the court saying: "A sufficient consideration, however, for the promise of the defendants to carry the stock without additional margin, was shown when it was made to appear that the plaintiff forebore his determination to immediately cover the stock and close his account without the risk of further loss."), have all been held valuable considerations.

⁶⁴*Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Bell v. Bean*, 75 Cal. 86, 16 Pac. 521; *Scribner v. Hanke*, 116 Cal. 613, 48 Pac. 714; *Jones v. Sikes*, 85 Ga. 546, 11 S. E. 664; *Blumenthal v. Tibbetts*, 160 Ind. 70, 66 N. E. 159; *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 114 Iowa 574, 87 N. W. 496; *Pelham v. Service*, 45 Kans. 614, 26 Pac. 29; *Foard v. Grinter*, 14 Ky. L. 5, 18 S. W. 1034; *Brandenburgh v. Bank*, 19 Ky. L. 1974, 45 S. W. 108; *Smith v. Bibber*, 82 Maine 34, 19 Atl. 89, 17 Am. St.

464; *Haskell v. Tukesbury*, 92 Maine 551, 43 Atl. 500, 69 Am. St. 529; *Howe v. Taggart*, 133 Mass. 284; *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. 452; *Fraser v. Backus*, 62 Mich. 540, 29 N. W. 92; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Tousey v. Moore*, 79 Mich. 564, 44 N. W. 958; *Mosher v. Lansing Lumber Co.*, 112 Mich. 517, 71 N. W. 161; *Union B. Co. v. Martin*, 113 Mich. 521, 71 N. W. 867; *Heitsch v. Cole*, 47 Minn. 320, 50 N. W. 235; *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37, 43 N. W. 685; *Minneapolis Land Co. v. McMillan*, 79 Minn. 287, 82 N. W. 591; *Hooker v. McIntosh*, 76 Miss. 693, 25 So. 866; *Murdock v. Lewis*, 26 Mo. App. 234; *Faulkner v. Gilbert*, 57 Nebr. 544, 77 N. W. 1072; *Hockenbury v. Meyers*, 34 N. J. L. 346; *Atlantic Nat. Bank v. Franklin*, 55 N. Y. 235, revg. 64 Barb. 449; *Perkins v. Proud*, 62 Barb. (N. Y.) 420; *Traders Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094; *Rogers v. Wiley*, 131 N. Y. 527, 30 N. E. 582; *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731; *Flanagan v. Mitchell*, 16 Daly 223, 32 N. Y. St. 303, 10 N. Y. S. 234; *Mechanics' Nat. Bank v. Jones*, 175 N. Y. 518, 67 N. E. 1085, affg. 76 App. Div. (N. Y.) 534, 78 N. Y. S. 800; *German Sav. Bank v. Brodsky*, 82 App. Div. 635, 81 N. Y. S. 1126, affg. 39 Misc. 100, 78 N. Y. S. 910; *Olmstead v. Latmer*, 9 App. Div. (N. Y.) 163, 75 N. Y. St. 500, 41 N. Y. S. 44; *McCullough v. Barr*, 145 Pa. St. 459, 22 Atl. 962; *First Nat. Bank v. Reid* (Tenn.), 58 S. W. 1124; *Von Branbenstein v. Ebensberger*, 71 Tex. 267, 9 S. W. 153; *Armstrong & Co. v. Snyder*, 15 Tex. Civ. App. 394, 39 S. W. 379; *Bedford's Exr. v. Chandler*, 81 Vt. 270, 69 Atl. 874; *Bradshaw v. Bratton*, 96 Va. 577, 32 S. E. 56; *Mygalt v. Tarbell*, 78 Wis. 351, 47 N. W. 618.

⁶⁵*Mapes v. Sidney*, Cro. Jac. 683; *Barnehurst v. Cabbot*, Hard. 5; *Taylor v. Thomas*, 61 Ga. 472; *Steadman v. Guthrie*, 61 Ky. 147; *Moore v. Mc*

upon request and because of a return promise.⁶⁶ The mere forbearance is not sufficient without some agreement, express or implied, but the circumstances may be such that an agreement may be implied.

§ 235. **Forbearance to sue—Time.**—An agreement to withhold suit either at law or in equity is a sufficient consideration to support a promise, although no fixed and definite time is expressly agreed upon.⁶⁷ Thus an agreement by a creditor to

Kinney, 83 Maine 80, 23 Am. St. 753; King v. Upton, 4 Maine 387, 16 Am. Dec. 266; Howe v. Taggart, 133 Mass. 284; Niles-Bement-Pond Co. v. Ury, 53 Misc. (N. Y.) 305, 103 N. Y. S. 226; Finch v. Skilton, 79 Hun (N. Y.) 531, 61 N. Y. St. 544, 29 N. Y. S. 925; Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330; Thomas v. Croft, 2 Rich. (S. Car.) 133, 44 Am. Dec. 279; Hakes v. Hotchkiss, 23 Vt. 231; Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494. When no period for forbearance is fixed it imports that forbearance shall be for a reasonable time. United & Globe Rubber Mfg. Co. v. Conard, 80 N. J. L. 286, 78 Atl. 203.

⁶⁶ "A promise to do or forbear from doing an act may be just as valuable consideration for a promise as the act or forbearance would be." Chappell v. McMillan, 15 N. Mex. 686, 113 Pac. 611. Forbearance from doing an illegal act is no consideration for a compromise. In re Thomas, (Conn.) 81 Atl. 972. See also, ante, § 233, Abandonment of legal right.

⁶⁷ Oldershaw v. King, 2 H. & N. 517; Coles v. Pack, L. R. 5 C. P. 65; Morgan v. Park Nat. Bank, 44 Ill. App. 582; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Johnson v. Staley, 32 Ind. App. 628, 70 N. E. 541; East Omaha Land Co. v. Hansen, 117 Iowa 96, 90 N. W. 705; Foard v. Grinter, 14 Ky. L. 5, 18 S. W. 1034; King v. Upton, 4 Maine 387; Haskell v. Tukesbury, 92 Maine 551, 43 Atl. 500, 69 Am. St. 529; Manter v. Churchill, 127 Mass. 31; Mecorney v. Stanley, 8 Cush. (Mass.) 85; Pratt v. Hedden, 121 Mass. 116; Ellis v. Clark, 110 Mass. 389, 14 Am. Rep. 609; Boyd v. Frieze, 71 Mass. (5

Gray) 553; Robinson v. Gould, 11 Cush. (Mass.) 55; Howe v. Taggart, 133 Mass. 284; Prouty v. Wilson, 123 Mass. 297; Mecorney v. Stanley, 8 Cush. (Mass.) 85; Walker v. Sherman, 11 Metc. (Mass.) 170; Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593; Cheneweth v. Pacific Exp., 93 Mo. App. 185; Weilage v. Abbott, (Nebr.), 90 N. W. 1128; Hockenbury v. Meyers, 34 N. J. L. 346; McCammon v. Shantz, 26 Misc. (N. Y.) 476, 57 N. Y. S. 515; Traders' & Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094; Elting v. Vanderlyn, 4 Johns. (N. Y.) 237; Watson v. Randall, 20 Wend. (N. Y.) 201; Mutual Life Ins. Co. v. Smith, 23 Hun (N. Y.) 535; Williamson v. McGill, 8 Ohio D. R. 185, 6 W. L. B. 202; Brownell v. Harsh, 29 Ohio St. 631; Downing v. Funk, 5 Rawle (Pa.) 69; Sidwell v. Evans, 1 Pen. & W. (Pa.) 383, 21 Am. Dec. 387; Cathcart v. Thomas, 8 Baxt. (Tenn.) 172; Hakes v. Hotchkiss, 23 Vt. 231; Lonsdale v. Brown, Fed. Cas. No. 8494, 4 Wash. C. C. 148. See also, note 60 Am. Dec. 524. An agreement to forbear for a "short time" or a "little while" is insufficient, it being too indefinite and uncertain. Lutwich v. Hussey, Cro. Eliz. 19; Oldershaw v. King, 2 H. & N. 517; Sidwell v. Evans, 1 Pen. & W. (Pa.) 383, 21 Am. Dec. 387; Lonsdale v. Brown, 4 Wash. C. C. 148. An agreement to forbear for a fortnight is good. Baker v. Jacob, 1 Bulst. 41. See also, Heineman v. Gans, 142 Mich. 289, 105 N. W. 763, 12 Detroit Leg. N. 722 (eight days' forbearance in bringing an action for removal of a person in possession). An agreement not to sue until after the maker's death is sufficient consideration to support a promise (Wil-

withhold suit against his debtor is a good consideration to support a promise by a third party to pay the debt, although no fixed and definite time of extension is expressly agreed on.⁶⁸ And whenever there is an agreement to forbear bringing suit for a debt due, for an indefinite time, if followed by actual forbearance for a reasonable time, this is a good consideration for a promise to pay the debt by a person other than the debtor.⁶⁹ What would

liamson v. McGill, 8 Ohio D. R. 185, 6 W. L. Bull. 202), or to hold a note until the death of one of the makers or nine and one-half years, provided such maker lived that long, is good. Daniels v. Daniels, 3 Cal. App. 294, 85 Pac. 134. There must be something of value in the eyes of the law promised in return for the forbearance. Thus an agreement by the holder of a note not to sue thereon for a certain length of time, supported only by the debtor's promise to pay within that time, is not binding. Austin Real Estate Co. v. Bohn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430, distinguishing Benson v. Phipps, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. 128. And see also, Norris v. Graham (Tex. Civ. App.), 42 S. W. 575. A surrender of a vested right in return for refraining from prosecuting a claim which is legally untenable is without consideration and void. Jennings v. Jennings (Iowa), 87 N. W. 726. An agreement never to sue is a release of the obligation and may be pleaded in bar of an action to recover the debt. Guard v. Whiteside, 13 Ill. 7; Marietta Saving Bank v. Janes, 66 Ga. 286; Harvey v. Harvey, 3 Ind. 473; Reed v. Shaw, 1 Blackf. (Ind.) 245; McAllester v. Sprague, 34 Maine 296; Walker v. McCulloch, 4 Maine 421; Stebbins v. Niles, 25 Miss. 267; Cuyler v. Cuyler, 2 Johns. (N. Y.) 186; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 18 Am. Dec. 514. It has been held that such an agreement relieves the maker from all liability on the note and that a subsequent voluntary promise to pay it, made without consideration, to the executor of the payee is not supported by a consideration. Monroe v. Martin, 137 Ga. 262, 73 S. E. 341. An agreement to forbear to sue in general without adding any particular time is to be understood as a total

and absolute forbearance. Lane v. Owings, 3 Bibb (Ky.) 247; Phelps v. Johnson, 8 Johns. (N. Y.) 54; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Clark v. Russell, 3 Watts (Pa.) 213, 27 Am. Dec. 348; Hamaker v. Eberly, 2 Binn (Pa.) 506, 4 Am. Dec. 477.

⁶⁸ Spielberger v. Thompson, 131 Cal. 55, 63 Pac. 132, 678; Van Epps v. Redfield, 68 Conn. 39, 35 Atl. 809, 34 L. R. A. 360; Knight & Wall Co. v. Tampa Sand Lime Brick Co., 55 Fla. 728, 46 So. 285; Wickham v. Hyde Park Building & Loan Assn., 80 Ill. App. 523; Allmendinger v. Malcom & Co., 82 Ill. App. 166; McMicken v. Safford, 100 Ill. App. 102, affd. 197 Ill. 540, 64 N. E. 540; Harris v. Harris, 180 Ill. 157, 54 N. E. 180; J. H. Queal & Co. v. Peterson, 138 Iowa 514, 116 N. W. 593; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. 452; Boyd v. Freize, 71 Mass. (5 Gray) 553; Hooper v. Pike, 70 Minn. 84, 72 N. W. 829, 68 Am. St. 512; German v. Gilbert, 83 Mo. App. 411; Traders' & Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094; Honsinger v. Mulford, 157 N. Y. 674, 51 N. E. 1091, affg. 35 N. Y. S. 986, 51 Hun (N. Y.) 589; Red River & Bank v. Barnes (subnomine North Star & Shoe Co.), 8 N. Dak. 432, 79 N. W. 880; Saalfeld v. Manrow, 165 Pa. St. 114, 30 Atl. 823; Schoening v. Maple Valley Lumber Co., 61 Wash. 332, 112 Pac. 381; Washburn County v. Thompson, 99 Wis. 585, 75 N. W. 309. See also, In re Pray's Estate, 111 Minn. 449, 127 N. W. 392 (forbearance on part of legatee to sue for legacy on promise by one of the trustees of the estate to pay her the difference between her legacy and the amount the trustees were willing to allow her).

⁶⁹ An agreement to forbear, in the absence of any stipulation as to a

be a reasonable time, if not always a question of fact, would be at least a question of law and fact, depending for its solution upon the circumstances of each case.⁷⁰ An agreement to forbear the foreclosure of a mortgage either for a definite or indefinite time is a sufficient consideration for a return promise.⁷¹ Also forbearance to enforce a judgment or to levy an attachment or execution is a sufficient consideration.⁷²

To constitute a forbearance to sue a sufficient consideration for a promise such forbearance must have been pursuant of an agreement to forbear.⁷³ A mere forbearance to sue is not

specified time, will be presumed to be for a reasonable time. *J. H. Queal & Co. v. Peterson*, 138 Iowa 514, 116 N. W. 593, 19 L. R. A. (N. S.) 842; *Howe v. Taggart*, 133 Mass. 284; *Prouty v. Wilson*, 123 Mass. 297; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Boyd v. Frieze*, 5 Gray (Mass.) 553; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *United & Globe Rubber Mfg. Co. v. Conard*, 80 N. J. L. 286, 78 Atl. 203; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Sidwell v. Evans*, 1 Pen. & W. 383, 21 Am. Dec. 387. But see, *Herbert v. Mueller*, 83 Ill. App. 391. See also, *Parsons v. Silva*, 1 Cal. App. 602, 82 Pac. 685.

⁷⁰ *Traders' & C. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094.

⁷¹ *Marshall v. Olds*, 14 Colo. App. 32, 59 Pac. 217; *Storms v. Storms*, 21 Ind. App. 191, 51 N. E. 955; *Burke v. Dillin*, 92 Iowa 557, 61 N. W. 370: "It is well settled that an agreement to forbear, for a time, proceedings at law or in equity to enforce a well-founded claim, is a valid consideration for a promise. 1 *Parsons on Contracts*, § 441; 3 *Am. & Eng. Ency. Law*, p. 836; *Lomax v. Smyth*, 50 Iowa 223. See *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256. Whatever may be said as to *Rice, Lodge & Henry*, by carrying out the contract, would not be doing what they were in any event obliged to do, as they were under no legal obligation to pay the taxes, or to pay the interest on the Squire mortgage, in the absence of this agreement." *Burchard v. Frazer*, 23 Mich. 224; *Streeter v. Smith*, 31 Minn. 52, 16 N. W. 460

(chattel mortgage); *Chiles v. Wallace*, 83 Mo. 84; *Williams v. Bedford Bank*, 63 App. Div. 278, 71 N. Y. S. 539; *Audas v. Nelson*, 64 Barb. (N. Y.) 362; *Haggerty v. Allaire*, 5 Sandf. (N. Y.) 230, 7 Super. Ct. 230; *Prime v. Koehler*, 7 Daly (N. Y.) 345, affd. 77 N. Y. 91; *Colgin v. Henley*, 6 Leigh (Va.) 85.

⁷² *Barker v. Guillian*, 5 Iowa 510; *Foster v. Clarke*, 36 Mass. 329; *Barnes v. Moody*, 5 How. (Miss.) 636, 37 Am. Dec. 172; *Oldham v. Kerchner*, 79 N. Car. 106, 28 Am. Rep. 302; *Brice v. Clark*, 8 Pa. St. (8 Barr.) 301. Forbearance to enforce a judgment against real estate on which it is a lien is sufficient consideration for a promise by a subsequent purchaser to pay such judgment. *Bradshaw v. Bratton*, 96 Va. 577, 32 S. E. 56.

⁷³ In order that forbearance may be a consideration for a promise there must be a request of forbearance and a forbearance in consequence of that request. *Deacon v. Gridley*, 15 Com. B. 295, 28 Eng. L. & Eq. 345; *Miles v. New Zealand Alford Estate*, 32 Ch. Div. 266, 55 L. J. Ch. 801, 54 L. T. 582, 34 W. R. 669; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Breed v. Hillhouser*, 7 Conn. 523; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Mecronev v. Stanley*, 8 Cush. (Mass.) 85; *Walker v. Sherman*, 11 Metc. (Mass.) 170; *Manter v. Churchill*, 127 Mass. 31; *Rue v. Meirs*, 43 N. J. Eq. 377, 12 Atl. 369; *Cary v. White*, 52 N. Y. 138; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Von Brandenstein v. Ebensberger*, 71 Tex. 267, 9 S. W. 153.

enough in the absence of any circumstance from which an agreement to forbear may be inferred.⁷⁴ But an actual forbearance to sue may often, in connection with other circumstances, sometimes slight, be evidence of an implied agreement to forbear and thus form a consideration for a promise.⁷⁵

⁷⁴ *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Hargroves v. Cooke*, 15 Ga. 321; *Beggs v. First Nat. Bank*, 134 Ill. App. 403; *J. H. Queall & Co. v. Peterson*, 138 Iowa 514, 116 N. W. 593; *Ford v. Grinter* (Ky.), 18 S. W. 1034; *Manter v. Churchill*, 127 Mass. 31; *Mecorney v. Stanley*, 8 Cush. (Mass.) 85; *McFarland v. Smith*, 6 Cow. (N. Y.) 669; *Bieber v. Beck*, 6 Pa. St. 198; *Cobb v. Page*, 17 Pa. 469; *Shupe v. Galbraith*, 32 Pa. 10. Forbearance without any agreement on the part of the creditor to forbear will not be deemed a sufficient consideration. "There must be promise for promise." *Hoffmann v. Mayaud*, 93 Fed. 171, 35 C. C. A. 256.

⁷⁵ *Breed v. Hillhouse*, 7 Conn. 523; *Waters v. White*, 75 Conn. 88, 52 Atl. 401; *McMicken v. Safford*, 197 Ill. 540, 64 N. E. 540, affg. 100 Ill. App. 102; *Webbe v. Romona Oolitic Stone Co.*, 58 Ill. App. 222; *Steadman v. Guthrie*, 4 Metc. (Ky.) 147; *Lansing Nat. Bank v. Coleman*, 117 Mich. 177, 75 N. W. 624; *Union Trust Co. v. Conus*, 129 Mich. 156, 88 N. W. 407; *Mosher v. Lansing & Co.*, 112 Mich. 517, 71 N. W. 161; *Hill v. Omaha & C. R. Co.*, 82 Mo. App. 188; *Mathews v. Seaver*, 34 Nebr. 592, 52 N. W. 283; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Muir v. Greene*, 191 N. Y. 201, 83 N. E. 685; *Niles-Bement-Pond Co. v. Ury*, 53 Misc. (N. Y.) 305, 103 N. Y. S. 226; *Armstrong & Co. v. Snyder*, 15 Tex. Civ. App. 394, 39 S. W. 379; *Saunders v. Bank of Mecklenburg*, 112 Va. 443, 71 S. E. 714. "I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. It is quite clear on the other hand that a binding promise to forbear would be a good consideration for a guarantee. The question is whether, if the guarantor requests the creditor to forbear from suing and the creditor on such request, although he does not at the

time bind himself to forbear, does in fact afterward forbear to sue, there is a good consideration for the guarantee. * * * If at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt. * * * The question whether the request is expressed or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request." *Crears v. Hunter*, L. R. 19 Q. B. Div. 341. Mere forbearance of a complainant will not suffice. *Gilman v. Ferguson*, 116 Ill. App. 347. "Whether actual forbearance, following a promise to pay interest upon interest for forbearance, is evidence of an acceptance of the promise, is a question of fact. If, under all the circumstances in evidence throwing light upon the question, it is reasonable to believe the party acted upon the faith of and pursuant to the promise, a jury would be justified in finding that he so acted,—otherwise not. * * * If the question were whether there was an express acceptance by words, there would be no difficulty in perceiving the question to be purely one of fact." *Edgerton v. Weaver*, 105 Ill. 43. "Such agreement may be express, or implied by law. The question, we think, has been between the mere fact of forbearance, without any promise to forbear; and a forbearance in conformity with such express or implied agreement. * * * Whether there was an implied agreement to forbear is a question of fact depending on the circumstances; and if they are such as lead to a natural and reasonable conclusion that the new security or other new promise was given to induce the creditor to forbear, and he did in fact forbear, a jury may find that there was such implied agreement or understanding, upon which a

While it is definitely settled that a promise to refrain from resorting to legal means to enforce a valid obligation may furnish a sufficient consideration for a promise, yet if the claim threatened to be enforced is invalid and worthless, a promise not to attempt to enforce or to refrain from making trouble concerning it is not a consideration recognized by the law as valuable.⁷⁰ This doctrine was originally given a rigorous application, but it has been very materially modified by subsequent cases, and it is now held that it is not necessary in a suit on a promise given in consideration of a forbearance from suit that it should appear that there was a good cause of action or a fair and reasonable ground of success in the threatened suit. Forbearance to sue on a claim known to be frivolous and vexatious is not a sufficient consideration for the reason that the promotion of such suit would be or could be found to be either fraudulent or wanting in good faith, but, short of that, forbearance to sue is a good

court will hold that there was a good and legal consideration to give effect to the new promise." *Boyd v. Freize*, 5 Gray (Mass.) 553.

⁷⁰ *Stone v. Wythipol*, Cro. Eliz. 126; *Tooley v. Windham*, Cro. Eliz. 206; *King v. Hobbs*, Yelv. 26; *Goodwin v. Willoughby*, Lat. 141 S. C. Poph. 177; *Hammon v. Roll*, Mar. 202; *Atkinson v. Settree*, Willes 482; *Barber v. Fox*, 1 Vent. 159, 2 W. Saund. 136; *Loyd v. Lee*, 1 Strange 94; *Wade v. Simeon*, 2 C. B. 548; *Herring v. Dorell*, 8 Dowl. 604; *Nelson v. Searle*, 4 Mees. & Wels. 795; *Smith v. Jones*, Yelv. 184; *Davis v. Wright*, 1 Vent. 120, 2 Lev. 3; *Rosyer v. Langdale*, Style, 248; *Jones v. Ashburnham*, 4 East. 455; *Edwards v. Baugh*, 11 M. & W. 641. Forbearance after instituting suit is upon the same footing as forbearance before suit is brought. In both cases the claim must not be unfounded. *Wade v. Simeon*, 2 C. B. 548; *Martin v. Black's Exrs.*, 20 Ala. 309; *Didlake v. Robb*, 1 Woods 680, Fed. Cas. No. 3899; *McElven v. Sloan & Co.*, 56 Ga. 208; *Cline v. Templeton*, 78 Ky. 550, 1 Ky. L. 276; *Schroeder v. Fink*, 60 Md. 436; *Taylor v. Weeks*, 129 Mich. 233, 88 N. W. 466; *Anderson v. Nystron* (Minn.), 13 L. R. A. (N. S.) 1141, 114 N. W. 742; *Oregon & C. R. Co. v.*

Potter, 5 Ore. 228; *Sidwell v. Evans*, 1 Pen. & W. (Pa.) 383, 21 Am. Dec. 387. Forbearance to attach a debtor's goods is no consideration for a promise when there was no valid ground for attachment. *Bates v. Sandy*, 27 Ill. App. 552; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 255; *Rood v. Jones*, 1 Dougl. (Mich.) 188; *Wierman v. Bay City Mich. Sugar Co.*, 142 Mich. 422, 106 N. W. 75, 12 Detroit Leg. N. 839. An agreement to pay a specified sum upon a claim the validity of which is disputed and had been adjudicated against the complainant is not supported by a promise to pay the same in the absence of any additional consideration being given the promisor. *Hargarten v. Berz*, 126 Ill. App. 368; *Palfrey v. Portland & C. R. Co.*, 86 Mass. 55; *Jacobs v. Curtis* (Pa.), 11 Leg. Int. 27. A promise to pay a claim if the promisee will forbear an attempt to enforce a lien which has been lost creates no cause of action. *Dunham v. Johnson*, 135 Mass. 310; *Lindsey v. Sellers*, 26 Miss. 169. In order for a promisor to avail himself of such a defense he must show conclusively that the suit which was a foundation of the promise could not have been prosecuted with effect. *Gould v. Armstrong*, 2 Hall (N. Y.) 266.

consideration for a promise founded thereon. It is only essential that the claim be doubtful either in law or equity and asserted in good faith.⁷⁷

§ 236. **Extension of time.**—An extension of time,⁷⁸ whether for a definite⁷⁹ or reasonable period,⁸⁰ in which to pay a debt constitutes a valuable consideration. If no time is mentioned it will be presumed that a reasonable time was intended;⁸¹ and in such case forbearance to sue for a reasonable time in accordance with the promise and in reliance thereon is sufficient.⁸²

⁷⁷ Longridge v. Dorville, 5 B. & Ald. 117, 7 E. C. L. 74; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Cook v. Wright, 1 B. & S. 559, 4 L. T. 704; Matthews v. Morris, 31 Ark. 222; Macklin v. Dwyer (Mass.), 91 N. E. 893; Rue v. Meirs, 43 N. J. Eq. 377, 12 Atl. 369; Springstead v. Nees, 125 App. Div. (N. Y.) 230, 109 N. Y. S. 148. Forbearance to sue on a claim which the creditor honestly believes to be valid will support a promise by a third person to pay the same, even though the claim is not valid. Di Oiorio v. Di Brazio, 21 R. I. 208, 42 Atl. 1114. In a suit for damages where the plaintiff's claim was disputed and doubtful, a suit was threatened. The waiver of a right to sue was sufficient for the defendant's promise to pay damages although there was in fact no legal liability for such damages. Snohomish River Boom Co. v. Great Northern R. Co., 57 Wash. 693, 107 Pac. 848.

⁷⁸ Lipsmeier v. Vehslage, 29 Fed. 175; Janis v. Roentgen, 59 Mo. App. 75; Virginia-Carolina & Co. v. McNair, 139 N. Car. 326, 51 S. E. 949; Ford v. Rehman, Wright (Ohio) 434; Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8, 494.

⁷⁹ Lyons v. Donkin, 23 N. S. 258; Hobson v. Hassett, 76 Cal. 203, 18 Pac. 320, 9 Am. St. 193. An extension of one day has been held sufficient to support a note. Whelan v. Swain, 132 Cal. 389, 64 Pac. 560; Tuttle v. Bigelow, 1 Root (Conn.) 108, 1 Am. Dec. 35; Martin v. Stubblings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; Wickham v. Hyde Park Loan Assn., 80 Ill. App. 523; Sweeney v. Kaufman, 64 Ill. App. 151, affd. 168

Ill. 233, 48 N. E. 144; Burke v. Dillin, 92 Iowa 557, 61 N. W. 370; Whitt v. Bailey (Ky.), 59 S. W. 514; Pulliam v. Withers, 8 Dana (Ky.) 98, 33 Am. Dec. 479; Wooley v. Cobb, 165 Mass. 503, 43 N. E. 497; Union Trust Co. v. Conus, 129 Mich. 156, 88 N. W. 407; Lundburg v. Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685; Peterson v. Russell, 62 Minn. 220, 64 N. W. 555, 54 Am. St. 634, 29 L. R. A. 612; Smith v. Richardson, 77 Mo. App. 422; Murdock v. Lewis, 26 Mo. App. 234; Farmers & C. Bank v. Wallace, 45 Ohio St. 152, 12 N. E. 439; Brainard v. Harris, 14 Ohio 107, 45 Am. Dec. 525; Hamaker v. Eberley, 2 Binn. (Pa.) 506, 4 Am. Dec. 477; Sidwell v. Evans, 1 Pen. & W. (Pa.) 383, 21 Am. Dec. 387; Walker v. Cole (Tex. Civ. App.), 28 S. W. 1012; Washburn Co. v. Thompson, 99 Wis. 585, 75 N. W. 309.

⁸⁰ Morgan v. Park National Bank, 44 Ill. App. 582. An agreement to delay "a short time" has been held too indefinite and uncertain and no consideration. Gates v. Hackethal, 57 Ill. 534, 11 Am. Rep. 45.

⁸¹ Moore v. McKenney, 83 Maine 80, 21 Atl. 749, 23 Am. St. 753; Traders' Nat. Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094.

⁸² Marshall v. Old, 14 Colo. App. 32, 59 Pac. 217; Breed v. Hillhouse, 7 Conn. 523; Hoffmann v. Mayaud, 93 Fed. 171, 35 C. C. A. 256; McMicken v. Safford, 197 Ill. 540, 64 N. E. 540, affg. 100 Ill. App. 102; Webbe v. Romona Oolitic Stone Co., 58 Ill. App. 222; Cooper v. Jackson, 22 Ky. L. 295, 57 S. W. 254; Moore v. McKenney, 83 Maine 80, 21 Atl. 749, 23 Am. St. 753; Haskell

The promise to extend the time must be supported by a consideration.⁸³ If the creditor is promised nothing but that which he is already legally entitled to, there is no consideration for the promised extension and it may be abrogated at any time.^{83a} But when

v. Tukesbury, 92 Maine 551, 43 Atl. 500, 69 Am. St. 529; Howe v. Taggart, 133 Mass. 284.

⁸³ An agreement to extend the time of a payment, without a consideration for it, is not binding on the parties. Jones v. Chamberlain, 97 Ill. App. 328. A proposition for an extension of the time for the payment of a note by the payee, to be valid, must be for a valuable consideration, accepted by the payor, and relied upon by the payee. Ott v. Anderson, 9 Kans. App. 320, 61 Pac. 330; Howe v. Klein, 89 Maine 376, 36 Atl. 620; Hilderbrandt v. Fallott, 46 Misc. (N. Y.) 615, 92 N. Y. S. 804; Benedict v. Pincus, 134 App. Div. (N. Y.) 555, 119 N. Y. S. 266 (agreement by broker entitled to commissions he had earned by procuring a tenant for premises to await payment thereof until the tenant paid the stipulated rent). See also, Sweet v. Newmann, 67 Misc. (N. Y.) 605, 123 N. Y. S. 776 (subsequent agreement by real estate broker to take less commission or wait until time for the execution of the contract of sale). Compare the two foregoing cases with Glade v. Ford, 131 Mo. App. 164, 111 S. W. 135 (where the owner refused to sell on the terms offered unless the brokers would wait for one-half of their commission until the purchase-money notes were collected). Payment of part of a debt or the interest already accrued is not a sufficient consideration to support a promised extension of time. Peachy v. Witter, 131 Cal. 316, 63 Pac. 468.

^{83a} In Miller v. Holbrook, 1 Wend. (N. Y.) 317, it was held that a promise to extend was not valid unless founded upon a good and sufficient consideration; also, "the promise of a maker to pay part of a note when due, and payment in pursuance thereof, is not such sufficient consideration." In Gibson v. Renne, 19 Wend. (N. Y.) 389, the question of the sufficiency of a consideration to support a promise was raised, and, in dealing with it,

Bronson, J., said: "The debt was due. The debtor says to the creditor, you promised, in consideration that I would discharge in part an existing and present duty, that you would give further time for the satisfaction of the residue. I cannot understand how this makes a good consideration for the promise. The discharge of a legal obligation by the debtor to the creditor cannot be such an injury to the one, or benefit to the other, as will make what the law calls a 'sufficient consideration' for an agreement." In Manchester v. Van Brunt, City Ct. (N. Y.), 19 N. Y. S. 685, it was said: "The promise to extend the time of payment of the note was void unless founded upon a good consideration, and the payment of \$100, part of the amount due on the note, was not a good consideration for such promise." In Pabodie v. King, 12 Johns. (N. Y.) 426, a partial payment was made upon the plaintiff's debt, and it was claimed there was an agreement in consideration thereof to "forbear to sue." The court said: "The promise to forbear was a nudum pactum. In paying the fifty dollars, King did no more than he was legally bound to do; and the promise, on the part of Pabodie, was without any benefit to him, and occasioned no loss to King." Part payment of wages due employees. Skinner v. Garnett Gold Min. Co., 96 Fed. 734; Fain v. Turner's Admr., 96 Ky. 634, 29 S. W. 628; Kronschnabel-Smith Co. v. Kronschnabel, 82 Minn. 230, 91 N. W. 892. An executory agreement by the plaintiff with the defendant to accept in payment less than the whole amount of the debt is not obligatory without a fresh consideration to support it. No payment of a part of the sum agreed on will serve as a consideration. Blalock v. Jackson, 94 Ga. 469, 20 S. E. 346. An agreement to extend the time for payment based only on a promise to pay interest regularly is void. McCann v. Lewis, 9 Cal. 246; Helms v. Crane, 4 Tex. Civ. App. 89, 23 S. W.

the debtor does or promises more than his contract calls for,⁸⁴ or when a third person⁸⁵ promises to do or forbear some act in consideration of the extension of time to the debtor, there is a consideration sufficient to support the agreement.

Thus as between the original parties the debtor's promise to pay either back interest on a non-interest bearing debt,⁸⁶ or, if the debt does not carry interest, a promise to pay interest during the extension of time,⁸⁷ or to pay an increased rate of interest,⁸⁸ will each of them support an agreement to grant an extension of time to the promisor. A promise to grant an extension of time is binding if made in consideration of the payment of the same rate of interest in advance,⁸⁹ or the same rate of interest as is called for by the original agreement, provided there is an agreement, either expressed or implied, to pay the same or a different rate during the entire time granted.⁹⁰ Those promises, however, where an extension of

392. The creditor must accept the terms and agree to forbear. *Blumental v. Tibbits*, 160 Ind. 70, 66 N. E. 159; *Manter v. Churchill*, 127 Mass. 31; *First National Bank v. Cecil*, 23 Ore. 58, 31 Pac. 61, 32 Pac. 393. Forbearance without an agreement on the part of the creditor to forbear is not a sufficient consideration for a guaranty of the debt. *Hoffman v. Maynard*, 93 Fed. 171. See also, *Russell v. Buck*, 11 Vt. 166. The extension must be granted at the instance of the promisor and in reliance on such promise. *Gilman v. Ferguson*, 116 Ill. App. 347.

⁸⁴ *Bedford's Exr. v. Chandler*, 81 Vt. 270, 69 Atl. 874.

⁸⁵ *Martin v. Black's Exrs.*, 20 Ala. 309; *In re Burchell*, 4 Fed. 406; *King v. Upton*, 4 Greenl. (Maine) 387, 16 Am. Dec. 266; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Gansevoort Bank v. Altshul*, 26 Misc. (N. Y.) 6, 55 N. Y. S. 733; *Honsinger v. Mulford*, 90 Hun (N. Y.) 589, 35 N. Y. S. 986, affd., 157 N. Y. 674, 51 N. E. 1091; *Cathcart v. Thomas*, 55 Tenn. 172.

⁸⁶ *Hutton v. Edgerton*, 6 S. Car. 485.

⁸⁷ *Moore v. Redding*, 69 Miss. 841, 13 So. 849.

⁸⁸ *Taylor v. Thomas*, 61 Ga. 472; *Austin v. Bainter*, 50 Ill. 308; *Beck-*

ner v. Carey, 44 Ind. 89; *Royal v. Lindsay*, 15 Kans. 591; *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. 479; *Smith v. Graham*, 34 Mich. 302; *Clarkson v. Creely*, 35 Mo. 95; *Knapp v. Mills*, 20 Tex. 123; *Marine & C. Mfg. Co. v. Bradley*, 105 U. S. 175, 26 L. ed. 1034. Where the time of payment is extended in consideration of the payment of a sum exceeding the interest past due such agreement is binding. *Schoonhoven v. Pratt*, 25 Ill. 379.

⁸⁹ *Warner v. Campbell*, 26 Ill. 282; *Williams v. Scott*, 83 Ind. 405; *Hubbard v. Ogden*, 22 Kans. 363; *Preston v. Henning*, 6 Bush (Ky.) 556; *Limerock Bank v. Mallett*, 34 Maine 547; *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. 755; *Wright v. Bartlett*, 43 N. H. 548; *Bank of British Columbia v. Jeffs*, 18 Wash. 135, 51 Pac. 348, 63 Am. St. 875.

⁹⁰ *Rees v. Berrington*, 2 Ves. Jr. 543; *Stallings v. Johnson*, 27 Ga. 564; *Reynolds v. Barnard*, 36 Ill. App. 218; *Pierce v. Goldsberry*, 31 Ind. 52; *Robinson v. Miller*, 2 Bush (Ky.) 179; *Chute v. Pattee*, 37 Maine 102; *Shayler v. Giddins*, 122 Mich. 659, 81 N. W. 552; *Keirn v. Andrews*, 59 Miss. 39; *Marquardt Bank v. Freund*, 80 Mo. App. 657, 2 Mo. App. 693; *Owen v. Bray*, 80 Mo. App. 526; *Fowler v.*

time is granted in consideration of a promise to pay the same rate of interest during such extension, are upheld on the ground that the payer waives his right to stop interest by paying the debt at any time after maturity, and binds himself to pay interest for such further and definite time. He thereby assumes an obligation which was not before imposed upon him, and the holder of the note acquires an additional substantial right—that of refusing payment and exacting interest for the full period of extension.⁹¹ In certain cases this latter element was not involved, and by them it is held that a promise to give a debtor time, on condition that he continue paying the same rate of interest, is inoperative and unsupported by a sufficient consideration.⁹²

Brooks, 13 N. H. 240; Davis v. Lane, 10 N. H. 156; Fawcett v. Freshwater, 31 Ohio St. 637; Wood v. Newkirk, 15 Ohio St. 295; McComb v. Kittridge, 14 Ohio 348. In many cases, which seemingly support the contrary doctrine, there was a mere promise by the creditor to forbear, without any corresponding promise on part of the debtor not to pay during the time of the promised forbearance. In such cases it is clear that there is no consideration for the promise. Angel v. Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092; Benson v. Phipps, 87 Tex. 578, 29 S. W. 1061, where it is said: "Whether a mere agreement for an extension by the debtor is sufficient to support a promise to extend by the creditor is a question upon which the authorities are not in accord. We are of opinion, however, that the question should be resolved in the affirmative, at least in cases in which it is contemplated by the contract that the debt should bear interest during the time for which it is extended. If the new agreement were that the debtor should pay, at the end of the period agreed upon for the extension, precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract. In case of a debt, which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties

thereto, the contract is that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest-bearing investment for a definite period of time. One gives up his right to sue for a period, in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement were that the debt should be extended at a reduced rate of interest. That an agreement by the debtor and creditor for an extension for a definite time, the debt to bear interest at the same rate, or at an increased, but not usurious, rate, is binding upon both, is held in many cases." Zapalac v. Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938; Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571.

⁹¹Eaton v. Whitmore, 3 Kans. App. 760, 45 Pac. 450. In the above case the interest to be paid during the extension was to be less than that called for by the original agreement. Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571.

⁹²Crossman v. Wohlleben, 90 Ill. 537; Holmes v. Boyd, 90 Ind. 332; Hunt v. Postlewait, 28 Iowa 427; Wilson v. Powers, 130 Mass. 127;

In case the debtor agrees to furnish his creditor with security for the debt this is sufficient to support a promise by the creditor to extend the time of payment of such debt.⁹³ Likewise, an agreement to extend the time of payment of a debt is sufficient consideration for the execution, by a third party, of his note to the creditor as collateral security for the payment of such debt.⁹⁴ Such an agreement entered into at the instance of a third person will support a direct promise by that person to pay the debt,⁹⁵ or to become surety for it.⁹⁶

Hale v. Forbis, 3 Mont. 395; *Kellogg v. Olmsted*, 25 N. Y. 189; *Stickler v. Giles*, 9 Wash. 147, 37 Pac. 293.

⁹³ *Union Trust Co. v. Conus*, 129 Mich. 156, 88 N. W. 407; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Red River Nat. Bank v. Barnes*, (sub nomine, *North Star &c. Shoe Co.*), 8 N. Dak. 432, 79 N. W. 880; *Ament v. Sarver*, 2 Grant (Pa.) 34; *Mansur &c. Co. v. Beer*, 19 Tex. Civ. App. 311, 45 S. W. 972; *Washburn Co. v. Thompson*, 99 Wis. 585, 75 N. W. 309. An agreement to extend the time of payment of the note first maturing was a valid and sufficient consideration for a promise to pay that note, and a second note at the time of the expiration of the extension agreed upon (*Brown v. First Nat. Bank*, 115 Ind. 572, 18 N. E. 56), giving time for the payment of a judgment, will support an agreement by the judgment debtor to pay plaintiff's attorney's fees. *Brainard v. Harris*, 14 Ohio 107, 45 Am. Dec. 525. A promise to pay the remainder of a judgment on a certain day if plaintiff would not issue execution is supported by a sufficient consideration. *Fraser v. Backus*, 62 Mich. 540, 29 N. W. 92. Where the holder of a claim was told by the debtor that if he would wait until the final disposition of his property he (the debtor) would see that he was well paid, and well paid for waiting, and the claimant consents to do so, the agreement is based on a sufficient consideration and therefore valid. *Davis v. Teachout*, 126 Mich. 135, 85 N. W. 475, 86 Am. St. 531. An agreement whereby a creditor promised to give time for the payment of a joint debt is consideration for a promise by one of the debtors to pay the debt

by applying it to a note owed by the creditor to the joint debtor individually. *Hawes v. Woolcock*, 26 Wis. 629. And where a surety consented to an extension of time on condition that the creditor would procure a chattel mortgage from the debtor to secure the debt, the court says, "It needs the citation of no authority that if the transaction was of advantage to Waterman or detrimental but to the disadvantage of Ressetter, it would form a sufficient consideration for the promise. That Ressetter was induced thereby to assent to the extension of time of payment to Ressetter's property, which, by the failure of Waterman to keep his promise and subsequent conduct in violation of it subjected Ressetter to the loss, is not questioned." *Ressetter v. Waterman*, 151 Ill. 169, 37 N. E. 875.

⁹⁴ *In re Burchell*, 4 Fed. 406; *Nichols &c. Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110.

⁹⁵ *Martin v. Black*, 20 Ala. 309; *Sanders v. Barlow*, 21 Fed. 836; *Haskell v. Tukesbury*, 92 Maine 551, 43 Atl. 500, 69 Am. St. 529; *Russell v. Babcock*, 14 Maine 138; *Cook v. Duval*, 9 Gill (Md.) 460; *Lent v. Pandelford*, 10 Mass. 230, 6 Am. Dec. 119; *Illinois Roofing &c. Co. v. Cribbs*, 142 Mich. 689, 106 N. W. 274; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. St. 593; *German Sav. Bank v. Brodsky*, 82 App. Div. (N. Y.) 635, 78 N. Y. S. 910, 39 Misc. (N. Y.) 100, 81 N. Y. S. 1126; *Honsinger v. Mulford*, 90 Hun (N. Y.) 589, 35 N. Y. S. 986; *Di Orto v. Di Brazia*, 21 R. I. 208, 42 Atl. 1114.

⁹⁶ *Cathcart v. Thomas*, 55 Tenn. 172; *Dahlman v. Hammel*, 45 Wis. 466.

§ 237. **Compromise of disputed claims.**—The compromise of a claim which is asserted in good faith and under color of right⁹⁷ is conclusive and binding on the parties thereto when the claim is doubtful,⁹⁸ and the compromise made in settlement

⁹⁷ *Miles v. New Zealand Alford Estate*, L. R. 32 Ch. Div. 266; *Allen v. Prater*, 35 Ala. 169; *Ernst v. Hollis*, 86 Ala. 511, 6 So. 85; *Ware v. Morgan*, 67 Ala. 461; *Vane v. Towle*, 5 Idaho 471, 50 Pac. 1004; *Adams v. Crown Coal &c. Co.*, 198 Ill. 445, 65 N. E. 97; *Bement v. May*, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150; *United States &c. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88; *Harris v. Cassidy*, 107 Ind. 158, 83 N. E. 29; *Smith v. Boruff*, 75 Ind. 412; *Sweitzer v. Heasley*, 13 Ind. App. 567, 41 N. E. 1064; *Keefe v. Vogle*, 36 Iowa 87; *Hurst v. Taylor*, 32 Ky. L. 1051, 107 S. W. 743; *Keley v. Peter &c. Stone Co.*, 130 Ky. 530, 113 S. W. 486; *Melcher v. Ins. Co. of Pa.*, 97 Maine 512, 55 Atl. 411; *Gates v. Shutts*, 7 Mich. 127; *Neibles v. Minneapolis &c. R. Co.*, 37 Minn. 151, 33 N. W. 332; *Osborne v. Fridrich*, 134 Mo. App. 449, 114 S. W. 1045; *Rue v. Neirs*, 43 N. J. Eq. 377, 12 Atl. 369; *Trenton St. R. Co. v. Lawlor*, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668; *Zoebisich v. Von Minden*, 120 N. Y. 406, 24 N. E. 795; *Silberman v. Horowitz*, 114 N. Y. S. 1; *McGlynn v. Scott*, 4 N. Dak. 18, 58 N. W. 460; *Fryer v. Cetnor*, 64 N. Dak. 518, 72 N. W. 909; *Smith v. Farra*, 21 Ore. 395, 28 Pac. 241, 20 L. R. A. 115; *Anthony v. Boyd*, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657; *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 221. See also, *Morey v. Newfane*, 8 Barb. (N. Y.) 645.

⁹⁸ *Satchfield v. Laconia Levee Dist.*, 74 Ark. 270, 85 S. W. 409; *Mason v. Wilson*, 43 Ark. 172; *Lee v. Swilling*, 68 Ark. 82, 56 S. W. 447; *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568n, 119 Am. St. 164, 11 Am. & Eng. Cas. 609; *Swem v. Green*, 9 Colo. 358, 12 Pac. 202. If the parties consider the claim doubtful it is sufficient to make it the subject of a compromise. *City Elect. R. Co. v. Floyd County*, 115 Ga. 655, 42 S. E.

45; *Johnson v. Redwine*, 98 Ga. 112, 25 S. E. 924; *Frank v. Heaton*, 56 Ill. App. 227; *Honeyman v. Jarvis*, 79 Ill. 318; *Cassell v. Ross*, 33 Ill. 244, 85 Am. Dec. 270; *Bement v. May*, 135 Ind. 664, 34 N. E. 327; *Smith v. Cedar Rapids &c. R. Co.*, 43 Iowa 239; *Sullivan v. Collins*, 18 Iowa 228; *French v. French*, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300; *Rowe v. Barnes*, 101 Iowa 302, 70 N. W. 197; *Western &c. Ins. Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456; *Reinecke v. Bailey*, 33 Ky. L. 977, 112 S. W. 569; *Read v. Hitchings*, 71 Maine 590; *Melcher v. Ins. Co.*, 97 Maine 512, 55 Atl. 411; *Adams v. Wilson*, 12 Metc. (Mass.) 138, 45 Am. Dec. 240; *Prout v. Pittsfield Fire Dist.*, 154 Mass. 450, 28 N. E. 679; *Demars v. Muser-Sauntry &c. Co.*, 37 Minn. 418, 35 N. W. 1; *Osborne v. Fridrich*, 134 Mo. App. 449, 114 S. W. 1045; *Gering v. School District*, 76 Nebr. 219, 107 N. W. 250; *Pitkin v. Noyes*, 48 N. H. 294, 2 Am. Rep. 218, 97 Am. Dec. 615. In the case of *Russel v. Cook*, 3 Hill (N. Y.) 504, the compromise of a disputed claim, not in suit, was held to sustain a promise. Judge Cowan there says: "No one would think of denying, that at least the dispute between parties was doubtful, and that probably the law was against the defendants on the facts disclosed by their evidence. It is enough, however, that it was doubtful." This language would indicate that the word doubtful, as used, in this connection, has some meaning—that the claim must have some probable foundation—must be really doubtful. This being so, if the case, instead of being doubtful, is clear in the judgment of the court and free from doubt against the claim, it follows that the compromise could not be sustained. See in connection with the above, *Morey v. Newfane*, 8 Barb. (N. Y.) 645; *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; *White v. Hoyt*, 73 N. Y. 505; *Crans v. Hunter*, 28 N. Y. 289;

of a dispute,⁹⁹ even though it may be ultimately found that the claimant could not have prevailed.¹ Nor will the court inquire into the adequacy or inadequacy of the consideration for a compromise fairly and deliberately made.² Even though one does not receive all that is legally due him, yet, where the sum actually due is in dispute, the avoidance of litigation is a sufficient consideration to support a settlement fairly made with full knowledge of all the facts.³ But a compromise in which one party makes the entire concession, and receives nothing in return, is not mutual or binding.⁴ Each party to the dispute must yield something.⁵ Therefore, the compromise of a claim which is clearly without foundation, and cannot be sustained either in law or equity, furnishes no consideration for a promise.⁶ A fortiori, a claim which is known by the claimant

Moore v. Blanck, 71 Misc. (N. Y.) 257, 129 N. Y. S. 1105. A void claim cannot be considered doubtful. Morrey v. Newfane, 8 Barb. (N. Y.) 645; Dickey v. Jackson, 47 Ore. 531, 84 Pac. 701; Gaynor v. Quinn, 212 Pa. 362, 61 Atl. 944; Blake v. Peck, 11 Vt. 483.

⁹⁹Llewellyn v. Llewellyn, 3 D. & L. 318; Smyth v. Holmes, 10 Jur. 862; McKenna v. McKenna, 118 Ill. App. 240; American Cent. Ins. Co. v. Sweetser, 116 Ind. 370, 19 N. E. 159; Bunnell v. Bunnell, 111 Ky. 566, 23 Ky. L. 800, 64 S. W. 420, 65 S. W. 607. A mere refusal to pay an undisputed claim is not such a dispute as will support a compromise. Demars v. Muser-Sauntry & Co., 37 Minn. 418, 35 N. W. 1; Fitzgerald v. Fitzgerald & Co., 44 Nebr. 463, 62 N. W. 899; Home Fire Ins. Co. v. Skoumal, 51 Nebr. 655, 71 N. W. 290; Flannagan v. Kilcome, 58 N. H. 443; Williams v. Irving, 47 How. Pr. (N. Y.) 440; Dolcher v. Fry, 37 Barb. (N. Y.) 152; Silander v. Gronna, 15 N. Dak. 552, 108 N. W. 544, 125 Am. St. 616; Duck v. Antle, 5 Okla. 152, 47 Pac. 1056. The dismissal of an action to set aside a trust deed has been held consideration for a reconveyance of the trust property, and a contract by its owner not to make a will. Jones v. Abbott, 228 Ill. 34, 81 N. E. 791.

¹Murray Show Case & Co. v. Sullivan, 15 Cal. App. 475, 115 Pac.

259; Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. 164n. See also, Hulse v. Hulse, 155 Ill. App. 343.

²Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761; Bowers Hydraulic Dredging Co. v. Hess, 71 N. J. L. 327, 60 Atl. 362; Trenton St. R. Co. v. Lawlor, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668; Worcester Loom Co. v. Heald, 78 N. J. L. 172, 72 Atl. 421; Stewart v. Ahrenheldt, 4 Denio (N. Y.) 189; Barnawell v. Threadgill, 56 N. Car. 50; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

³Battle v. McArthur, 49 Fed. 715.

⁴Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056; Cruetz v. Heil, 89 Ky. 429, 12 S. W. 926.

⁵Silander v. Gronna, 15 N. Dak. 552, 108 N. W. 544, 125 Am. St. 616.

⁶Jones v. Ashburnham, 4 East 455; Ivy Coal & Co. v. Long, 139 Ala. 535, 36 So. 722; Prince v. Prince, 67 Ala. 565; Ware v. Morgan, 67 Ala. 461; North v. Forest, 50 Conn. 400; Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453; Emery v. Royal, 117 Ind. 299, 20 N. E. 150; United States Mortgage Co. v. Henderson, 111 Ind. 24, 12 N. E. 88; Moon v. Martin, 122 Ind. 211, 23 N. E. 668; Tucker v. Ronk, 43 Iowa 80; Jennings v. Jennings (Iowa), 87 N. W. 726; Read v. Hitchings, 71 Maine 590; Gunning

to be wholly without foundation, either in law or equity, cannot form the basis of a compromise.⁷ A claim may be compromised although a judgment has been rendered for it. It may still be considered as doubtful, the right of appeal existing to contest its validity.⁸ However, if the compro-

v. Royal, 59 Miss. 45, 42 Am. Rep. 350; House v. Callicott, 83 Miss. 506, 35 So. 761; Holladay-Klotz Land & Co. v. Beekman Lumber Co., 136 Mo. App. 176, 116 S. W. 436; Wheeler v. Reynolds Land Co., 193 Mo. 279, 91 S. W. 1050; Haynes v. Thom, 28 N. H. 386; Sherman v. Barnard, 19 Barb. (N. Y.) 291; Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600. An agreement to pay a lessee a certain sum, in consideration that he surrender his rights under a void lease, is unenforceable. Conqueror Gold & Co. v. Ashton, 39 Colo. 133, 90 Pac. 1124. There are cases holding that the relinquishing of a right to litigate the question of law or fact involved in the dispute will furnish a consideration for a compromise, even though there was no liability which a court would enforce. Brown v. Jennett, 130 Iowa 311, 5 L. R. A. (N. S.) 725, 106 N. W. 747. It is held as a general rule that "the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed." Murray Show Case & Co. v. Sullivan, 15 Cal. App. 475, 115 Pac. 259, quoting from Union Collection Co. v. Buckman, 150 Cal. 163, 88 Pac. 710, 9 L. R. A. (N. S.) 568, 119 Am. St. 164. The compromise of a suit upon a note claimed by the maker to be a forgery has been held binding. The settlement of the dispute, and not the alleged forged paper, was held a consideration for the compromise. Grant v. Chambers, 30 N. J. L. 323.

⁷Ex parte Banner, L. R. 17 Ch. Div. 480; Wade v. Simeon, 2 C. B. 548; Cook v. Wright, 30 L. J. Q. B. 321; Union Collection Co. v. Buckman, 135 Cal. 159, 88 Pac. 708, 9 L.

R. A. (N. S.) 568n, 119 Am. St. 164n, 11 Am.-Eng. Ann. Cas. 609; Bell v. Beam, 75 Cal. 86, 16 Pac. 521; McKinley v. Watkins, 13 Ill. 140; Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Adams v. Crown Coal Tow. Co., 198 Ill. 445, 65 N. E. 97; Melcher v. Ins. Co., 97 Maine 512, 55 Atl. 411; Headley v. Hackley, 50 Mich. 43, 14 N. W. 693; Sheldon v. Estate of Rice, 30 Mich. 296, 18 Am. Rep. 136; Gates v. Shutts, 7 Mich. 127; Carter White Lead v. Kinlin, 47 Nebr. 409, 66 N. W. 536; White v. Hoyt, 73 N. Y. 505; McGlynn v. Scott, 4 N. Dak. 18, 58 N. W. 460; Fryer v. Cetnor, 6 N. Dak. 518, 72 N. W. 909; Ormsbee v. Howe, 54 Vt. 182, 54 Am. Rep. 841; Davisson v. Ford, 23 W. Va. 617. However, if one party to the compromise knows that the other claims against him without a right, but rather than litigate the question into such agreement, preferred to settle said claim, understandingly, freely and on equal terms with the claimant, the settlement will be sustained by the courts. Dailey v. King, 79 Mich. 568, 44 N. W. 959. See also, cases cited ante, in this note.

⁸Hanchet v. Ives, 171 Ill. 122, 69 Ill. App. 83, 49 N. E. 206; Prout v. Pittsfield Fire District, 154 Mass. 450, 28 N. E. 679; Gering v. School District, 76 Nebr. 219, 107 N. W. 250; Jeffries v. Mutual Life Ins. Co., 110 U. S. 305, 28 L. ed. 156, 4 Sup. Ct. 8. A claim may also be compromised after there has been a trial of the cause in which trial the jury disagreed. Stoddard v. Mix, 14 Conn. 12. See also, Livingston v. Dugan, 20 Mo. 102. But if the time for appeal has passed a compromise made in consideration of no appeal being taken it is without consideration. Denny v. Bean, 51 Ore. 180, 93 Pac. 693.

mise of a doubtful claim is obtained by fraud,⁹ duress,¹⁰ or mistake, provided such mistake is one of fact¹¹ and not law,¹² it will not furnish a consideration to support a promise or contract based thereon. It is perhaps impossible to formulate a general rule that will govern all the cases which have been cited on the subject of compromise. It would seem, however, that the good faith of the parties to the compromise instead of color of right has been finally adopted in England and in most of the states of this country as the test by which to determine the validity of a compromise.¹³ The rule most applicable to all the

⁹ Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Tucker v. Roach, 139 Ind. 275, 38 N. E. 822; Spahr v. Hollingshead, 8 Blackf. (Ind.) 415; Mills' Heirs v. Lee, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118; Taylor v. Patrick, 1 Bibb (Ky.) 168; Barlow v. Ocean Ins. Co., 4 Metc. (Mass.) 270; North Nebraska Fair &c. Assn. v. Box, 57 Nebr. 302, 77 N. W. 770; Baker v. Spencer, 47 N. Y. 562; Stewart v. Ahrenfeldt, 4 Denio (N. Y.) 189; Stephens v. Splires, 25 N. Y. 380; Truett v. Chaplin, 11 N. Car. 178; Barnawell v. Threadgill, 56 N. Car. 50; Brown v. Eccles, 2 Pa. Super. Ct. 192; Anthony v. Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 637; Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600; Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186. A party, however, is not called upon to direct others' attention to the bearing of or meaning to be drawn from facts known to both. Daly v. Busk Tunnel R. Co., 129 Fed. 513, 66 C. C. A. 87. Compromise is presumed to be based upon a sufficient consideration. Doyle v. Donnelly, 56 Maine 26.

¹⁰ Vane v. Towle, 5 Idaho 471, 50 Pac. 1004; Tucker v. Roach, 139 Ind. 275, 38 N. E. 822; Baldwin v. Hutchinson, 8 Ind. App. 454, 35 N. E. 711; Taylor v. Patrick, 1 Bibb (Ky.) 168; Holland v. Hoyt, 14 Mich. 238; Gering v. School District, 76 Nebr. 219, 107 N. W. 250. A mere threat to sue on a claim does not amount to duress. Kiler v. Wohletz, 79 Kans. 716, 101 Pac. 474; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76; Bolln v. Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. 898. A compromise

made in order to procure a promisor's release from prison cannot be avoided on the ground of duress. Clark v. Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157. Threats of prosecution and arrest do not of themselves constitute duress. Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76. Money paid to revenue officers for infringement of the revenue laws cannot be recovered on the ground that it was paid under duress. Atlee v. Backhouse, 3 M. & W. 633.

¹¹ Underwood v. Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Casville Roller Mill Co. v. Aetna Ins. Co., 105 Mo. App. 146, 79 S. W. 720; North Nebraska &c. Assn. v. Box, 57 Nebr. 302, 77 N. W. 770; In re Waters' Appeal, 4 Walk. (Pa.) 52; Fink v. Smith, 170 Pa. 124, 32 Atl. 566, 50 Am. St. 750. But see Rabun v. Pierson, 23 La. Ann. 696 (obiter); Wells v. Neff, 14 Ore. 66, 12 Pac. 84; Meinecke v. Sweet, 106 Wis. 21, 81 N. W. 986.

¹² Coffee v. Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125; Stover v. Mitchell, 45 Ill. 213; Knotts v. Preble, 50 Ill. 226, 99 Am. Dec. 514; Gilek v. Sock, 33 Ill. App. 147; Emery v. Royal, 117 Ind. 299, 20 N. E. 150; Smith v. Farra, 21 Ore. 395, 28 Pac. 341, 20 L. R. A. 115; Warren v. Williamson, 8 Baxt. (Tenn.) 427; Lewis v. Cooper, Cooke (Tenn.) 467. But see Underwood v. Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Warder v. Tucker, 7 Mass. 449, 5 Am. Dec. 62.

¹³ Murray Show Case &c. Co. v. Sullivan, 15 Cal. App. 475, 115 Pac. 259; Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L.

cases may therefore be stated thus,—the compromise of a claim which is asserted in good faith and of the validity of which the parties at the time entertain a doubt, and about which there is a bona fide controversy, is a valuable consideration and will support a promise or a contract.

§ 238. **Delivery of property in trust.**—A promise to execute a trust based upon a delivery of the trust property to the promisor rests upon a sufficient consideration.¹⁴ Likewise, the delivery of property to another is sufficient consideration to uphold a promise by the receiver to return it.¹⁵ It has also been held that a pledge of stock as security for an overdue note was supported by a sufficient consideration.¹⁶

§ 239. **Incurring liabilities or obligations.**—Damages, liabilities or obligations occasioned to one by the promise of another are sufficient consideration for such promise, and will make it binding although no actual benefit accrues to the promisor.¹⁷ If a gift is promised, and in reliance on such promise the promisee incurs a liability, obligation, or voluntarily sustains any detriment, the gift will be upheld.¹⁸ Thus payment of a promissory note,

R. A. (N. S.) 568, 119 Am. St. 164n; Osborne v. Fridrich, 134 Mo. App. 449, 114 S. W. 1045; Bowers Hydraulic Dredging Co. v. Hess, 71 N. J. L. 327, 60 Atl. 362; Worcester Loom Co. v. Heald, 78 N. J. L. 172, 72 Atl. 421.

¹⁴ Hart v. Miles, 4 C. B. (N. S.) 371; Wadsworth v. Thompson, 3 Gilm. (Ill.) 423; Miller v. Upton, 6 Ind. 53; Jenkins v. Bacon, 111 Mass. 373, 15 Am. Rep. 33; McCauley v. Davidson, 10 Gill. (Minn.) 335; Rutgers v. Lucet, 2 Johns. (N. Y.) Cas. 92; Robinson v. Threadgill, 35 N. Car. 39. See also, McSorley v. Coyle, 40 Pa. Super. Ct. 560 (property of the vendors given to agents of the vendors with which such agents promised to discharge a lien on the property sold which could not then be paid).

¹⁵ Clark v. Gaylord, 24 Conn. 484; Leverenz v. Haines, 32 Ill. 357; Ames v. Taylor, 49 Maine 381; Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539.

¹⁶ State Banking &c. Co. v. Taylor,

25 S. Dak. 577, 127 N. W. 590, 29 L. R. A. (N. S.) 523.

¹⁷ Mascola v. Mantesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170; Beatty's Estate v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. 242; Lomax v. Smyth, 50 Iowa 223; Choppin v. Dauphin, 48 La. Ann. 1217, 20 So. 681, 33 L. R. A. 133, 55 Am. St. 313; School Dist. v. Sheidley (sub nomine Stocking), 138 Mo. 672, 37 L. R. A. 406, 60 Am. St. 576; Bank of New Hanover v. Bridgers, 98 N. Car. 67, 3 S. E. 826, 2 Am. St. 317; Barrett v. Mahnken, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. 953. See also, Hoffman v. St. Louis &c. Storage Co., 120 Mo. App. 661, 97 S. W. 619 (agreement entered into by a contractor with a third person which imposed liabilities on the contractor not imposed on him by his contract with the city).

¹⁸ Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N. W. 74. See also, ante, §§ 227, 203, Voluntary subscriptions, and What is meant by consideration.

given to enable the payee to quit work, cannot be resisted on the ground that it was without consideration if the payee abandons work in anticipation of such note being paid.¹⁹ So where the administrator of a decedent's estate agreed to loan the buyer of mortgaged chattels of the estate money with which to pay the mortgage debt and the sale would not have been consummated without the promise, the administrator's promise was held supported by a sufficient consideration.²⁰

§ 240. **Services.**—The right to recover compensation for personal services rendered was early recognized, and it is thought by historians that in the latter part of the reign of Edward I the king's court would have placed services rendered on the same footing with the delivery of a chattel which constituted the *quid pro quo* of other similar contracts.²¹ At the present time it is hardly necessary to cite authorities to support the proposition that the performance of services which the promisee was under no legal obligation to perform, for the benefit of the promisor or for a third person at the promisor's request, is a valuable consideration and will support a return promise.²² Nor is the validity

¹⁹ *Ricketts v. Scothorn*, 57 Nebr. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. 491. Equitable estoppel is the theory upon which these decisions are based.

²⁰ *Hedden v. Schneblin*, 126 Mo. App. 478, 104 S. W. 887.

²¹ 2 *Pollock and Maitland Hist. Eng. L.* (2d ed.) 211; 2 *Street Foundations of Legal Liability* 23.

²² *Barley v. Buell*, 70 Cal. 335, 11 Pac. 632; *Steves v. Frazee*, 19 Ind. App. 284, 49 N. E. 385; *Harper v. R. Co.*, 15 Ky. 223, 22 S. W. 849; *Murry v. Kennedy*, 15 La. Ann. 385, 77 Am. Dec. 189; *Borden v. Curtis*, 46 N. J. Eq. 468, 19 Atl. 127; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. St. 428; *Free-land v. Bacon*, 27 N. Y. St. 273, 7 N. Y. S. 674; *Macfeaters v. Pattison*, 188 Fa. St. 270, 41 Atl. 609. Examples of services sufficient to uphold a return promise, see *Dexter v. McClellan*, 116 Ala. 37, 22 So. 461 (organizing a corporation); *Benton v. Holliday*, 44 Ark. 56 (duties and responsibilities of foreclosing a mortgage); *Patrick v. Morrow*, 33 Colo.

509, 81 Pac. 242, 108 Am. St. 107 (procuring divorce); *Cory v. Newton*, 9 Colo. App. 181, 48 Pac. 156 (circulating petition); *Collins v. Hutchins*, 2 Pennew. (Del.) 496, 47 Atl. 1004 (searching for criminal that has forfeited his bond); *Wilson v. Clonbrock Steam Boiler Co.*, 105 Fed. 846 (advertising a business); *Sheppey v. Stevens*, 177 Fed. 484 (using best efforts to break off a third person's relations with certain people); *Hancock v. McFarland*, 17 Iowa 124 (constructing cofferdam); *Roberts v. Sayre*, 22 Ky. (6 T. B. Mon.) 188 (recovering mortgaged slave); *Trundle's Admr. v. Rieley*, 17 B. Mon. (Ky.) 396 (extra services and attention given by jailer to prisoner); *Collyer v. Hyden*, 94 Ky. 180, 15 Ky. L. 101, 21 S. W. 868 (son moving in with and caring for a parent); *Braswell's Admr. v. Braswell*, 109 Ky. 15, 58 S. W. 426 (caring for the business of another); *Chick v. Trevett*, 20 Maine 7, 37 Am. Dec. 68 (erecting parsonage); *Wilson v. Church*, 1 Pick. (Mass.) 23 (services rendered

of the promise affected by the fact that the value of the reward received exceeded that of the services rendered.²³ A note made payable at the maker's death, given in consideration of the services rendered, will be enforced against the estate of the deceased.²⁴ Nor will the fact that the payee received some compensation for such services during the payor's lifetime defeat recovery thereon.²⁵ An agreement to pay for the services rendered in the absence of any express agreement to that effect may be implied, if warranted by the circumstances.²⁶

by a pauper); *Rice v. Dwight Mfg. Co.*, 56 Mass. 80 (to perform services additional to those required by contract); *Muir v. Kalamazoo Corset Co.*, 155 Mich. 624, 119 N. W. 1079 (selling out retail department and executing a release for commission on sales); *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228 (contract with land agent for his services in finding a purchaser for land); *Underwood Typewriter Co. v. Century Realty Co.*, 118 Mo. App. 197, 94 S. W. 787 (spending time and labor to procure a tenant); *Wilson v. Moore*, 13 Nebr. 240, 13 N. W. 217 (furnishing data in regard to claims); *Title Guarantee & Co. v. Steinberg*, 119 App. Div. (N. Y.) 28, 103 N. Y. S. 857 (services in searching title to premises); *First Religious Soc. v. Stone*, 7 Johns. (N. Y.) 112 (preaching the gospel); *Archer v. McDuffie*, 5 Barb. (N. Y.) 147 (selling land); *Hamlin v. Wheedock*, 42 Hun (N. Y.) 530, 4 N. Y. St. 475 (in introducing customers to merchant); *Lord v. Hull*, 37 Misc. (N. Y.) 83, 74 N. Y. S. 711, *affd.*, 80 App. Div. (N. Y.) 194, 80 N. Y. S. 321 (aiding firm of architects to get a contract); *Smith v. McKenna*, 53 Pa. St. 151 (erecting public defenses in time of war). Where services are rendered by one under no legal obligation to perform them, and the beneficiary makes an express promise to pay for such services, and in reliance on such promise the services are continued, there is a consideration to support the promise to pay. *In re Currey's Estate*, 26 Pa. Super. Ct. 479. Where there was a dispute between two parties as to which one was entitled to the possession of a hopyard and the one in possession agreed to

harvest the crop and hold it until the rights of the parties were determined by the courts, and the other agreed, in case the decision was in his favor, to pay the one in possession for his services, such agreement was supported by a consideration; the services rendered by the one in possession in harvesting the crop, holding it and foregoing the right to sell immediately were sufficient to uphold defendant's promise to pay therefor. *Meyer v. Livesley (Ore)*, 107 Pac. 476. *Neal's Exr. v. Gilmore*, 79 Pa. St. 421 (an express agreement to pay a child wages on condition that he live with certain of his relation until attaining his majority); *Texarkana Lumber Co. v. Lennard*, 47 Tex. Civ. App. 116, 104 S. W. 506 (contract by employer for services of a physician in giving medical attention to employés); *Hubbel v. Olmstead*, 36 Vt. 619 (administering an estate); *Pond v. Pond's Estate*, 79 Vt. 352, 65 Atl. 97 (daughter remaining at home and assisting with the work).

²³ *Earl v. Peck*, 64 N. Y. 596.

²⁴ *Stone v. Pennock*, 31 Mo. App. 544; *Worth v. Case*, 42 N. Y. 362; *Bentley v. Lamb*, 112 Pa. St. 480, 4 Atl. 200, 56 Am. Rep. 330. See also, *Drefahl v. Security Sav. Bank*, 132 Iowa 563, 107 N. W. 179.

²⁵ *In re Clark's Appeal*, 57 Conn. 565, 19 Atl. 332; *Barthe v. Succession of Lacroix*, 29 La. Ann. 326, 29 Am. Rep. 330; *Stone v. Pennock*, 31 Mo. App. 544; *Bentley v. Lamb*, 112 Pa. St. 480, 4 Atl. 200, 56 Am. Rep. 330.

²⁶ *Paynter v. Williams*, 1 C. & M. 811, 3 Tyrw. 894; *Friedman v. Suttle*, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 933; *Dewolf v. Chicago*,

If the services are gratuitous, or voluntarily rendered, however, they are not a sufficient consideration to sustain an executory promise.²⁷ Services rendered to relatives, in the absence of an express agreement, are presumed to be gratuitous. It is presumed that the service is rendered without intending to ask for compensation. The motives which prompt the service or the expectation which the doer hopes may be realized in no way affect the rule.²⁸ Thus, as between parent and infant child, the relation of the parties negatives the idea that the payment was to be made for services rendered, and no compensation can be recovered.²⁹ This same rule applies to adults where the child continues after attaining its majority to live with its parents, in the absence of any agreement or understanding, and where no circumstances warrant the inference that remuneration was to be made for the services rendered there is no legal liability

26 Ill. 443; *Montgomery v. Downey*, 116 Iowa 632, 88 N. W. 810; *Daily v. Minnick*, 117 Iowa 563, 91 N. W. 913, 60 L. R. A. 840; *Pool v. Horner*, 64 Md. 131, 20 Atl. 1036; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *O'Connor v. Beckwith*, 41 Mich. 657, 3 N. W. 166; *McClary v. Michigan & C. R. Co.*, 102 Mich. 312, 60 N. W. 695; *Crane v. Bandouine*, 55 N. Y. 256; *Baillard v. Rowan*, 21 Misc. (N. Y.) 324; *Hicks v. Burhans*, 10 Johns. (N. Y.) 243; *Blount v. Guthrie*, 99 N. Car. 93, 5 S. E. 890; *Seymour v. Marlboro*, 40 Vt. 171; *Wheeler v. Hall*, 41 Wis. 447; *Silverthorn v. Wylie*, 96 Wis. 69, 71 N. W. 107. See also, ante, § 213, Past consideration.

²⁷ *Polk v. Johnson*, 160 Ind. 292, 66 N. E. 752, 98 Am. St. 274; *In re Jones*, 106 App. Div. (N. Y.) 334, 92 N. Y. Supp. 719, 94 N. Y. Supp. 627; *In re Pinkerton Estate*, 49 Misc. (N. Y.) 363, 99 N. Y. S. 492. See also, *Conqueror Gold Min. & C. Co. v. Ashton*, 39 Colo. 133, 90 Pac. 1124; *Utah Sav. & C. Co. v. Bamberger*, 29 Utah 370, 81 Pac. 887.

²⁸ *Castle v. Edwards*, 63 Mo. App. 564; *Swires v. Parsons*, 5 Watts & S. (Pa.) 357.

²⁹ *Morris v. Simpson*, 3 Houst. (Del.) 568; *Poole v. Baggett*, 110 Ga. 822, 36 S. E. 86; *McNemar v. McNemar*, 137 Ill. App. 504; *Finch v.*

Green, 225 Ill. 304, 80 N. E. 318; *Reeve's Estate v. Moore*, 4 Ind. App. 492, 31 N. E. 44; *Collins v. Williams*, 21 Ind. App. 227, 52 N. E. 92; *Tank v. Rohweder*, 98 Iowa 154, 67 N. W. 106; *In re Bishop's Estate*, 130 Iowa 250, 106 N. W. 637; *Coleman v. Simpson*, 2 Dana (Ky.) 166; *Turner's Admr. v. Turner* (Ky.), 38 S. W. 506; *Conway v. Conway*, 130 Ky. 218, 113 S. W. 94; *Bixler v. Seelman*, 77 Md. 494, 27 Atl. 137; *Lowe v. Lowe*, 111 Md. 113, 73 Atl. 878; *Harris v. Harris*, 106 Mich. 246, 64 N. W. 15; *Baxter v. Gale*, 74 Minn. 36, 76 N. W. 954; *Louder v. Hart*, 52 Mo. App. 377; *Birch v. Birch*, 112 Mo. App. 157, 86 S. W. 1106; *Moore v. Moore*, 58 Nebr. 268, 78 N. W. 495; *Page v. Page*, 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; *In re Cooper*, 6 Misc. (N. Y.) 501, 57 N. Y. St. 704, 27 N. Y. S. 425; *In re Sworthout's Estate*, 38 Misc. (N. Y.) 56, 76 N. Y. S. 961; *In re Barbite's Appeal*, 126 Pa. 404, 17 Atl. 617; *Dash v. Inabniet*, 53 S. Car. 382, 31 S. E. 297; *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888; *Beale v. Hall*, 97 Va. 383, 34 S. E. 53; *Coons v. Coons*, 106 Va. 572, 56 S. E. 576; *Pelton v. Smith*, 50 Wash. 459, 97 Pac. 460; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. 125.

to pay.⁸⁰ It is also applicable to mutual services rendered by brothers or sisters,⁸¹ grandparents and grandchildren,⁸² uncle or aunt, nephew or niece,⁸³ in case they are living together as one family, or one is dependent upon the other.⁸⁴ And where services are rendered by persons related by affinity they are presumed to be gratuitous. Thus as between parent and son-in-law or

⁸⁰ *Friermuth v. Friermuth*, 46 Cal. 42; *Wall v. Wall*, 69 Ill. App. 389; *Neish v. Gannon*, 98 Ill. App. 248, *affd.*, 198 Ill. 219, 64 N. E. 1000; *Adams v. Adams' Admr.*, 23 Ind. 50; *Hill v. Hill*, 45 Ind. App. 99, 90 N. E. 331; *Donovan v. Driscoll*, 116 Iowa 339, 90 N. W. 60; *Wise v. Outtrim*, 139 Iowa 192, 117 N. W. 264, 130 Am. St. 301n; *Dowell v. Dowell's Admr.*, 137 Ky. 167, 125 S. W. 283; *Saunders v. Saunders*, 90 Maine 284, 38 Atl. 172; *Hiale v. Hiale's Estate*, 157 Mich. 45, 121 N. W. 465; *Ronsiek v. Boverschmidt's Admr.*, 63 Mo. App. 421; *Carrell v. McDonell*, 139 Mo. App. 450, 122 S. W. 1129; *Moore v. Moore*, 58 Nebr. 268, 78 N. W. 495; *Munger v. Munger*, 33 N. H. 581; *Page v. Page*, 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; *Smith v. Smith's Admr.*, 30 N. J. Eq. 564; *Haberman v. Kaufer*, 70 N. J. Eq. 381, 61 Atl. 976; *In re Hughey*, 7 N. Y. St. 732; *More v. Shepard*, 133 App. Div. (N. Y.) 471, 117 N. Y. S. 1095; *Grant v. Grant*, 109 N. Car. 710, 14 S. E. 90; *Wilkes v. Cornelius*, 21 Ore. 348, 28 Pac. 135; *Burgess v. Burgess*, 109 Pa. St. 312, 1 Atl. 167; *Newell v. Lawton*, 20 R. I. 307, 38 Atl. 946; *Harris v. Currier*, 44 Vt. 468; *Westcott v. Westcott's Estate*, 69 Vt. 234, 39 Atl. 199; *Harshberger's Admr. v. Alger*, 31 Grat. (Va.) 52; *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910; *Stansbury v. Stansbury's Admr.*, 20 W. Va. 23; *Wells v. Perkins*, 43 Wis. 160; *Voss v. Voss*, 134 Wis. 52, 113 N. W. 1097.

⁸¹ *State v. Connaway*, 2 Houst. (Del.) 206; *Chapman v. Chapman*, 87 Ill. App. 427; *Fuller v. Fuller's Estate*, 21 Ind. App. 42, 51 N. E. 373; *Keegan v. Malone's Estate*, 62 Iowa 208, 17 N. W. 461; *Cochran v. Zach-*

ery, 137 Iowa 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235n, 126 Am. St. 307, 15 Ann. Cas. 297; *Price v. Price's Exr.*, 101 Ky. 28, 19 Ky. L. 211, 39 S. W. 429; *Spencer v. Spencer*, 181 Mass. 471, 63 N. E. 947; *Martin v. Sheridan*, 46 Mich. 93, 8 N. W. 722; *Callahan v. Riggins*, 43 Mo. App. 130; *Moore v. Renick*, 95 Mo. App. 202, 68 S. W. 936; *Carpenter v. Weller*, 15 Hun (N. Y.) 134; *Taylor v. Taylor*, 1 Lea (Tenn.) 83; *Key v. Harris*, 116 Tenn. 161, 92 S. W. 235, 8 Ann. Cas. 200; *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352.

⁸² *Murrell v. Studstill*, 104 Ga. 604, 30 S. E. 750; *Teeter v. Poe*, 48 Ill. App. 158; *In re Wells*, 4 N. Y. St. 878; *Dodson v. McAdam*, 96 N. Car. 149, 2 S. E. 453, 60 Am. Rep. 408; *In re Barhite's Appeal*, 126 Pa. 404, 17 Atl. 617; *Davis v. Goodenow*, 27 Vt. 715.

⁸³ *Hurst v. Lane*, 105 Ga. 506, 31 S. E. 135; *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Hays v. McConnell*, 42 Ind. 285; *Weir v. Weir's Admr.*, 3 B. Mon. (Ky.) 645, 39 Am. Dec. 487; *Robinson v. McAfee's Estate*, 59 Mich. 375, 26 N. W. 643; *Sloan v. Dale*, 90 Mo. App. 87; *Hayden v. Parsons*, 70 Mo. App. 493; *In re Galway's Estate*, 19 Misc. (N. Y.) 92, 43 N. Y. Supp. 970; *Hicks v. Barnes*, 132 N. Car. 146, 43 S. E. 604; *Defrance v. Austin*, 9 Pa. St. 309; *Glenn v. Gerald*, 64 S. Car. 236, 42 S. E. 155; *Andrus v. Foster*, 17 Vt. 556; *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569. See also, *Hoffman v. Condon*, 134 App. Div. (N. Y.) 205, 118 N. Y. S. 899.

⁸⁴ As to services rendered by cousins each to the other, see *Gallaher v. Vought*, 8 Hun (N. Y.) 87; *Neal's Exr. v. Gilmore*, 79 Pa. St. 421.

daughter-in-law,³⁵ brothers-in-law and sisters-in-law,³⁶ parent and step-child,³⁷ in case they are living together as one family,³⁸ and services rendered by an adopted child,³⁹ or any de facto members of the family,⁴⁰ are presumed gratuitous.⁴¹

§ 241. **Marriage.**—Marriage is a valuable consideration,⁴² and will support an antenuptial agreement whereby the husband

³⁵ *Mariner v. Collins*, 5 Har. (Del.) 290; *Poole v. Baggett*, 110 Ga. 822, 36 S. E. 86; *Oxford v. McFarland*, 3 Ind. 156; *Rogers v. Millard*, 44 Iowa 466; *Coe v. Wager*, 42 Mich. 49, 3 N. W. 248; *Ramsey v. Hicks*, 53 Mo. App. 190; *Bonney v. Haydock*, 40 N. J. Eq. 513, 4 Atl. 766; *Heinz v. Jacob*, 76 N. J. L. 189, 68 Atl. 1069; *McConnell v. McConnell*, 75 N. H. 385, 74 Atl. 875; *Conger v. Van Aernum*, 43 Barb. (N. Y.) 602; *Reid v. Farrar*, 6 N. Y. St. 199; *Koebel v. Beetson*, 112 App. Div. (N. Y.) 639, 98 N. Y. S. 408; *Callahan v. Wood*, 118 N. Car. 752, 24 S. E. 542; *Lovet v. Price*, *Wright* (Ohio) 89; *In re Young's Estate*, 148 Pa. 573, 24 Atl. 124; *Gerz v. Weber*, 151 Pa. 396, 25 Atl. 82; *Sprague v. Waldo*, 38 Vt. 139; *Williams v. Stonestreet*, 3 Rand. (Va.) 559; *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. 991; *In re Schmidt's Estate*, 93 Wis. 120, 67 N. W. 37. *Contra*, *Wright's Admr. v. Donnell*, 34 Tex. 291.

³⁶ *Broughton v. Smart*, 59 Ill. 440. *Contra*, *In re Russell's Estate*, 7 Phila. (Pa.) 64; *In re McCarty's Estate*, 9 Phila. (Pa.) 318.

³⁷ *Murdock v. Murdock*, 7 Cal. 511; *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015; *Harris v. Smith*, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702; *Baxter v. Gale*, 74 Minn. 36, 76 N. W. 954; *Guenther v. Birkick's Admr.*, 22 Mo. 439; *Williams v. Hutchinson*, 5 Barb. (N. Y.) 122, 3 N. Y. 312, 53 Am. Dec. 301; *Satterly v. Dewick*, 129 App. Div. (N. Y.) 701, 114 N. Y. S. 354; *Lantz v. Frey*, 19 Pa. St. 366; *Brown v. Cummings*, 27 R. I. 369, 62 Atl. 378; *Nichols v. McCormick* (Tex. Civ. App.), 35 S. W. 530; *Wells v. Perkins*, 43 Wis. 160; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. 125. But it has been held that in case the service is extraordinary in

its nature there may be a recovery. *Succession of Stuart*, 48 La. Ann. 1484, 21 So. 29.

³⁸ But there is no presumption that the services rendered by a step-son-in-law or step-daughter-in-law were gratuitous. *Hardiman's Admr. v. Crick*, 131 Ky. 358, 115 S. W. 236, 133 Am. St. 248n.

³⁹ *Lang v. Dietz*, 191 Ill. 161, 60 N. E. 841; *Lunay v. Vantyne*, 40 Vt. 501.

⁴⁰ *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192; *Martin v. Martin*, 101 Ill. App. 640, *revd.*, 202 Ill. 382, 67 N. E. 1; *Waechter v. Walters*, 41 Ind. App. 408, 84 N. E. 22; *Ottoway v. Milroy*, 144 Iowa 631, 123 N. W. 467; *Frailey's Admr. v. Thompson*, 20 Ky. L. 1179, 49 S. W. 13; *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023; *Fitzpatrick v. Dooley*, 112 Mo. App. 165, 86 S. W. 719.

⁴¹ It is a universal rule, however, that before any of the before-mentioned presumptions will arise the parties must either live under the same roof or the one be dependent upon the other. *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835.

⁴² *Barrow v. Barrow*, 2 Dick. 504; *Campion v. Cotton*, 17 Ves. Jr. 271; *Nairn v. Prowse*, 6 Beav. 752. *In Prewit v. Wilson*, 103 U. S. 22, 26 L. ed. 360, the court said: "Now, marriage is not only a valuable consideration, but as Coke says, there is no other consideration so much respected in the law." *Andrews v. Andrews*, 8 Conn. 79; *Rockafellow v. Newcomb*, 57 Ill. 186; *Marmon v. White*, 151 Ind. 445, 51 N. E. 930; *State v. Osborn*, 143 Ind. 671, 42 N. E. 921; *Deery v. Deery*, 74 Ind. 560; *Wright v. Wright*, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261; *Kinnard v. Daniel*, 13 B. Mon. (Ky.) 496; *Tolman v. Ward*, 86 Maine 303, 29 Atl. 1081, 41 Am. St. 556; *Waters v. Howard*, 8

contracts to make provision for the intended wife,⁴⁸ or the wife

Gill (Md.) 262; Dugan v. Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Smith v. Allen, 5 Allen (Mass.) 454; Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. 663; Lionberger v. Baker, 88 Mo. 447; Mellick v. Mellick, 47 N. J. Eq. 86, 19 Atl. 870, affd., 48 N. J. Eq. 613, 23 Atl. 582; Peck v. Vandemark, 99 N. Y. 29, 1 N. E. 41; Wright v. Wright, 54 N. Y. 440; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Whelan v. Whelan, 3 Cow. (N. Y.) 537; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Gurvin v. Cromartie, 33 N. Car. 174, 53 Am. Dec. 406; In re Frank's Appeal, 59 Pa. St. 190; Magniac v. Thompson, 7 Pet. (U. S.) 348, 8 L. ed. 709, affg. Fed. Cas. No. 8956, Baldw. 344. McCreery v. Davis, 44 S. Car. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. 794, per Pope, J.: "Under our law, 'marriage is a valuable consideration. Some have considered it the highest known in law. None would say it was a lower consideration than money. There is nothing unreasonable in this. The great value of the consideration consists in this: that the wife surrenders her person and her self-dominion to the husband, and enters into an indissoluble engagement with him, foregoing all other prospects in life; and, if the consideration for which she stipulates fails, she cannot be restored to the status in quo. She can have no remedy or relief.'" Her-ring v. Wickham, 29 Grat. (Va.) 628, 26 Am. Rep. 405; Snell v. Bray, 56 Wis. 156, 14 N. W. 14. "Marriage is a valuable consideration and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of the marriage, or by virtue of any valid antenuptial agreement." Nelson v. Brown, 164 Ala. 397, 51 So. 360, 137 Am. St. 61.

⁴⁸ Synge v. Synge, L. R. (1894) 1 Q. B. 466, per Lord Justice Kay: "The learned judge who decided this case has held that the letter was not treated by the lady as a contract, although by the advice of Mr. Woodruff she preserved it. * * * We cannot, with deference to the learned judge, agree in his view that she

treated the letter as a mere statement of intention by which the intended husband was not to be bound. The law relating to proposals of this kind before marriage was thus stated by Lord Lyndhurst, L. C., in *Hammersley v. De Biel*, 12 Cl. & F. 45: 'The principle of law, or at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal.'

"We are of opinion that the proposal of terms in this case was made as an inducement to the lady to marry, that she consented to the terms, and married the defendant on the faith that he would keep his word, and that accordingly there was a binding contract on the defendant's part to leave to his wife the house and land at Ardfield for her life. * * *

"Marriage is a valuable consideration for such a contract of the highest order, and where, as here, the contract is in writing, so that there is no question upon the Statute of Frauds, in the language already quoted, a Court of Equity will take care that the party who marries on the faith of such a proposal 'is not disappointed, and will give effect to the proposal.'" Wright v. Wright, 54 N. Y. 440. In the case of *Smith v. Allen*, 5 Allen (Mass.) 454, a deed executed to induce the intended wife to marry him was held good although the intended husband died before the marriage. *Offutt v. Offutt*, 106 Md. 236, 67 Atl. 138, 12 L. R. A. (N. S.) 232, 124 Am. St. 491. Equity will enforce such an agreement. *Holtham v. Ryland*, Nelson Ch. 205; *Haymer v. Haymer*, 2 Vent. 343; *Acton v. Peirce*, 2 Vern. 480; *Collins v. Collins*, 72 Iowa 104, 33 N. W. 442; *Culver v. Culver*, 8 B. Mon. (Ky.) 128; *Miller v. Goodwin*, 8 Gray (Mass.) 542. And where the agreement was oral, and is subsequently executed,

the husband.⁴⁴ Consequently the settlement of lands, although made by the settler with the design to defraud his creditors, will not be set aside in the absence of clearest proof of his intended wife's participation in the fraud.⁴⁵ In such case the wife is deemed a purchaser for value of the property settled on her in consideration of marriage, and is entitled to hold it against the world.⁴⁶ By such agreement he may waive his right to curtesy,⁴⁷ and she may waive her right to dower.⁴⁸ If such a contract is fairly and

the grantor will be bound by the recitals in the deed. *Prignon v. Dausat*, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. 914, where it is said: "As we view the law, it is the contract to marry, and not the marriage itself, which is the consideration which supports the deed." And see *Potts v. Merrit*, 14 B. Mon. (Ky.) 326, which was an antenuptial contract, the husband agreeing to allow the wife to keep her slaves if she would marry him.

⁴⁴*Lawrence v. Bartlett*, 2 Allen (Mass.) 36; *In re Appleby*, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590; *De Barante v. Gott*, 6 Barb. (N. Y.) 492.

⁴⁵*Prewit v. Wilson*, 103 U. S. 22, 26 L. ed. 360.

⁴⁶*Barrow v. Barrow*, 2 Dickens 504, the court saying: "I never knew an instance where a settlement in consideration of marriage hath been set aside, and I will not make a precedent for it." *Campion v. Cotton*, 17 Ves. 271; *Nairn v. Prowse*, 6 Beav. 752; *Ex parte McBurnie's Trustees*, 1 DeG., M. & G., 441; *Fraser v. Thompson*, 4 DeG. & J. 659; *Tunno v. Trezevant*, 2 Des. (S. Car.) 264; *Magniac v. Thompson*, 1 Bald. (U. S.) 344, Fed. Cas. No. 8956; *Greenhow v. Coutts*, 4 Hen. & M. (Va.) 485. See *Magniac v. Thompson*, 7 Pet. (U. S.) 348, 8 L. ed. 709, where Judge Story said: "Nothing can be clearer, both upon principle and authority, than the doctrine, that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If the settler alone intended a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contem-

plation of the law, is not only a valuable consideration to support such a settlement, but it is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed in the highest sense purchasers for a valuable consideration, and so that it is bona fide, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors." *Andrew v. Jones*, 10 Ala. 400; *Bunell v. Witherow*, 29 Ind. 123; *Smith v. Allen*, 5 Allen (Mass.) 454; *Armfield v. Armfield*, Freem. Ch. (Miss.) 311; *Verplank v. Sterry*, 12 Johns. (N. Y.) 536. *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 260, where Chanc. Kent said: "It is the constant language of the books and of the courts, that a voluntary deed is made good by a subsequent marriage, and a marriage has always been held to be the highest consideration in law." *In re Jones's Appeal*, 62 Pa. St. 324; *Herring v. Wickham*, 29 Grat. (Va.) 628, 26 Am. Rep. 405; *Metz v. Blackburn*, 9 Wyo. 481, 65 Pac. 857. See also, *Huston v. Cantrell*, 11 Leigh (Va.) 136; *Eppes v. Randolph*, 2 Call (Va.) 125; *Bentley v. Harris' Admr.*, 2 Gratt. (Va.) 357; *Welles v. Cole*, 6 Gratt. (Va.) 645; *Fones v. Rice*, 9 Gratt. (Va.) 568.

⁴⁷*In re Appleby*, 100 Minn. 408, 101 N. W. 305, 10 L. R. A. (N. S.) 590.

⁴⁸*In re Staub's Appeal*, 66 Conn. 127, 33 Atl. 615; *Cowles v. Cowles*, 74 Conn. 24, 49 Atl. 195; *McMahill v. McMahon*, 113 Ill. 461; *Shaffer v. Mathews*, 77 Ind. 83; *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; *Paine v. Hollister*, 139 Mass. 144, 29 N. E. 541; *Desnoyer v. Jordan*, 27 Minn. 295, 7 N. W. 140;

equitably made between the parties it, and not the law, furnishes the measure of their respective rights, nor will a mistake as to the law, of itself, be sufficient ground on which to set aside a contract waiving dower rights.⁴⁹ But if one of the parties knowingly or fraudulently misrepresents the law or the facts, such contract may be set aside.⁵⁰ The fact that the engagement of marriage between the parties is entered into several months before an agreement was formally drawn up and signed does not exclude the marriage as a consideration for such agreement.⁵¹

While it is evident that the parties may contract with each other before marriage as to their mutual property rights they cannot vary the personal duties and obligations to each other which result from the marriage contract itself. Consequently an antenuptial agreement entered into by the parties, in which she contracts to bequeath the intended husband all her property in consideration of his nursing, supporting and caring for her during her life, will not be enforced at the instance of the husband on her failure so to do.⁵²

Even should a third person promise to do or perform certain acts in consideration of the marriage of others, their marriage will make such promise binding. Thus where an uncle wrote to his nephew, saying, "I am glad to hear of your intended marriage to E. N.; and, as a consideration, I promise to assist you at starting. I am happy to tell you I will pay to you yearly and until your income derived from your profession of chancery barrister shall amount to 600 guineas," it was held that this was a binding promise.⁵³ And when a settlement is made in

Tierman v. Binns, 92 Pa. St. 248; In re Deller (Wis.), 124 N. W. 278, 25 L. R. A. (N. S.) 751.

⁴⁹ Robbins v. Robbins, 225 Ill. 333, 80 N. E. 326, 9 L. R. A. (N. S.) 953n. See also, Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. St. 1024.

⁵⁰ Lamb v. Lamb, 130 Ind. 273, 30 N. E. 36, 30 Am. St. 227; Simpson v. Simpson, 94 Ky. 586, 23 S. W. 361; Graham v. Graham, 67 Hun (N. Y.) 329, 22 N. Y. S. 299, affd., 143 N. Y. 573, 38 N. E. 722; Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868; Ellis v. Ellis, 1 Tenn. Ch. App. 198; In re

Deller (Wis.), 124 N. W. 278, 25 L. R. A. (N. S.) 751.

⁵¹ McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; In re Appleby, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590.

⁵² Ryan v. Dockery, 134 Wis. 431, 114 N. W. 820, 15 L. R. A. (N. S.) 491n, 126 Am. St. 1025. As to the wife contracting to support the husband, see Cocoran v. Cocoran, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. 390.

⁵³ Shadwell v. Shadwell, 9 C. B. (N. S.) 159. A father's promise to his son's fiancée that he will give her

contemplation of marriage the law presumes it was an inducement to it. So, where a father makes such a settlement upon his daughter, even before any contract of marriage, if the settlement was known to third persons, it will be presumed it was a probable inducement to the marriage.⁵⁴

§ 242. **Name and change of name.**—The privilege of naming a child is a valid and legal consideration for a promise. The right to name the child belongs to its parents. If they surrender this right at the instance of and in reliance on the promise of another it constitutes a valuable consideration.⁵⁵ This rule applies

certain property in case she marries his son is binding (*Wright v. Wright*, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261), or where the promise is made by the father to the son in consideration of the son's marriage. *Curvin v. Cromartie*, 11 Ired. (N. Car.) 174, 53 Am. Dec. 406; *Thompson v. Thompson*, 17 Ohio St. 649; *Caines v. Jones*, 5 Yerg. (Tenn.) 249. A promise given in consideration of marriage to one's niece is binding. *Barr v. Hill*, Add. (Pa.) 276. A verbal promise given before marriage will support a written agreement entered into after marriage. *Argenbright v. Campbell*, 3 Hen. & M. (Va.) 144. A deed given to a daughter and her husband in consideration of marriage shows a valuable consideration. *Arnold v. Estis*, 92 N. Car. 162. See also, *Hammersley v. De Biel*, 12 C. & F. 45, where a man represented to his daughter's suitor that he would leave her a provision by will. *Brown v. Jones*, 1 Atk. 188; *Browne v. Garborough*, Cro. Eliz. 63; *Bradley v. Toder*, Cro. Jac. 228; *Ex parte Cottrell*, 2 Cowp. 742; *Douglasse v. Waad*, 1 Ch. App. Cas. 100; *Prole v. Soady*, 2 Giffard 1. Here a settlement was directed to be made in accordance with the representations although they were by parol. "If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause proof of any such contract. When the authorities on this subject are attended to, it will

be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation." *Jorden v. Money*, 5 H. L. C. 185, the court saying: "That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There the person who has made the false representations has in a great many cases been held bound to make his representations good."

⁵⁴*Brown v. Carter*, 5 Ves. 862; *Hering v. Wickham*, 29 Grat. (Va.) 628, 26 Am. Rep. 405; *Welles v. Cole*, 6 Gratt. (Va.) 645.

⁵⁵*Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16. "In *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87, it was held, following the *Wolford* case, that naming a child after the maker of a note is a sufficient consideration for the note given to the child. In general a waiver of any legal or equitable right at the request of another party is a sufficient consideration for a promise. *Parsons on Contracts* (8th ed.) 444. It is said: 'A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance,

to the changing of a child's Christian name, as where the grandfather of a child promises her parents to leave to her by his will a specified amount of money as a legacy, if they would change her name from Catherine to Harriet, and the change was accordingly made. It was held that the change of name was a sufficient consideration for the promise, and that there was a sufficient privity

detriment, loss or responsibility, given, suffered or undertaken by the other.' *Currie v. Misa*, L. R. 10 Exch. 153, referred to in *Hamer v. Sidway*, 124 N. Y. 538, where it also said that courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forbore or suffered by the party to whom the promise is made as consideration for the promise made to him.' It is also said quoting from *Pollock on Contracts*, 166, that 'consideration means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first.' In *Hamer v. Sidway*, 124 N. Y. 538, a promise to pay the promisee \$5,000 if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, was held to be based on sufficient consideration. A similar view was taken in *Lindell v. Rokes*, 60 Mo. 249. In *Earle v. Angell*, 157 Mass. 294, it was held that a promise to pay the promisee \$500 if he would attend the funeral of the promisor was enforceable. In view of the doctrine of the *Wolford* case and the general principle enunciated or approved in the *Hamer* case, we are of the opinion that a sufficient consideration is alleged for the promise of the decedent. There is no question here about the adequacy. *Earl v. Peck*, 64 N. Y. 596. In 1 Comyn's Digest (5th ed., p. 210, note), the rule is stated, 'Where one for whose benefit a contract has been expressly made is nearly related to the party from whom its consideration moves, either

may sue for the breach of it, though the pendency of either's suit will preclude the other's action.' This is based mainly on the case of *Dutton v. Poole*, 2 Levinz 210, where the right of the child to sue was asserted. The authority of that case has been often recognized. *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57; *Todd v. Weber*, 95 N. Y. 193; *Knowles v. Erwin*, 43 Hun (N. Y.) 152, *affd.*, 124 N. Y. 633; *Sackett v. Sackett*, 14 N. Y. St. 251. The principle that relationship may be the basis of a privity sufficient for the action is also recognized in *Bogardus v. Younge*, 64 Hun (N. Y.) 398; *Coleman v. Hiler*, 85 Hun (N. Y.) 547. In *Vrooman v. Turner*, 69 N. Y. 280, 284, it is said: 'To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefits to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally.' The plaintiff here has certainly an equitable claim to the benefit of the promise. The plaintiff's parents acted for her as well as for themselves in the transaction. They owed her a duty in that regard from which it may well be said a privity arose sufficient for the maintenance of the action.' *Babcock v. Chase*, 92 Hun (N. Y.) 264, 36 N. Y. S. 879. See *Daily v. Minnick*, 117 Iowa 563, 91 N. W. 933, 60 L. R. A. 840; *Eaton v. Libey*, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. 511; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101. See also, *Parks v. Francis*, 50 Vt. 626, 28 Am. Rep. 517.

between the child and her parents to enable her to enforce the promise.⁵⁶

§ 243. **Contracts and contractual rights generally.**—One consideration will support all the provisions of a contract if such was the intention of the parties.⁵⁷ Therefore, if the agreement is but the completion of a former contract it has the original consideration for its support,⁵⁸ as when the contract calls for the giving of bond for its faithful performance such bond is not without consideration merely because it was executed after the contract. The letting of the contract is sufficient consideration for the bond.⁵⁹ Or should one party at the instance of the other consent to a change or modification in the terms of their mutual obligations the modification so made is a valuable consideration, and will support a promise given by the party at whose request the change was made.⁶⁰ A fortiori, cancellation of a contract or the granting of a release and the relinquishment of its benefits

⁵⁶ *Babcock v. Chase*, 92 Hun. (N. Y.) 264, 72 N. Y. St. 401, 36 N. Y. S. 879, 3 N. Y. Ann. Cas. 25.

⁵⁷ *Boughn v. Smith*, 58 Nebr. 590, 79 N. W. 160. One consideration may sustain more than one promise. *Studwell v. Bush Co.*, 126 App. Div. (N. Y.) 818, 111 N. Y. S. 293. See also, *Johnson v. Wilkerson*, 96 Ark. 320, 131 S. W. 690. But an agreement collateral to the original contract must be supported by a consideration. *Norton v. Abbott*, 28 How. Pr. (N. Y.) 388, 113 N. Y. S. 669. See also, *Seymour v. Hughes*, 55 Misc. (N. Y.) 248, 105 N. Y. S. 249; *Heal v. Richmond, etc., Bank*, 127 App. Div. (N. Y.) 428, 111 N. Y. S. 602, 196 N. Y. 549, 89 N. E. 1101.

⁵⁸ *Griffith v. Fields*, 105 Iowa 362, 75 N. W. 325. Plaintiff and another bought stock in a bank, paying therefor with notes and mortgages endorsed to the bank, and as part of the contract of sale the defendant undertook to hold the plaintiff harmless and indemnify him against any action by the bank to recover on his endorsement. Held, that defendant's contract was supported by a sufficient consideration. *Patrick v. Barker*, 78 Nebr. 535, 112 N. W. 358.

⁵⁹ *Smith v. Molleson*, 148 N. Y. 241,

42 N. E. 669. See also, *Standard Fashion Co. v. Ostrom*, 16 App. Div. (N. Y.) 220, 44 N. Y. S. 666; *Andrews v. Pontue*, 24 Wend. (N. Y.) 285; *Cady v. Allen*, 22 Barb. (N. Y.) 388; *Bourne v. Sherrill*, N. Car., 55 S. E. 799; *Wiswall v. Potts*, 58 N. Car. 184; *Haile v. Morgan*, 25 S. Car. 601; *Tyson v. Jackson*, 41 Tex. Civ. App. 128, 90 S. W. 930; *Rabaud v. D'Wolf*, 1 Paine (U. S.) 580, Fed. Cas. No. 11519, affd., 1 Pet. (U. S.) 476; *Carpenter v. French*, 28 Vt. 796; *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687.

⁶⁰ *Merchant v. O'Rourke*, 111 Iowa 351, 82 N. W. 759; *Murray v. Meagher*, 71 Ky. 574; *Hildreth v. Pinkerton Academy*, 29 N. H. 227; *Lamkin v. Palmer*, 24 App. Div. (N. Y.) 255, 48 N. Y. S. 427, affd., 164 N. Y. 201, 58 N. E. 123; *Eccleston v. Ogden*, 34 Barb. (N. Y.) 444 (receiving additional security); *Smith v. McKinney*, 22 Ohio St. 200; *Deutschman v. Battaile* (Tex. Civ. App.), 36 S. W. 489; *Old River Rice Irr. Co. v. Stubbs* (Tex. Civ. App.), 137 S. W. 154 (parol change in a contract for water to be furnished for irrigation purposes made subsequent to its execution).

accrued or expected is a valuable consideration.⁶¹ Thus the surrender of all rights under a contract of employment is a consideration which will support a return promise.⁶² The assignment of a contract is a sufficient consideration for a promise by the assignee.⁶³ Where there is a lien by attachment⁶⁴ or mortgage⁶⁵ the release of such lien is a consideration; and if property is held by another in bailment the relinquishment by the bailor of his right to possession is a sufficient consideration to support a promise by the bailee.⁶⁶

⁶¹ In *re Tuke's Case*, 7 Mod. 13; *Carpenter v. Murphree*, 49 Ala. 84; *Jones v. Jones*, 1 Colo. App. 28, 27 Pac. 85; *Montgomery v. Morris*, 32 Ga. 173; *Morrill v. Colehour*, 82 Ill. 618; *Runnion v. Beard*, 6 Blackf. (Ind.) 401; *Taylor v. Meek*, 4 Blackf. (Ind.) 388; *Farr v. Bach*, 13 Ind. App. 125, 41 N. E. 393; *Mansfield v. Watson*, 2 Iowa 111; *Weld v. Nichols*, 34 Mass. 538; *Scott v. McKinney*, 98 Mass. 344; *Blagborne v. Hunger*, 101 Mich. 375, 59 N. W. 657; *Midland Nat. Bank v. Missouri Pac. R. Co.*, 132 Mo. 492, 33 S. W. 521, 53 Am. St. 505; *Lamkin v. Palmer*, 24 App. Div. (N. Y.) 255, 48 N. Y. S. 427, *affd.*, 164 N. Y. 201, 58 N. E. 123; *Wile v. Wilson*, 93 N. Y. 255; *Oregon Pac. R. Co. v. Forrest*, 128 N. Y. 83, 28 N. E. 137; *Tallman v. Earle*, 13 N. Y. S. 805; *Kvello v. Taylor*, 5 N. Dak. 76, 63 N. W. 889; *Hawkins v. Barney*, 27 Vt. 392; *Perry v. Buckman*, 33 Vt. 7; *Buechal v. Buechal*, 65 Wis. 532, 27 N. W. 318. The release of one party to a valid marriage contract by the other party thereto is a sufficient consideration for a promise, the agreement being merely the making of a legal contract in consideration of the release from another legal contract, the consideration of the original contract being the consideration for the substituted agreement. *Henderson v. Spratlen*, 44 Colo. 278, 98 Pac. 14, 19 L. R. A. (N. S.) 655; *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14. But a release from a void agreement is not a sufficient consideration for a promise. *Van Allen v. Jones*, 10 Bosw. (N. Y.) 369; *Prior v. Flagler*, 13 Misc. (N.

Y.) 115, 68 N. Y. St. 199, 34 N. Y. S. 152. Also see *Hargarte v. Berg*, 126 Ill. App. 368. But see *Brown v. Jenett*, 130 Iowa 311, 106 N. W. 747, 5 L. R. A. (N. S.) 725n. The surrender of the right to declare a breach of a contract is sufficient to support a promise. *Globe Fertilizer Co. v. Tennessee Phosphate Co.*, 27 Ky. L. 636, 85 S. W. 1177. See *ante*, § 237, *Compromise*.

⁶² *Richardson v. Mellish*, 2 Bing. 229, 1 C. & P. 241; *Peck v. Requa*, 13 Gray (Mass.) 407; *Worrell v. First Presbyterian Church*, 23 N. J. Eq. 96; *Perry v. Buckman*, 33 Vt. 7.

⁶³ *Early v. Reed*, 60 Mo. 528; *Gardiner v. Hopkins*, 5 Wend. (N. Y.) 23.

⁶⁴ *Smith v. Taylor*, 39 Maine 242.

⁶⁵ *Norris v. Vosburgh*, 98 Mich. 426.

⁶⁶ *Hart v. Miles*, 4 C. B. (N. S.) 371, 93 E. C. L. 371; *Prince v. State Fair*, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; *Clark v. Gaylord*, 24 Conn. 484; *Miller v. Upton*, 6 Ind. 53; *Newhall v. Paige*, 10 Gray (Mass.) 366; *Rickey v. Morrison*, 69 Mich. 139, 37 N. W. 56; *Keller v. Smith*, 59 Minn. 203, 60 N. W. 1102; *Smith v. Library*, 58 Minn. 108, 59 N. W. 979, 25 L. R. A. 280; *McKay v. Buffalo Bill's Show*, 7 Misc. (N. Y.) 396, 39 N. Y. S. 1041; *Robinson v. Threadgill*, 35 Ired. L. (N. Car.) 39; *Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. 99. In case the pawnee delivers the pledge to a third person not authorized to receive it, it is a valuable consideration for an agreement with such pawnee. *Saunders v. Pope*, 1 Ohio 486.

§ 244. **Rights to personal property.**—The assignment, transfer or sale of personal property, or any interest therein, is a valuable consideration.⁶⁷ The mere fact that the property is sold subject to a lien does not affect the validity of the contract.⁶⁸ The sale or transfer of stock in a corporation,⁶⁹ negotiable bonds,⁷⁰ a promissory note⁷¹ or bank checks⁷² are all valuable considerations. A sale of the good will of an established business may be the consideration for a return promise.⁷³ Should personal property be subject to a lien its release is a sufficient consideration.⁷⁴

§ 245. **Interests in real property.**—A conveyance of an interest in realty is a valuable consideration.⁷⁵ Nor is it necessary

⁶⁷ *McCurry v. Gibson*, 108 Ala. 451, 18 So. 806, 54 Am. St. 177; *Lemmon v. Sibert*, 15 Colo. App. 131, 61 Pac. 202; *Hellman v. Schwartz*, 44 Ill. App. 84; *Linton v. Porter*, 31 Ill. 107; *Phillips v. Gifford*, 104 Iowa 458, 73 N. W. 1033; *Gunther v. Gunther*, 181 Mass. 217, 63 N. E. 402; *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435; *Richmond v. Nye*, 126 Mich. 602, 85 N. W. 1120; *Demarco v. Williams* (Miss.), 12 So. 552; *Connecticut River & C. Ins. Co. v. Whipple*, 61 N. H. 61; *Electric Fireproofing Co. v. Smith*, 113 App. Div. (N. Y.) 615, 99 N. Y. S. 37, (sale of business to corporation in exchange for stock of corporation); *Grand Forks Lumber & C. Co. v. Tourtelot*, 7 N. Dak. 587, 75 N. W. 901; *Maloney v. Moore* (Tenn. Ch. App.), 42 S. W. 805. Instruments affecting rights in property must be supported by a consideration in order to give them binding force in law. *Bonney v. Bonney*, 237 Ill. 452, 86 N. E. 1048, affg. 141 Ill. App. 476. The sale of the good will of a business together with an agreement not to engage in the same business in a reasonable space for a reasonable time, is supported by a consideration. *Lee v. United States Graphite Co.*, 161 Mich. 157, 125 N. W. 748, 17 Detroit Leg. N. 211. See post, Ch. 22, also ante, § 197, Contracts in restraint of trade.

⁶⁸ *Gunnell v. Emerson*, 73 Mo. App. 291; *Provenchee v. Piper*, 68 N. H. 31, 36 Atl. 552; *Lessel v. Zillmer*, 105 Wis. 334, 81 N. W. 403.

⁶⁹ *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853; *Knarr v. Sand Creek Turnpike Co.*, 45 Ind. 278; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. 480; *Wyatt v. Jackson*, 55 Minn. 87, 56 N. W. 578; *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963; *Farmers & C. Bank v. Jenks*, 7 Metc. (Mass.) 592.

⁷⁰ *Denny v. Campbell's Exr.*, 9 Ky. L. 367, 4 S. W. 301.

⁷¹ *Litchfield v. Falconer*, 2 Ala. 280; *Farber v. National Forge & C. Co.*, 140 Ind. 54, 39 N. E. 249; *Dockray v. Dunn*, 37 Maine 442; *Backus v. Spaulding*, 116 Mass. 418.

⁷² *Deal v. Bank*, 79 Mo. App. 262.

⁷³ *McCurry v. Gibson*, 108 Ala. 451, 18 So. 806, 54 Am. St. 177; *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Davis v. Garrison*, 85 Iowa 447, 52 N. W. 359; *Phillips v. Gifford*, 104 Iowa 458, 73 N. W. 1033; *Searing v. Tye*, 4 E. D. Smith (N. Y.) 197.

⁷⁴ *Cronkhite v. White*, 25 Ind. 418.

⁷⁵ *Hanold v. Kays*, 64 Mich. 439, 31 N. W. 420, 8 Am. St. 835; *Goss v. Goss*, 57 Nebr. 294, 77 N. W. 687; *Alexander v. McDaniel*, 56 S. C. 252, 34 S. E. 405; *Bushby v. Bush*, 79 Tex. 656, 15 S. W. 638. See also, *Jasper v. Wilson*, 14 N. Mex. 482, 94 Pac. 951, 23 L. R. A. (N. S.) 982; *Faust v. Faust*, 144 N. Car. 383, 57 S. E. 22, (conveyance held sufficient to support a promise on the part of the grantee's father to pay a designated sum of money to the grantor's child).

that the fee simple be conveyed.⁷⁶ The release of a mortgage⁷⁷ or other lien⁷⁸ is a sufficient consideration for a promise.⁷⁹ The yielding of possession of real estate may constitute a sufficient consideration for a contract.⁸⁰

§ 246. Blood or natural affection.—As has already been stated,⁸¹ a good consideration consists of natural love and affection. But natural love and affection can serve as a consideration only when the contracting parties are related by blood or marriage. Thus it may constitute the consideration for an executed contract between husband and wife,⁸² or between one and his lineal descendants, such as his children⁸³ or grandchildren.⁸⁴ But it is no consideration for a contract between collateral relatives either of consanguinity⁸⁵ or affin-

⁷⁶ *Fish v. Dunn*, 59 Minn. 99, 60 N. W. 843. A conveyance of property by a trustee from which he is entitled to support is a sufficient consideration for a promise by the grantee to pay a certain annuity to the trustee. *Hiss v. Hiss*, 228 Ill. 414, 81 N. E. 1056. An equity of redemption is a sufficient consideration to support a promise. *J. F. Hall-Martin Co. v. Hughes* (Cal. App.), 123 Pac. 617.

⁷⁷ *Henry & Co. v. Fisher*, 37 Nebr. 207, 55 N. W. 643. For sale or surrender of mortgagor's right to redeem, see *Shade v. Creviston*, 93 Ind. 591.

⁷⁸ *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365; *Lane v. Logue*, 12 Lea (Tenn.) 681. See also, *Sharp v. Carmody*, 17 Ky. L. 827, 32 S. W. 749. As to assignment or surrender of lease, *Creighton v. Finlayson*, 46 Nebr. 457, 64 N. W. 1103; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391. See also, *Sharp v. Carmody*, 17 Ky. L. 827, 32 S. W. 149; *Creighton v. Finlayson*, 46 Nebr. 457, 64 N. W. 1103; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 396.

⁷⁹ But a promise by the vendor's husband to apply the first two payments made by the vendee to the satisfaction of a trust deed given by the husband and wife has been held without consideration when the wife was the sole owner of the land. *Savage v. Cauthorn*, 109 Va. 694, 64 S. E. 1052.

⁸⁰ *Rogers Devel. Co. v. Southern Cal. & Co.*, 159 Cal. 735, 115 Pac. 934, 35 L. R. A. (N. S.) 543, upholding the

validity of a contract by the vendor of real estate to repurchase vendee's interest after the latter's default. See also, *Herkenrath v. Ragley*, 55 Wash. 52, 109 Pac. 279, upholding an oral contract by which a real estate agent, in order to induce a customer to buy, agreed that if he did not resell the property within nine months he himself would repay the purchase price to the vendee. The contract was held to be one by which money was advanced by the vendee for the agent's use.

⁸¹ See ante, § 206, Good Consideration.

⁸² *Brown v. Brown*, 44 S. Car. 378, 22 S. E. 412.

⁸³ *Worth v. Daniel*, 1 Ga. App. 15, 57 S. E. 898 (promise by child to support parent); *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *Schneitter v. Carman*, 98 Iowa 276, 67 N. W. 249; *Hutsell v. Crewse*, 138 Mo. 1, 39 S. W. 449; *Bell v. Scammon*, 15 N. H. 381, 41 Am. Dec. 706; *Carney v. Carney*, 196 Pa. St. 34, 46 Atl. 264; *In re Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. 885.

⁸⁴ *Hanson v. Buckner's Exr.*, 4 Dana (Ky.) 251, 29 Am. Dec. 401. Contra, *Borum v. King*, 37 Ala. 606.

⁸⁵ *Buford's Heirs v. McKee*, 1 Dana (Ky.) 107; *Mark v. Clark*, 11 B. Mon. (Ky.) 44; *Studybaker v. Cofield*, 159 Mo. 596, 61 S. W. 246; *Coombe v. Carthew*, 59 N. J. Eq. 638, 43 Atl. 1057; *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258.

ity.⁸⁶ A "good consideration" imports merely the motive of natural affection toward relations, and excludes the element of compensation or its equivalent for the promise which is essential to constitute a valuable consideration. The rule is practically universal, that every executory simple contract must be supported by a valuable consideration.⁸⁷ Consequently, a promise supported by a good consideration only is voidable, and a deed made on such consideration is a voluntary one which is valid only between the parties, and is not aided in equity, but is voidable as to creditors and purchasers for value if shown to have been made with an intent to defraud.⁸⁸ A good consideration is sufficient in equity to support an executed conveyance,⁸⁹ but is not sufficient in law or equity to support an executory promise.⁹⁰

⁸⁶ *Kirksey v. Kirksey*, 8 Ala. 131; *Cotton v. Graham*, 84 Ky. 672, 8 Ky. L. 658, 2 S. W. 647; *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453 (father-in-law and son-in-law).

⁸⁷ *Sullivan v. Sullivan*, 122 Ky. 707, 92 S. W. 966, 7 L. R. A. (N. S.) 156n; *Maynard v. Maynard*, 105 Maine 567, 75 Atl. 299.

⁸⁸ The only purpose for which a good consideration is effectual is to support a covenant to stand seized to uses. *Tweddle v. Atkinson*, 1 B. & S. 393; *Pulvertoft v. Pulvertoft*, 18 Ves. 99; *Buckle v. Mitchell*, 18 Ves. 100; *Yeend v. Weeks*, 104 Ala. 331, 16 So. 165, 53 Am. St. 50; *Morrow v. Southern Exp. Co.*, 101 Ga. 810, 28 S. E. 998; *Rockhill v. Spraggs*, 9 Ind. 32. As against pre-existing creditors and subsequent bona fide purchasers, such conveyances are deemed prima facie void. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. ed. 328. As against subsequent creditors the transfer is valid. *Bennett v. Bedford Bank*, 11 Mass. 421.

⁸⁹ *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *Nicholas v. Shiplett*, 19 Ky. L. 1295, 43 S. W. 248; *Parsons v. Teller*, 188 N. Y. 318, 80 N. E. 930, revg. 111 App. Div. 637, 97 N. Y. S. 808; *Jackson v. Delancey*, 4 Cow. (N. Y.) 427.

⁹⁰ *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. 244; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Geer v. Gondy*, 174 Ill. 514, 51 N. E. 623; *Schwerdt v. Schwerdt*, 141 Ill.

App. 386; *Denman v. McMahan*, 37 Ind. 241; *Talbott v. Stemmons*, 10 Ky. L. 33; *Pennington v. Gittings*, 2 Gill. & J. (Md.) 208; *Phillips v. Frye*, 96 Mass. (14 Allen) 36; *Conrad v. Manning*, 125 Mich. 77, 83 N. W. 1038; *Duvoll v. Wilson*, 9 Barb. (N. Y.) 487; *Parsons v. Teller*, 188 N. Y. 318, 80 N. E. 930, revg. 111 App. Div. 637, 97 N. Y. S. 808; *Kennedy v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145; *Wilbur v. Wilbur*, 17 R. I. 295; 21 Atl. 497; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171; *Pennybacker v. Maupin*, 96 Va. 461, 31 S. E. 607. The love and affection which one bears his wife is no consideration for a promise to pay a third person money. *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453. The affection and sense of duty which should naturally exist on the part of a child towards an aged and dependent parent is, under sec. 3658 code 1895, a good consideration to support an executory contract by the child making provision for the parent. *Worth v. Daniel*, 1 Ga. App. 15, 57 S. E. 898. In the state of Kentucky "love and affection, growing out of the relationship of parent and child, is a good consideration, and sufficient to uphold not only an executed, but an executory contract between them." *Doty v. Dickey*, 29 Ky. L. 900, 96 S. W. 544. See also, *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453 (a case in which a parent deeded his son-in-law certain real estate).

Thus it is the general rule that a promissory note, the consideration of which is love and affection, will not be enforced against the maker either during his life or against the estate after his death,⁹¹ but the fact that natural affection forms an element of the consideration does not impair the force of a contract.⁹² Except in a few instances, equity will not enforce an executory promise founded on a good consideration, as when the promisor has died, without having altered his intention and the promisee or covenantee has an equity superior to those against whom the promise or covenants is sought to be enforced.⁹³

§ 247. Evidence of consideration.—Since a simple contract must be supported by a consideration it is incumbent upon the one seeking to enforce the contract to show that it is so supported, but as has been seen a consideration is presumed or imported in certain cases.⁹⁴ In case a written contract recites a con-

⁹¹ *Holfiday v. Atkinson*, 5 Barn. & Cr. 501; *Jones v. Lock*, L. R. 1 Ch. 25; *Armstrong v. Armstrong*, 142 Ill. App. 507; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *West v. Cavins*, 74 Ind. 265; *Sullivan v. Sullivan*, 122 Ky. 707, 92 S. W. 966, 7 L. R. A. (N. S.) 156n. See, however, *Doty v. Duke* (Ky.) 96 S. W. 544; *Strevell v. Jones*, 106 App. Div. (N. Y.) 334, 94 N. Y. S. 627; *Fink v. Cox*, 18 Johns (N. Y.), 145, 9 Am. Dec. 191; *Hadley v. Reed*, 58 Hun (N. Y.) 608, 34 N. Y. St. 949, 12 N. Y. S. 163; *Simmons v. Cincinnati Sav. Soc.*, 31 Ohio St. 457, 27 Am. Rep. 521; *Prior v. Reynolds*, 1 Ohio Dec. 366, 8 West. Law. J. 325; *Starr v. Starr*, 9 Ohio St. 74; *Kern's Estate*, 171 Pa. St. 55, 33 Atl. 129; *Kline's Estate*, 9 Pa. Dis. R. 386; *Priester v. Priester*, Rich Eq. (S. Car.) 26, 18 Am. Dec. 191; *Shugart v. Shugart*, 111 Tenn. 179, 76 S. W. 821, 102 Am. St. 777; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508; *Smith v. Kittridge*, 21 Vt. 238. See, however, *Woodbridge v. Spooner*, 1 Chitty 661; *Bowers v. Hurd*, 10 Mass. 427; *In re Ross' Appeal*, 127 Pa. St. 4, 17 Atl. 682.

⁹² *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341; *Brown v. Whaley*, 58 Ohio St. 654, 49 N. E. 479, 65 Am. St. 793.

⁹³ *Conover's Admr. v. Brown's Exrs.*, 49 N. J. Eq. 156, 23 Atl. 507. The relationship existing between father and daughter is sufficient to uphold a mortgage given by her to him as security for her deceased husband's debts, though they could not have been enforced as against her. *Ray v. Hallenbeck*, 42 Fed. 381.

⁹⁴ *Byers v. Harris*, 67 Iowa 685, 25 N. W. 879; *Kentucky Female Orphans' School v. Fleming*, 10 Bush (Ky.) 234; *Snowden v. Light*, 5 Ky. L. 603; *Williams Commission Company's Assignee v. W. A. Shirley*, 136 Ky. 303, 124 S. W. 327; *Barrow v. Cazeaux*, 5 La. 72; *Marigny v. Union Bank*, 12 Rob. (La.) 283; *Brashear v. Hazard*, 12 Rob. (La.) 328; *Quimb v. Morrill*, 47 Maine 470; *Shelton v. St. Louis &c. R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063; *Brown v. Edsall*, 23 S. Dak. 610, 122 N. W. 658; *Grimsrud Shoe Co. v. Jackson*, 22 S. Dak. 114, 115 N. W. 656; *Western Mfg. Co. v. Freeman* (Tex. Civ. App.), 126 S. W. 924. As to the burden of proving want of consideration, see *Ginn v. Dolan*, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. 761 and note. See ante, § 198 et seq., *When Presumed or Imported*.

sideration,⁹⁵ as "for value received",⁹⁶ it is generally presumed to be sufficient. In those cases where a consideration is not conclusively presumed, the statement thereof as set out in the contract is, as a general rule, merely formal. It is not deemed an essential part of the contract but merely a recital. Consequently it may be shown to be different from that expressed.⁹⁷ An addi-

⁹⁵ *In re Wickersham's Estate*, 153 Cal. 603, 96 Pac. 311; *Lee v. Davis*, 70 Ind. 464; *Sims v. Stilwell*, 3 How. (Miss.) 176; *Shelton v. St. Louis & C. R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *Town of Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130.

⁹⁶ *Whitney v. Stearns*, 16 Maine 394; *Bourne v. Ward*, 51 Maine 191; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Conrad Seipp. Brew. Co. v. McKittrich*, 86 Mich. 191, 48 N. W. 1086; *Frank v. Irgens*, 27 Minn. 43, 6 N. W. 380; *Jerome v. Whitney*, 7 Johns. (N. Y.) 321; *Hamilton v. Hamilton*, 127 App. Div. (N. Y.) 871, 112 N. Y. S. 10; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Jones v. Holliday*, 11 Tex. 412, 62 Am. Dec. 487; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682.

⁹⁷ *Coles v. Soulsby*, 21 Cal. 47; *Phelps v. Clasen*, Fed. Cas. No. 11074; *Swope v. Forney*, 17 Ind. 385; *Stewart v. Chicago & C. R. Co.*, 141 Ind. 55, 40 N. E. 67; *Brown v. Summers*, 91 Ind. 151; *Nichols & C. Co. v. Burch*, 128 Ind. 324, 27 N. E. 737; *Bourne v. Bourne*, 92 Ky. 211, 13 Ky. L. 545, 17 S. W. 443; *Dickson v. Ford*, 38 La. Ann. 738; *Smith v. Conrad*, 15 La. Ann. 579; *Tyler v. Carlton*, 7 Maine (7 Greenl.) 175, 20 Am. Dec. 357; *Emmons v. Littlefield*, 13 Maine 233; *Dayton v. Warren*, 10 Minn. 233; *Aull Sav. Bank v. Aull*, 80 Mo. 199; *Moore v. Ringo*, 82 Mo. 468; *Lehn-dorf v. Schields*, 13 Mo. App. 486; *Mc-Crea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Rosboro v. Peck*, 48 Barb. (N. Y.) 92; *Cassily v. Cassily*, 4 Ohio S. & C. P. Dec. 62, 2 Ohio N. P. 387; *Barbre v. Goodale*, 28 Ore. 465, 43 Pac. 378; *Appeal of Holmes*, 79 Pa. St. 279; *Taylor v. Merrill*, 64 Tex. 494. *Contra*, *Mead v. Steger*, 5 Port. (Ala.) 498; *Cutter & Co. v. Reynolds*, 8 B. Mon. (Ky.) 596; *Emery v. Chase*, 5 Greenl. (Maine) 232; *Boyce v. Wilson*, 32 Md. 122;

Maigley v. Hauer, 7 Johns. (N. Y.) 341; *Schemerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139, 3 Am. Dec. 304; *Miller v. Bagwell*, 3 McCord (S. Car.) 562. If the stipulation as to the consideration is contractual it cannot be varied by parol evidence. *Pickett v. Green*, 120 Ind. 584, 22 N. W. 737; *Miller v. Edgerton*, 38 Kans. 36; *Hilton v. Homans*, 23 Maine 136; *Baum v. Lynn*, 72 Miss. 932; *Davis v. Gann*, 63 Mo. App. 425, (see also, *Strong v. Whybark*, 204 Mo. 341, 102 S. W. 968, 12 L. R. A. (N. S.) 240n.); *Maigley v. Hauer*, 7 Johns. (N. Y.) 341; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497. "A mere statement of a certain amount of money, without more, as the consideration, is inattentive recital, common in conveyancing, of a consideration in most general use. It is thus spoken of in the books and adjudications. But when this common form of expression, thus reciting a sum of money, the medium of exchange which is generally used as a consideration, is departed from and an unusual provision inserted, thereby evidencing the contractual intention, it is as binding as any other contract. But money may also be contracted for as a consideration in a written contract. And when the intention to so contract is disclosed by the written instrument, no other or additional consideration can be shown. Thus, suppose that the consideration was stated in the written contract to be 'one thousand dollars, to be paid as follows: Two hundred dollars in six months from date without interest; four hundred dollars in twelve months from date with three per cent. interest; and four hundred dollars in eighteen months from date with ten per cent. interest from maturity; all to be secured by a mortgage' on certain described property. Could it be shown in contradiction to this that the consideration agreed upon was fifty head

tional consideration to that expressed may be shown.⁹⁸ And if no consideration is expressed in a written agreement the real consideration may be shown.⁹⁹ But if the contract sued on does not import a consideration and none is set out in express terms, a consideration must be alleged and proved.¹ Parol² or documentary³ evidence is admissible to show the real consideration, if any,

¹ of cattle or an additional sum of money? Clearly not. The reason is that it has been contracted otherwise by the parties and that contract has been reduced to writing." *Jackson v. Chicago &c. R. Co.*, 54 Mo. App. 636. But if the evidence offered to prove the real consideration would, in effect, change the character of the instrument, it is not admissible. *Meades v. Lansingh, Hopk.* (N. Y.) 124.

⁹⁸ *Cowan v. Cooper*, 41 Ala. 187; *Stringfellow v. Ivie*, 73 Ala. 209; *Mobile & M. R. Co. v. Wilkinson*, 72 Ala. 286; *Fraley v. Bentley*, 1 Dak. 25, 46 N. W. 506; *Pennsylvania Company v. Dolan*, 6 Ind. App. 109, 32 N. E. 302; *McMahan v. Stewart*, 23 Ind. 590; *Bryant v. Hunter*, 6 Bush (Ky.) 75; *Edmons v. Littlefield*, 13 Maine 233; *Nedvidek v. Meyer*, 46 Mo. 600; *In re Buckley's Appeal*, 48 Pa. St. 491; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427; *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167; *Taylor v. Merrill*, 64 Tex. 494; *Wait v. Wait*, 28 Vt. 350.

⁹⁹ *Booth v. Dexter Steam &c. Co.*, 118 Ala. 369, 24 So. 405; *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Jessup v. Trout*, 77 Ind. 194; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334, 9 N. E. 372; *Warren v. Walker*, 23 Maine 453; *Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342; *Greer v. Nutt*, 54 Mo. App. 4; *Ash v. Beck* (Tex. Civ. App.), 68 S. W. 53. As to the sufficiency of the statement of the consideration set forth in the contract see, *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819; *Southern Bell &c. Co. v. Harris*, 117 Ga. 1001, 44 S. E. 885; *Boyce v. Royal Stove &c. Co.*, 45 Ind. App. 469; 91 N. E. 32; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. 880.

¹ *Rann v. Hughes*, 7 T. R. 350; *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255; *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. 378; *Thomas v.*

Kyles, 54 N. Car. 302; *Greenless Ranson Co. v. Berne*, 9 Ohio Dec. 298, 12 Wkly. Law Bul. 100; *In re Thun's Estate*, 5 Pa. Dist. 739; *Greer v. Latimer*, 47 S. Car. 176, 25 S. E. 136; *Tilden v. Smith*, 24 S. Dak. 576, 124 N. W. 841; *Denison v. Tyson*, 17 Vt. 549. Non-negotiable instruments. *National Sav. Bank v. Cable*, 73 Conn. 568, 48 Atl. 428; *Bristol v. Warner*, 19 Conn. 7; *Wickersham v. Beers*, 20 Ill. App. 243; *Louisville E. & St. Louis R. Co. v. Caldwell*, 98 Ind. 245; *Prior v. Linsey*, 3 Bibb (Ky.) 76; *Hemmenway v. Hickey*, 21 Mass. 497; *Courtney v. Doyle*, 10 Allen (Mass.) 122; *Hardin v. Pelan*, 41 Miss. 112; *Conover v. Stillwell*, 34 N. J. L. 54; *Joseph v. Catron*, 13 N. Mex. 202, 81 Pac. 439, 1 L. R. A. (N. S.) 1120; *Stronach v. Bledsoe*, 85 N. Car. 473; *Wingo v. McDowell*, 8 Rich. (S. Car.) 446; *Reade v. Wheeler*, 10 Tenn. (2 Yerg.) 50; *Averett v. Booker*, 15 Grat. (Va.) 163, 76 Am. Dec. 203.

² *St. Louis &c. R. Co. v. Crandell*, 75 Ark. 89, 86 S. W. 855, 112 Am. St. 42; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Moffatt v. Bulson*, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. 192; *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Lafitte v. Shawcross*, 12 Fed. 519; *Collier v. Mahan*, 21 Ind. 110; *Jessup v. Trout*, 77 Ind. 194; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334, 9 N. E. 372; *First Nat. Bank v. Snyder*, 79 Iowa 191, 44 N. W. 356; *Lake Manawa R. Co. v. Squire*, 89 Iowa 576, 57 N. W. 307; *Warren v. Walker*, 23 Maine 453; *Semple v. Fletcher*, 3 Mart. (La.) (N. S.) 382; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322; *Breitenwischer v. Clough*, 111 Mich. 6, 69 N. W. 88, 66 Am. St. 372; *Greer v. Nutt*, 54 Mo. App. 4; *Chesson v. Pettijohn*, 28 N. Car. 121.

³ *Adams v. Adams*, 29 Ala. 433; *Parke & Lacey Co. v. San Francisco Bridge Co.*, 145 Cal. 534, 78 Pac. 1065; *Keefer v. Mattingly*, 1 Gill. (Md.)

supporting the contract. But in proving the real consideration evidence of its adequacy or value cannot be shown to defeat the contract of itself in the absence of an entire want or failure thereof.⁴ As to the weight and sufficiency of the evidence it must be borne in mind that while any consideration, however small, may be regarded as sufficient to support a contract, yet the effect of a consideration when proved or admitted and the effect of the evidence offered to prove it are entirely different things.⁵ And its weight or sufficiency is a question of fact for the court or jury as the case may be.⁶

§ 248. Entire or indivisible consideration.—The consideration for a contract may be entire and indivisible, in which case if any part of such consideration is illegal and the illegal portion is not separable from the whole consideration, the whole contract is as a general rule declared unenforceable.⁷ This is true in such

182; *Dole v. Wilson*, 20 Minn. 356; *Weaver v. Wood*, 9 Pa. St. 220. In order to establish the value of certain services, the terms of the settlement made with another employe for similar services are inadmissible. *Dixon v. Million*, 142 Ill. App. 559. Any evidence is admissible under the general issue. *Chamberlain v. Painesville & C. R. Co.*, 15 Ohio St. 225. If the instrument recites a consideration as, "for value received," evidence of a money consideration may be given. *Munro v. Robertson*, Fed. Cas. No. 9927, 2 Cranch (U. S.) 262. Evidence may be admitted to show the value of the consideration at the time the contract was made. *Randall v. Pettes*, 12 Fla. 517. It may be shown in order to defeat the assignment of a life insurance policy given in consideration of marriage, that the one to whom it was assigned was married at the time the assignment was made. *Howe v. Hagan*, 110 App. Div. (N. Y.) 392, 97 N. Y. S. 86.

⁴ *American Merchants' Mfg. Co. v. Kantrowitz*, 77 Ill. App. 155 (action on a note given for a patent—validity of patent still standing); *Hartle v. Stahl*, 27 Md. 157.

⁶ *Liberty v. Haines*, 103 Maine 182, 68 Atl. 738.

⁵ *Earle v. Angell*, 157 Mass. 294, 32 N. E. 164; *Bluff Springs Mercantile Co. v. White* (Tex. Civ. App.), 90 S. W. 710; *Missouri & C. R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159. Auditor's finding as conclusive as a finding by the court or jury. *In re Dutton's Estate*, 181 Pa. St. 426, 37 Atl. 582.

⁷ *Wadsworth v. Dunham*, 117 Ala. 661, 23 So. 699; *Edwards v. Randle*, 63 Ark. 318, 38 S. W. 343, 36 L. R. A. 174, 58 Am. St. 108; *C. B. Ensign & Co. v. Coffelt* (Ark.), 145 S. W. 231 (sale of a patented device); *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348, 90 Am. St. 167; *Chicago I. & L. & C. R. Co. v. Southern Indiana R. Co.* (Ind. App.), 70 N. E. 843; *Flersheim v. Cary*, 39 Kans. 178, 17 Pac. 825; *Nicholson v. Ellis*, 110 Md. 322, 73 Atl. 17, 24 L. R. A. (N. S.) 942n, 132 Am. St. 445; *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218, 13 Am. St. 355; *Case v. Smith*, 107 Mich. 416, 65 N. W. 279, 31 L. R. A. 282, 61 Am. St. 341; *Rand v. Mather*, 11 Cush. (Mass.) 1, 59 Am. Dec. 131; *Woodruff v. Wentworth*, 133 Mass. 309; *Bishop v. Palmer*, 146 Mass. 469, 16

cases, notwithstanding there may be several considerations for the promise, since it is impossible to say whether the return promise was induced by the legal or the illegal portion of the consideration.⁸ Thus in case a contract is made which is in direct violation of some law of the land, the courts will not sustain any action growing out of such transaction, as where goods are furnished to those in open rebellion against the government, the party furnishing the goods cannot recover their value.⁹ Likewise, it has been held that there can be no recovery on a promissory note given for intoxicating liquors sold on Sunday, even though the note may be also intended as payment for articles which were legally purchased,¹⁰ and money loaned for gaming purposes is, as a general rule, held not recoverable.¹¹ Likewise, a

N. E. 299, 4 Am. St. 339; *Clark v. Ricker*, 14 N. H. 44; *Carleton v. Woods*, 28 N. H. 290; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712.

⁸ *Sims v. Alabama Brewing Co.*, 132 Ala. 311, 31 So. 35; *Santa Clara & Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. 211; *Pueblo & Co. R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 512; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *St. Louis & Co. R. Co. v. Mathers*, 104 Ill. 257; *Rickets v. Harvey*, 106 Ind. 564, 6 N. E. 325; *Dennis v. Kuster*, 57 Kans. 215, 45 Pac. 602; *Kim-brough v. Lane*, 11 Bush (Ky.) 556; *Sandige v. Sanderson*, 21 La. Ann. 757; *Taylor v. Jaques*, 106 Mass. 291; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931; *Sumner v. Summers*, 54 Mo. 340; *Merrill v. Carr*, 60 N. H. 114; *Foley v. Speir*, 100 N. Y. 552, 3 N. E. 477; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; *Covington v. Threadgill*, 88 N. Car. 186; *Gage v. Fisher*, 5 N. Dak. 297, 65 N. W. 809, 31 L. R. A. 557; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Springfield & Co. Ins. Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37, 46 Am. St. 571; *Bredin's Appeal*, 92 Pa. 241, 37 Am. Rep. 677; *Sullivan v. Horgan*, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110; *Massey v. Wal-*

lace, 32 S. Car. 149, 10 S. E. 937; *Potts v. Gray*, 3 Cold. (Tenn.) 468, 91 Am. Dec. 294; *Read v. Brewer*, 90 Tex. 144, 37 S. W. 418; *Bowen v. Buck*, 28 Vt. 308.

⁹ *Hanauer v. Doane*, 12 Wall. (U. S.) 342, 20 L. ed. 439.

¹⁰ *Wadsworth v. Bunman*, 117 Ala. 661, 23 So. 699; *Braith v. Guelick*, 37 Iowa 212; *Gerlick v. Skinner*, 34 Kans. 86, 8 Pac. 257, 55 Am. Rep. 240; *Ladd v. Dillingham*, 34 Maine 316; *Cotten v. McKenzie*, 57 Miss. 418; *Bick v. Seal*, 44 Mo. App. 475; *Sanderson v. Goodrich*, 46 Barb. (N. Y.) 616; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

¹¹ *Viser v. Bertrand*, 14 Ark. 267; *Reed v. Reeves's Admr.*, 13 Bush (Ky.) 447; *Emmerson v. Townsend*, 73 Md. 224, 20 Atl. 984; *White v. Buss*, 3 Cush. (Mass.) 448; *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Staples v. Gould*, 9 N. Y. 520; *Critcher v. Holloway*, 64 N. Car. 526. Money loaned to furnish a house for gaming purposes, even though the plaintiff knew that the house was to be so used, may be recovered. *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138.

contract which tends to corrupt good morals¹² or unduly influence legislative action¹³ is unenforceable.¹⁴

§ 249. **Divisible considerations or promises.**—But if the legal portion of the consideration can be separated from the illegal portion, the contract will be upheld.¹⁵ Thus a contract in restraint of trade will be enforced as to its remaining provisions if that part in unreasonable restraint thereof is divisible from the remainder of the contract.¹⁶ And where several articles are sold

¹² *Chateau v. Singla*, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. 63; *Dougherty v. Seymour*, 16 Colo. 285, 26 Pac. 823; *Walraven v. Jones*, 1 Houst. (Del.) 355; *Ralston v. Boady*, 20 Ga. 449; *McDonald v. Fleming*, 12 B. Mon. (Ky.) 285; *Kathman v. Walters*, 22 La. Ann. 54; *Ashbrook v. Dale*, 27 Mo. App. 649; *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294; *Mackbee v. Griffith*, 2 Cranch (U. S.) 336, 15 Fed. Cas. No. 8660; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. 960.

¹³ *Pratt v. Foot*, 6 Conn. 232; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Cook v. Shipman*, 24 Ill. 614; *Coquillard's Admr. v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *McBratney v. Chandler*, 22 Kans. 692, 31 Am. Rep. 213; *Wood v. McCann*, 6 Dana (Ky.) 366; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Burney's Heirs v. Ludeling*, 47 La. Ann. 73, 16 So. 507; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Buck v. First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189; *Houlton v. Dunn*, 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737, 51 Am. St. 493; *Richardson v. Scott's Bluff County*, 59 Nebr. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. 682; *Sedgwick v. Stanton*, 14 N. Y. 289; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Basket v. Moss*, 115 N. Car. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. 463; *Sweeney v. McLeod*, 15 Ore. 330, 15 Pac. 275; *Clippinger v. Hephaugh*, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; *Spalding v. Ewing*, 149 Pa. 375, 24 Atl. 219, 15 L. R. A. 727, 34 Am. St. 608; *Powers v. Skin-*

ner, 34 Vt. 274, 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

¹⁴ See post, § 226, *Illegal Contracts*.

¹⁵ *Hanauer v. Gray*, 25 Ark. 350, 99 Am. Dec. 226; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Ragsdale v. Nagle*, 106 Cal. 332, 29 Pac. 628; *Hoyt v. Macon*, 2 Colo. 502; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *Emshwiler v. Tyner*, 21 Ind. App. 347, 52 N. E. 459, 69 Am. St. 360; *Casady v. Woodbury County*, 13 Iowa 113; *Nicholson v. Ellis*, 110 Md. 322, 73 Atl. 17, 24 L. R. A. (N. S.) 942n, 132 Am. St. 445; *Sawyer v. Smith*, 109 Mass. 220; *Eaton v. Kegan*, 114 Mass. 433; *Carleton v. Woods*, 28 N. H. 290; *Feldman v. Gamble*, 26 N. J. Eq. 494; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505; *Leavitt v. Blatchford*, 5 Barb. (N. Y.) 9; *State v. Board of Education*, 35 Ohio St. 519; *Frazier v. Thompson*, 2 Watts & S. (Pa.) 235; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Sprigg's Admr. v. Rutland R. Co.*, 77 Vt. 347, 60 Atl. 143; *Conrad v. Lepper*, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2.

¹⁶ *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, 31 Am. St. 242; *Western Union Tel. Co. v. Burlington & C. R. Co.*, 11 Fed. 1, 3 McCrary (U. S.) 130; *Consumer's Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. 193; *Nicholson v. Ellis*, 110 Md. 322, 73 Atl. 17, 24 L. R. A. (N. S.) 942n, 132 Am. St. 445; *Dean v. Emerson*, 102 Mass. 480; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Rosenbaum v. United States Credit System Co.*, 65 N. J. L. 255, 48 Atl. 237, 53 L. R. A. 449; *Arnot v. Pittson, & Co.*, 2 Hun (N. Y.) 591, 5 Thomp.

and a definite and fixed price is put on each article, the fact that some of the articles are sold unlawfully will not prevent a recovery for the price of those legally sold.¹⁷ And in case a mortgage is given as security for two or more notes one of which is valid and the other illegal, it is, nevertheless, enforceable as to the valid note.¹⁸

The divisibility or indivisibility of the consideration may usually be determined by ascertaining whether or not the plaintiff requires any aid from the illegal part of the transaction to assist him in the establishment of his case.¹⁹ Therefore, if the illegal portion of the consideration is merely incidental to the contract, and after separating the legal part of the consideration from the illegal, there still remains a consideration, the contract will usually be given effect.²⁰ But where the sole object for the formation of the contract was the accomplishment of an illegal purpose, no part of the contract will be enforced.²¹

It is important that the illegality and indivisibility of the consideration be distinguished from the validity of the promise. For if the consideration is valid and one or more of the promises given in consideration of it are illegal, the illegality of one or more of such promises will not avoid the rest, provided that those which are valid are severable from the others.²² If the consideration is

& C. 143, *revd.*, 68 N. Y. 558, 23 Am. Rep. 190; *Thomas v. Miles' Admr.*, 3 Ohio St. 274.

¹⁷ *Boyd v. Eaton*, 44 Maine 51, 69 Am. Dec. 83; *Verett v. Delano* (Maine), 14 Atl. 288; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Chase's Exr. v. Burkholder*, 18 Pa. 48; *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Dec. 837. Where fertilizer is shipped, and notes are given in payment thereof, and one of the sacks did not have a tag attached thereto as required by law, this would not defeat a recovery of all the notes, but only on that note given for the fertilizer of which that sack formed a part. *Alabama Nat. Bank v. C. C. Parker & Co.*, 146 Ala. 513, 40 So. 987.

¹⁸ *Hynds v. Hays*, 25 Ind. 31; *Warren v. Chapman*, 105 Mass. 87; *Caradine v. Wilson*, 61 Miss. 573; *Yundt v. Roberts*, 5 Serg. & R. (Pa.)

139; *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837; *State v. Wilson*, 73 Kans. 334, 84 Pac. 737, 117 Am. St. 479. See also, *Padget v. O'Connor*, 71 Nebr. 314, 98 N. W. 870.

¹⁹ *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. 363.

²⁰ *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404. See post, Ch. 21, et seq., *Legality of Object and Illegal Contracts*.

²¹ *Santa Clara Valley, etc., Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. 211.

²² *Pigot's Case*, 6 Coke 47 (Part XI, 26b); *Gaskell v. King*, 11 East. 165, 10 Rev. R. 462; *Keener's Cases*, 1632; *Newman v. Newman*, 4 Mau. & Sel. 66; *Bank of Australasia v. Breillatt*, 6 Moore P. C. 152; *Kerrison v. Cole*, 8 East 231; *Baines v. Geary*, 35 Ch. Div. 154; *Wallis v. Day*, 2 Mees. & Wels. 273; *Haynes v. Doman*, 80 L. T. (N. S.) 569; *St. Louis, etc., R.*

deemed an entirety and a part thereof is invalid, the entire contract fails if there has been no apportionment made or means of apportionment furnished by the parties themselves. But where the entire consideration is lawful and the promisor undertakes to do two things, one lawful and the other unlawful, and they may be separated, the entire and legal consideration will uphold the lawful part of the contract.²³

§ 250. From whom consideration must move.—There is much confusion on this general subject and a wilderness of conflicting cases concerning it. The question, the answer to which has given rise to this confusion, is whether or not a stranger to the consideration, who is not a party to the agreement, can sue to enforce a contract made for his benefit or is the right of action confined to the one from whom the consideration moves, i. e. the promisee. This branch of the subject, however, has nothing to do with consideration and will be discussed elsewhere.²⁴

It is obvious that the consideration cannot move from a stranger or third person in no way a party to the contract. It must, therefore, move from one or both of the parties. For this reason it is necessary to revert to a definition of consideration and by an analysis of it answer the question. As has already been stated,²⁵ the common definition of consideration is "A benefit to the promisor, or to a third person at his request, or an injury, detriment, loss, change, or inconvenience, or the actual risk thereof, to the

Co. v. Mathews, 64 Ark 398, 42 S. W. 902, 39 L. R. A. 467; Pueblo &c. R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512; Presbury v. Fisher &c., 18 Mo. 50; Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505; Erie R. Co. v. Union Locomotive & Express Co., 35 N. J. L. 240; State v. Berryburg Board of Education, 35 Ohio St. 519; Gelpcke v. City of Dubuque, 1 Wall. (U. S.) 221; Oregon Steam Navigation Company v. Winsor, 20 Wall. (U. S.) 64, 22 L. ed. 315; Western Union Tel. Co. v. Burlington &c. R. Co., 3 McCrary (U. S.) 130, 11 Fed. 1. In the case of Tuttle Bros. & Bruce v. City of Cedar Rapids, 176 Fed. 86, the court uses this language: "The result is that by the contract in hand the city gave three covenants, one of

which was valueless and two of which were legal and valuable, for the plaintiffs' promise that the \$2,250 should be paid to the city; the plaintiffs were not induced to make this agreement by fraud, mistake, or accident. * * * The covenants to accept and grade the streets and alleys constituted ample consideration for the plaintiffs' undertaking." For a case contrary to this general doctrine see, Lindsay v. Smith, 78 N. Car. 328, 24 Am. Rep. 463.

²³ See ante, §§ 209, 254, Failure of Consideration, Adequacy of Consideration.

²⁴ See post, Parties, Ch. 10.

²⁵ See ante, § 203, What is meant by consideration.

promisee."²⁶ By this definition the consideration may be either a benefit to one party, a loss to the other or both. In case it is assumed that the consideration consists of a benefit to the promisor or a third person, from whom is this benefit derived if not the promisee,—the person to whom the promisor gives his promise? There is no other alternative. If the consideration consists of a detriment, it is clear that such detriment is sustained by the promisee. Here, as in the first instance, there can be no alternative. It is evident from what has been said that the consideration must always move from the promisee. This substantiates the statement previously made²⁷ that the consideration in all unilateral executory contracts consists in detriment to the promisee. For if the consideration is held to be a benefit to the promisor, the benefit so conferred must pass from the promisee and the conferring of this benefit would, in the eyes of the law, be a detriment to him, while, on the other hand, the detriment suffered by the promisee need not be a benefit to the promisor.²⁸

§ 251. At whose instance the consideration must move.—It is equally clear that the consideration must move at the instance of the promisor.²⁹ For as has been seen the promise to perform or the actual performance of a gratuitous service is not a sufficient consideration no matter how great the detriment suffered by one party on account of the failure to perform the promised gratuitous service,³⁰ or on the other hand no matter how

²⁶ 1 Chit Cont. (11 Am. Ed.) 31n. See also, ante, § 203, What is meant by consideration.

²⁷ See ante, § 203, What is meant by consideration.

²⁸ It must be borne in mind in this connection that it is not absolutely necessary for the promise to be given to the one from whom the consideration moves. Thus if A promises C to perform an act for C, if D will do a certain thing and D does that thing, the latter is the promisee in contemplation of law, although C may have been the one to whom the promise was actually given. 2 Street Foundation of Legal Liability, p. 154. See also, Van Winkle v. King, 145 Ky. 691, 141 S. W. 46. But see Bing v.

Bank of Kingston, 5 Ga. App. 578, 63 S. E. 652, in which it is stated "that the consideration need not flow directly from the promisee," but this is due to a confusion of terms. See also, Elmer v. Campbell, 136 Mo. App. 100, 117 S. W. 622, holding that where a promise is made for the benefit of several persons each of them need not have paid some consideration for the promise before there can be a recovery.

²⁹ Ellis v. Clark, 110 Mass. 389, 14 Am. Rep. 609; Stewart v. Hamilton College, 2 Denio (N. Y.) 403.

³⁰ Brawn v. Lyford, 103 Maine 362, 69 Atl. 544; Heal v. Richmond Co. Sav. Bank, 127 App. Div. (N. Y.) 428, 111 N. Y. S. 602; Thorne v.

great the detriment suffered by an actual performance of the gratuitous service.³¹ If, however, the promisee does any act which the law will consider as a detriment, at the request, either express or implied, of the promisor, and in reliance on a return promise, it is a sufficient consideration.³²

§ 252. To whom consideration must move.—While the consideration must move from the promisee at the instance of the promisor it is not necessary that the promisor be the recipient of it.³³ It need not pass directly to the latter, but under the prevailing rule, may move from the promisee to a third person at the promisor's request.³⁴

§ 253. Want of consideration.—Since every simple executory contract must be supported by a consideration and its absence renders the contract or promise a nudum pactum and void,³⁵ a contract unsupported by a consideration is unenforceable.³⁶ But

Deas, 4 Johns. (N. Y.) 84; Ridgeway v. Grace, 2 Misc. (N. Y.) 293, 50 N. Y. St. 326, 21 N. Y. S. 934.

³¹ See ante, § 213, Past Consideration.

³² Shadwell v. Shadwell, 9 C. B. (N. S.) 159, 99 E. C. L. 159; Violett v. Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61; Johnson v. Wabash Col., 2 Ind. 555; Owing's Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Chapin v. Laphan, 20 Pick. (Mass.) 467; Wilson v. Baptist Education Soc., 10 Barb. (N. Y.) 308. See also, § 239, Incurring Liabilities or Obligations.

³³ Daniel & Co. v. Dickey, 6 Ga. App. 548, 65 S. E. 301; Ashburn v. Watson, 8 Ga. App. 566, 70 S. E. 19; McMicken v. Safford, 100 Ill. App. 102, affd. 197 Ill. 540, 64 N. E. 540; Shaffer v. Ryan, 84 Ind. 140; Van Winkle v. King, 145 Ky. 691, 141 S. W. 46; Watt v. Rice, 1 La. Ann. 280; Haskell v. Tukesbury, 92 Maine 551, 43 Atl. 500, 69 Am. St. 529; Mack v. Mack, 87 Nebr. 819, 128 N. W. 527; Gansevoort Bank v. Altshul, 26 Misc. (N. Y.) 6, 55 N. Y. S. 733. See also, Utah Nat. Bank v. Nelson (Utah), 111 Pac. 907. See ante, §§ 234, 235, Forbearance; Extension of Time.

³⁴ William v. Perkins, 21 Ark. 18; Reed v. Pueblo First Nat. Bank, 23 Colo. 380, 48 Pac. 507; Dillman v.

Nadelhofer, 160 Ill. 121, 43 N. E. 378; Crawford v. Shaw, 18 Ind. 495; Miller v. Root, 77 Iowa 545, 42 N. W. 502; Bowling v. Floyd (Kans. App.), 48 Pac. 875; Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68; Osborne v. Gullikson, 64 Minn. 218, 66 N. W. 965; Beakes v. Da Cunha, 126 N. Y. 293, 27 N. E. 251; Pennsylvania Coal Co. v. Blake, 85 N. Y. 226; Johnston v. Elizabeth Bldg. Assn., 104 Pa. St. 394. See also, Buell v. Adams, 157 Mich. 248, 121 N. W. 752, 16 Detroit Leg. N. 309. Where the parties contract for the benefit of a third person the latter need not give any consideration. Klitzke v. Smith, 46 Ind. App. 26, 91 N. E. 748. An agent's contract with a third person may be supported by a consideration which moves to the principal. Loeb v. Flannery, 148 Ill. App. 471.

³⁵ See ante, §§ 195, 208, Necessity for; Nudum Pactum.

³⁶ An agreement by a purchaser, who holds the vendor's bond to convey title upon payment of the purchase-price and who is not by such bond excluded from possession, to pay the vendor rent, has been held without consideration. Able v. Gunter (Ala.), 57 So. 464. Pinkerton v. Hudson, 87 Ark. 506, 113 S. W. 35

where want of consideration is merely partial the contract is

(agreement to pay part of costs of a suit when the promisor was in no way obliged so to do). The assignment by a subcontractor to his creditor of any debt which the contractor might owe him held not consideration for an agreement by the subcontractor or his creditor. *S. R. H. Robinson & Co. v. Harrison*, 97 Ark. 643, 133 S. W. 197. In re Casner's Estate, 1 Colo. App. 145, 81 Pac. 991 (promise to assign property unsupported by a consideration); *Cowan v. Howard* (Colo.), 116 Pac. 153 (alleged promise made for the release of an option); *Price v. Press Pub. Co.*, 117 App. Div. (N. Y.) 854, 103 N. Y. S. 296 (promise to pay bonus if employee would abide by his contract of employment); *Jenkins v. Bishop*, 136 App. Div. (N. Y.) 104, 120 N. Y. S. 825 (agreeing to give plaintiff credit for any reduction defendant might obtain in the purchase price of certain real estate). In case a tenant cannot abandon premises for bad repair the landlord's agreement to allow him to make repairs and give him three months' rent free is without consideration. *Kaye v. Hoage*, 63 Misc. (N. Y.) 332, 117 N. Y. S. 122; *Smith v. Burditt*, 107 App. Div. (N. Y.) 628, 95 N. Y. S. 188 (or to pay no further money to a contractor until it appeared that a subcontractor had received his money); *Bank of Spartanburg v. Mahon*, 78 S. Car. 408, 59 S. E. 31 (agreement to apply proceeds derived from the sale of a stock of goods in a certain way); *McKone v. Metropolitan Life Ins. Co.*, 131 Wis. 243, 110 N. W. 472 (promise to repay money embezzled by another); *Martin v. Flahive*, 112 App. Div. (N. Y.) 347, 98 N. Y. S. 577 (promise by principal contractor to pay materialman for material furnished subcontractor). See also, *Snyder v. Monroe Eckstein Brewing Co.*, 107 App. Div. (N. Y.) 328, 95 N. Y. S. 144. *Utah Sav. & Trust Co. v. Bamberger*, 29 Utah 370, 81 Pac. 887 (promise made in consideration of the payment of a note when note had already been cancelled); *Engel v. Gordon*, 97 N. Y. S. 981, 49 Misc. 641 (promise to

pay the obligation of another); *Bull v. Payne*, 47 Ore. 580, 84 Pac. 697 (promise to pay claimant a specified sum of money and to convey a farm on perfecting title thereto); *Riley v. Stevenson*, 118 Mo. App. 187, 94 S. W. 781 (promise by vendor to repair damages made after the completion of the sale); *Graham v. Spence*, 71 N. J. Eq. 183, 63 Atl. 344 (an agreement entered into with third person that a gift should be the property of the one to whom it was given); *Gloeckner v. Kittlaus*, 192 Mo. 477, 91 S. W. 126 (promise to share land purchased at sheriff's sale with another); *Precht v. Howard*, 110 App. Div. (N. Y.) 680, 97 N. Y. S. 462 (agreement to convey building to its owner); *affd.*, 187 N. Y. 136, 79 N. E. 847, 9 L. R. A. (N. S.) 483; *Chase v. Chase*, 191 Mass. 556, 78 N. E. 115 (promise by the devisee to share with other heirs); *Bunnell v. Rosenberg*, 126 Ill. App. 196 (promise to forbear where promisor suffers nothing). An agreement made without any consideration to fix the division line between two adjoining property owners at a place which is known by both parties not to be the true line, is without effect. *Lewis v. Ogram*, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610n, 117 Am. St. 151. See note to above case as reported in 10 L. R. A. (N. S.) 610n. A promise by a county treasurer to return money deposited with an application for a liquor license, to one advancing it to the applicant, in case the license is refused, is without consideration, and not binding when the law specifies that the deposit shall be returned to the applicant who has not assented to the contract. *Hemrich Bros. Brewing Co. v. Kitsap County*, 45 Wash. 454, 9 L. R. A. (N. S.) 910, 88 Pac. 838; *Fox v. Seabury*, 211 Pa. 140, 60 Atl. 508 (where the sole inducement for the promise is a threat made by plaintiff at the time it was given). For further discussion of Want of Consideration, see ante, § 209 et seq.; *Rowland v. Phalen*, 14 N. Y. Super Ct. 43 (want of authority on the part of an agent to contract does not prove want of consideration).

usually affected only pro tanto, and may be enforced to the extent of the valuable consideration.³⁷

§ 254. **Failure of consideration.**—Want or failure of consideration overlap and no clear, distinct dividing line can be drawn between them. This fact, however, gives rise to practically no difficulty in practice except, in some jurisdictions, as to the pleadings.³⁸ When the term want of consideration is used it is understood that there was no consideration whatever for the contract at the time it was made. By failure of consideration is meant that a sufficient consideration was contemplated by the parties at the time the contract was entered into but either on account of some innate defect in the thing to be given or non-performance in whole or in part of that which the promisee agreed to do or forbear nothing of value can be or is received by the promisee. As indicated by this definition, failure of consideration may result from lack of value in the thing given or from the act of one of the parties. Where the thing contracted for is a nullity it is ineffectual as a consideration and will not support a promise based thereon.³⁹ Thus a failure of consideration results on the assignment of a patent which the parties deem valid, but which subsequently is proven void and a contract based thereon cannot be enforced.⁴⁰ And in the transfer of personal prop-

³⁷ *Doebler v. Waters*, 30 Ga. 344; *Gamble v. Grimes*, 2 Ind. 392; *Robson v. McKoin*, 18 La. Ann. 544; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Griffiths v. Parry*, 16 Wis. 218. But a plea of entire want or failure of consideration has been held bad if it shows only a partial want, and is not supported by proof of a partial want or failure of consideration. *Wilson v. Town of Monticello*, 85 Ind. 10; *Wheelock v. Barney*, 27 Ind. 462.

³⁸ See *Osborne & Co. v. Hanlin*, 158 Ind. 325, 63 N. E. 572; *Billan v. Hercklebrath*, 23 Ind. 71.

³⁹ *Sorrells v. McHenry*, 38 Ark. 127; *Pettyjohn v. Liebscher*, 92 Ga. 149; *Jeffries v. Lamb*, 73 Ind. 202; *Montelius v. Wood*, 56 Iowa 254, 9 N. W. 212; *Dodge v. Oatis*, 27 Kans. 762; *Woods v. Schlater*, 24 La. Ann. 284; *Cabot v. Haskins*, 3 Pick.

(Mass.) 83; *Deering Harvester Co. v. Melheim*, 83 Minn. 359, 86 N. W. 348; *Nichols & Shepard Co. v. Soderquist*, 77 Minn. 509, 80 N. W. 630; *Wentworth v. Wentworth*, 5 N. H. 410; *Crosby v. Wood*, 6 N. Y. 369; *House v. Kendall*, 55 Tex. 40. The one alleging failure of consideration must introduce evidence of such failure of consideration and of what such failure consisted. *National Tube Works v. Ring & C. Mach. Co.*, 201 Mo. 30, 98 S. W. 620. The above case also holds that evidence of failure of consideration is admissible under a plea of want of consideration.

⁴⁰ *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. 165; *Snyder v. Kurtz*, 61 Iowa 593, 16 N. W. 722; *First Nat. Bank v. Peck*, 8 Kans. 660; *Lester v. Palmer*, 4 Allen (Mass.) 145; *Bierce v. Stocking*, 11

erty generally, if the seller did not have title,⁴¹ or if the goods are sold under a warranty and do not meet the specifications of such warranty,⁴² there is no consideration for the contract based on the transfer. Likewise, it is true, as a general rule, that if real estate is conveyed by warranty deed and the title thereto entirely fails, want of consideration may be pleaded in an action for the purchase-price.⁴³ And the failure of a party to a contract to fulfil his promise to do or refrain from doing some act before the other party is obligated to perform, is a failure of consideration and relieves the other party from performing.⁴⁴ But if the performance is rendered impossible by the promisor's own act he cannot escape liability on the ground that there was a fail-

Gray (Mass.) 174; Bliss v. Negus, 8 Mass. 46; Harlow v. Putnam, 124 Mass. 553; Hash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Jolliffe v. Collins, 21 Mo. 338; Herzog v. Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. 646; Geiger v. Cook, 3 Watts. & S. (Pa.) 266; Clough v. Patrick, 37 Vt. 421. The English courts hold the contrary. Adie v. Clark, L. R. 3 Ch. Div. 134; Hall v. Conder, 2 C. B. (N. S.) 53; Lawes v. Purser, 6 El. & Bl. 930. And the courts of this country apply the English rule in case the patent is granted in England. Chemical &c. Co. v. Howard, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 168 (second appeal, 150 Mass. 495, 23 N. E. 317). Or if the machine is absolutely useless for the purpose named in the letters patent no recovery can be had on a note given for its purchase. Rowe v. Blanchard, 18 Wis. 441, 86 Am. Dec. 783.

⁴¹ Chenault v. Bush, 84 Ky. 528, 8 Ky. Law 490, 2 S. W. 160; Maxfield v. Jones, 76 Maine 135; Ledwick v. McKim, 53 N. Y. 307; Wilkinson v. Ferrce, 24 Pa. St. 190; Vance v. Davenport, 11 Rich. L. (S. Car.) 517.

⁴² Lathrop v. Hickson, 67 Ga. 445; Thompson v. Wheeler &c. Mfg. Co., 29 Kans. 476; Button v. Trader, 75 Mich. 295, 42 N. W. 834; Shepard v. Temple, 3 N. H. 455.

⁴³ Heaton v. Myers, 4 Colo. 59; Cook v. Mix, 11 Conn. 432; Slack v. McLagan, 15 Ill. 242; Davis v. McVickers, 11 Ill. 327; Fleetwood v. Brown, 109 Ind. 567, 9 N. E. 352;

Rice v. Goddard, 14 Pick. (Mass.) 293; Redding v. Lamb, 81 Mich. 318, 45 N. W. 997; Durment v. Tuttle, 50 Minn. 426, 52 N. W. 909; Tillotson v. Grapes, 4 N. H. 444; Tibbets v. Ayer, Hill & D. (N. Y.) 174; Steinhauer v. Witman, 1 Serg. & R. (Pa.) 438; Gray v. Handkinson's Ex'rs, 1 Bay (S. Car.) 278; Chandler v. Marsh, 3 Vt. 161. Contra, Fields v. Clayton, 117 Ala. 538, 23 So. 530, 67 Am. St. Rep. 189; Jenness v. Parker, 24 Maine 289.

⁴⁴ Billings v. Everett, 52 Cal. 661; Booth v. Fitzer, 82 Ind. 66; Medcalf v. Brown, 77 Ind. 476; New Orleans Polo Club v. New Orleans Jockey Club, 128 La. 1044, 55 So. 668; Taft v. Montague, 14 Mass. 281, 7 Am. Dec. 215; Perkins v. Brown, 115 Mich. 41, 72 N. W. 1095; Ward v. Textile Commission Co., 139 App. Div. (N. Y.) 109, 123 N. Y. S. 918; Denniston v. Bacon, 10 Johns. (N. Y.) 198; Gilmartin v. Van Horn, 107 N. Y. S. 131; Richardson & Morgan Co. v. Gudewill, 30 Misc. (N. Y.) 818, 61 N. Y. S. 1120; Pope v. Hays, 19 Tex. 375. Where the act is to be performed by a third person his non-performance constitutes a failure of consideration. Gale v. Harp, 64 Ark. 462, 43 S. W. 144. Where a contractor agreed to lay and maintain for ten years a pavement in consideration of a stipulated price, failure on the part of the contractor to maintain the pavement constituted a failure of consideration. Nelson v. San Antonio Tract. Co. (Tex. Civ. App.),

ure of consideration.⁴⁵ Nor is failure of consideration a defense in case the promisor himself destroys the consideration he received.⁴⁶ Nor is it any defense, in the absence of fraud, duress or mutual mistake of fact that the consideration received is not as valuable as the promisor supposed it to be.⁴⁷ And if the contract is still in force and may be ultimately fulfilled, a suit cannot be maintained to recover the consideration given.⁴⁸ Should there be a partial failure of consideration a recovery pro tanto may be had in case the contract is divisible.⁴⁹ This is not true, however, if a part of the entire consideration is illegal.⁵⁰

After what has been said it is hardly necessary to add that want or failure of consideration is always available as a defense,⁵¹ except in those few instances where a consideration is conclusively presumed, as in the case of instruments under seal, or negotiable instruments in the hands of an innocent purchaser, and the establishment of this defense avoids the contract.⁵² And as

142 S. W. 146. The grantor of an interest in tide lands in consideration of the construction of a canal by the grantee has been held entitled to show that the canal was not constructed and that the consideration has failed for the subsidy. *Ames v. Kinnear*, 42 Wash. 80, 84 Pac. 629. See ante, § 205, Continuing, executed and concurrent considerations.

⁴⁵ *Stray v. Russell*, 1 El. & El. 888; *Bean v. Prosens*, 96 Cal. 17, 31 Pac. 49; *Mitcherson v. Dozier*, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116. See also, *Sixta v. Ontonagon Valley Land Co.*, 148 Wis. 186, 134 N. W. 341.

⁴⁶ *Simmons v. Sefrit* (Iowa), 125 N. W. 93. See also, *Lund v. Smith*, 191 Mass. 473, 77 N. E. 893.

⁴⁷ See also, § 209, Adequacy of Consideration; *White v. Butler University*, 78 Ind. 585; *Valley City Milling Co. v. Prange*, 123 Mich. 211, 81 N. W. 1074; *C. H. Brown Banking Co. v. Fink*, 95 Mo. App. 257, 68 S. W. 586; *Pittsburgh Stove & Range Co. v. Penn. Stove Co.*, 208 Pa. 37, 57 Atl. 77.

⁴⁸ *Hinrichs v. Consolidated Adjustment Co.*, 145 Ill. App. 8. See also, *Flanagan v. Callanan*, 22 Misc. (N. Y.) 139, 48 N. Y. S. 708.

⁴⁹ *Keller v. Vowell*, 17 Ark. 445; *Doebler v. Waters*, 30 Ga. 344; *Gamble v. Grimes*, 2 Ind. 392; *Robson v. McKoin*, 18 La. Ann. 544; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Collins Iron Co. v. Burkhams*, 10 Mich. 283; *Deering Harvester Co. v. Melheim*, 83 Minn. 359, 86 N. W. 348; *Briscoe v. Kinealy*, 8 Mo. App. 76; *Griffiths v. Perry*, 16 Wis. 218. By statute in New Jersey a partial failure of consideration operates not as a complete defense, but only as a ground for an abatement of the damages. *United & C. Mfg. Co. v. Conard*, 80 N. J. L. 286, 78 Atl. 203.

⁵⁰ *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348, 90 Am. St. Rep. 167; *Galt v. Provan*, 131 Iowa 277, 108 N. W. 760; *State v. Wilson*, 73 Kans. 343, 84 Pac. 737, 117 Am. St. 479. See also, *Todd v. Bettingen*, 98 Minn. 170, 107 N. W. 1049; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664. See ante, § 248, Indivisible considerations.

⁵¹ *Butler & Co. v. McCall*, 119 Ga. 503, 46 S. E. 647.

⁵² *Russ Lumber & C. Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. 186; *Arthur v. Blackman*, 63 Fed. 536; *Paton v. Stewart*, 78 Ill. 481; *Booth*

a general rule the money paid or the thing of value given, if tangible, may be recovered in case the consideration therefor has entirely failed.⁵³

v. Fitzer, 82 Ind. 66; Sandage v. Studabaker &c. Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. 165; Grisby v. Grisby, 1 Ky. L. 62; Sentell & Co. v. Bonner (La.), Man. Unrep. Cas. 345; Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Ward v. Hartley, 178 Mo. 135, 77 S. W. 302; Chemical Elect. &c. Co. v. Howard, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 158; Sawyer v Chambers, 44 Barb. (N. Y.) 42; Rowe v. Blanchard, 18 Wis. 441, 86 Am. Dec. 783.
⁵³ Spring v. Coffin, 10 Mass. 31; Lawrence v. Carter, 16 Pick. (Mass.) 12; Claflin v. Godfrey, 21 Pick. (38 Mass.) 1; Lathrop v. Mayer, 86 Mo. App. 335; Tausig v. Drucker, 90 N. Y. S. 380.

CHAPTER X.

PARTIES.

- | | |
|--|--|
| § 260. Must have capacity to contract. | § 269. Mental incapacity. |
| 261. Capacity is generally presumed. | 270. Deaf mutes. |
| 262. How incapacity may arise or be caused. | 271. Coverture. |
| 263. United States or state as a party. | 272. Artificial persons and corporations. |
| 264. Foreign governments and representatives. | 273. Agents and representatives. |
| 265. Aliens. | 274. Drunken persons. |
| 266. Convicts. | 275. Where incapacity is such as to make contracts void. |
| 267. Effect of laws requiring license or the like. | 276. Where incapacity is such as to make contracts voidable. |
| 268. Youth or lack of age. | 277. Ratification. |

§ 260. **Must have capacity to contract.**—One fundamental principle applied over and over in the law of contracts is to the effect that no binding agreement can exist until the parties have mutually assented to its terms. This presupposes a free, fair and serious exercise of the reasoning faculty, or at least an ability to give an intelligent assent, in other words, the power both physical and mental of deliberating upon the matter and weighing its consequences. It follows that capacity to contract is absolutely necessary to the formation of a binding agreement.¹ This is too elementary to require the citation of additional authority.

§ 261. **Capacity is generally presumed.**—The law presumes, however, that there is a full capacity to contract. Want of capacity is the exception and not the general rule. Consequently its absence must be established by the party alleging incapacity. It is only in certain instances that protection will be given. Weakness of mind short of insanity, the mere absence of experience or skill upon the particular subject of the contract in question, or immaturity of reason where the party has obtained

¹ *Carson v. Clark*, 1 Scam. (Ill.) N. W. 590. See also, post, chaps. 11, 113, 25 Am. Dec. 79; *Van Buren &c.* 12, 13. *Infancy, Insanity, Married R. Co. v. Lanphear*, 54 Mich. 575, 20 women, etc.

full age, affords in general no ground for release at law or in equity if no fraud is practiced on the party. Persons entering into an agreement will be presumed to be adults and competent to contract.²

§ 262. **How incapacity may arise or be caused.**—Incapacities may be classified under two heads; they are: first, natural incapacity, such as insanity or imbecility, and under this head will also be included drunken persons; second, artificial incapacities. An artificial incompetency arises when by a positive rule of law a specified class of individuals is declared incapable of binding themselves by a contractual obligation.³ Certain individuals of such class may or may not be mentally or physically capable, but no distinction is made in such cases; all are impartially declared incompetent to contract. The foregoing is true of infants, married women at common law, and those incapable from such causes as are declared grounds of incapacity by the laws of the various states, varying in different jurisdictions.⁴ The various persons incapacitated by operation of natural or artificial reasons will be specifically mentioned in the following sections of this chapter, and some of them,—infancy, for instance,—will be specially treated in separate chapters.

§ 263. **United States or state as a party.**—The United States Government and the several states have the power to make contracts as “an incident to the general right of sovereignty.”⁵ It follows that if this power is “an incident to the general right of sovereignty” the capacity of the federal and state governments

² *Hickson v. Aylward*, 3 Moll. 15; *Foltz v. Wert*, 103 Ind. 404, 2 N. E. 950; *Paulus v. Reed*, 121 Iowa 224, 96 N. W. 757; *Merchants' Nat. Bank v. Soesbe*, 138 Iowa 354, 116 N. W. 123; *Nason v. Chicago & C. R. Co.*, 149 Iowa 608, 128 N. W. 854 (holding mere physical weakness as a general rule insufficient to avoid a contract); *Mathews v. Nash*, 151 Iowa 125, 130 N. W. 796; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; 1 Elliott on Ev., §§125, 126; 3 Elliott on Ev., § 2266. See also, *Moore v. Gilbert*, 175 Fed. 1, 99 C. C. A. 141; *Hauber v. Leibold*, 76 Nebr. 706, 107 N. W. 1042;

Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 Atl. 1110.

³ See 2 Parsons on Contracts (6th ed.), *573.

⁴ It will of course be understood that the disabilities of coverture have been largely removed by legislative enactment in the various states.

⁵ *United States v. Lane*, 3 McLean (U. S.) 365; *United States v. Tingey*, 5 Pet. (U. S.) 115, 8 L. ed. 66; *Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. ed. 169, 7 Ct. Cl. (U. S.) 65. “It does not require legislation to empower the proper department to act

to contract must be coextensive with their functions.⁶ But since the government of the United States and the various states composing it are limited in their power they have no right to enter into contracts opposed to an express constitutional limitation or inhibition, or which is beyond the sphere and does not further the

in making the contract or receiving the security; the power exists as an incident to sovereignty and may be exercised by the proper department, if not forbidden by legislation." *Dikes v. Miller*, 25 Tex. Supp. 281, 78 Am. Dec. 571.

⁶ *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *United States v. Maurice*, 2 Brock. (U. S.) 96; *United States v. Lane*, 3 McLean (U. S.) 365. The United States government has the implied power to enter into any contract, not prohibited by law, that is expedient and appropriate for the accomplishment of the powers conferred upon it by the constitution. *United States v. Tingey*, 5 Pet. (U. S.) 115, 8 L. ed. 66. See also, *United States v. Pittsburgh & Co. R. Co.*, 26 Fed. 113; *United States v. Tygh Valley Land & Co.*, 76 Fed. 693; *Dugan v. United States*, 3 Wheat. (U. S.) 172, 4 L. ed. 362; *United States v. Bradley*, 10 Pet. (U. S.) 343, 9 L. ed. 448; *United States v. Linn*, 15 Pet. (U. S.) 290, 10 L. ed. 742; *Cotton v. United States*, 11 How. (U. S.) 229, 13 L. ed. 265; *Neilson v. Lagow*, 12 How. (U. S.) 98, 13 L. ed. 909; *United States v. Hodson*, 10 Wall. (U. S.) 395, 19 L. ed. 937; *United States v. Powell*, 14 Wall. (U. S.) 493, 20 L. ed. 726; *Jessup v. United States*, 106 U. S. 147, 27 L. ed. 85, 1 Sup. Ct. 74; *Tyler v. Hand*, 7 How. (U. S.) 573, 12 L. ed. 824; *United States v. Mora*, 97 U. S. 413, 24 L. ed. 1013; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Moses v. United States*, 166 U. S. 571, 41 L. ed. 1119, 17 Sup. Ct. 682; *United States v. Garlinghouse*, 4 Ben. (U. S.) 194, 25 Fed. Cas. No. 15189; *Eight Hundred and Fifty-Eight Bales Cotton, Blatchf. Prize Cas.* 325, 8 Fed. Cas. No. 4318; *United States v. Boice*, 2 McLean (U. S.) 352, 24 Fed. Cas. No. 14619; *United States v. Ames*, 1 Woodb. &

M. (U. S.) 76, 24 Fed. Cas. No. 14441; *United States v. Howell*, 4 Wash. (U. S.) 620; *United States v. Lane*, 3 McLean (U. S.) 365, 26 Fed. Cas. No. 15559; *United States v. Noah*, 1 Paine (U. S.) 368; *In re Floyd's Case*, 2 Ct. Cl. (U. S.) 429; *In re Fowler's Case*, 3 Ct. Cl. (U. S.) 43; *In re Allen's Case*, 3 Ct. Cl. (U. S.) 91; *United States v. Lane*, 3 McLean (U. S.) 365, 26 Fed. Cas. No. 15559; *United States v. Speed*, 8 Wall. (U. S.) 77, 19 L. ed. 449. The same principles apply to contracts entered into by state governments, except that their powers are not only limited by their own separate constitutions but all are limited by the Constitution of the United States. Their power to contract may also be limited by a valid express statute. *State v. Smyrna Bank*, 2 Huston (Del.) 99, 73 Am. Dec. 699; *Kauffmann v. Cooper*, 46 Nebr. 644, 65 N. W. 796; *Van Dusen v. State*, 11 S. Dak. 318, 77 N. W. 201; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369, 14 L. ed. 977; *Poole v. Fleege's Lessee*, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955; *Green v. Biddle*, 8 Wheat. (U. S.) 1, 5 L. ed. 547. The state may be the payee of a promissory note. *State v. Little Rock R. Co.*, 31 Ark. 701; *Indiana v. Woran*, 6 Hill (N. Y.) 33, 40 Am. Dec. 378. It may convey its property. *Bilger v. State*, 63 Wash. 457, 116 Pac. 19. A corporation charter is a contract. *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629; *Province Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. ed. 939. The United States may be liable on an implied contract. *United States v. Buffalo Pitts Co.*, 193 Fed. 905. See post, ch. 31, Implied Contracts.

objects for which the government was organized.⁷ Nor can they by contract divest themselves of their attributes of sovereignty and agree not to exercise them.⁸

When a state enters into a contract it binds itself substantially as an individual does, and it can claim no exception from the rules of law applicable to contracts between individuals.⁹ The legislative branch of the government may, however, within the limits of the constitution, regulate the manner in which contracts shall be entered into. If the provisions relative thereto are mandatory they must be strictly adhered to or the agreement will be void,¹⁰ but if directory the agreement may be sustained

⁷ *Patton v. Gilmer*, 42 Ala. 428, 94 Am. Dec. 665; *Oxnard Beet Sugar Co. v. State*, 7 Nebr. 57, 102 N. W. 80, 105 N. W. 716. See also, *Dagett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, 27 Am. St. 95. A contract in contravention of an express constitutional provision is unenforceable. *Jobe v. Urquhart* (Ark.), 143 S. W. 121. The United States Supreme Court is the final arbiter as to the meaning of the United States Constitution and whether or not a given statute is in contravention thereof. *Van Horne's Lessee v. Dorrance*, 2 Dall. (U. S.) 304; *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 4 L. ed. 97; *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 5 L. ed. 257; *Ablemann v. Booth* (sub nomine *United States v. Booth*), 21 How. (U. S.) 506, 16 L. ed. 169. A contract in contravention of a valid statute is as a general rule unenforceable, depending on the wording of the statute. *Myrick v. Thompson*, 99 U. S. 291, 25 L. ed. 324. In the above case the agreement was in contravention of a treaty. *William Wilcox Mfg. Co. v. Brazos*, 74 Conn. 208, 50 Atl. 722; *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348, 90 Am. St. 167; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. 203; *State v. Wilson*, 73 Kans. 343, 84 Pac. 737, 117 Am. St. 479. Thus, when coal was bought by the board of the state institution in violation of a statute, and the coal was used by such institution, it was held that the price of the coal could not be re-

covered. *Consolidated Coal Co. v. Board Trustees*, 164 Mich. 235, 129 N. W. 193; *Haggerty v. St. Louis Ice & Co.*, 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. 647. In the above case it is said that the consequences resulting from an act *malum prohibitum* are the same as if the act were *malum in se*. See also, post, § 267. Effect of law requiring license, and the like. Also, Chap. 22, *Illegal Contracts*.

⁸ *Spooner v. McConnell*, 1 McLean (U. S.) 337, Fed. Cas. No. 13245.

⁹ *Patton v. Gilmore*, 42 Ala. 428, 94 Am. Dec. 665; *Calloway v. Cossart*, 45 Ark. 81; *Chapman v. State*, 104 Cal. 690, 38 Pac. 457, 43 Am. St. 158; *Carr v. State*, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. 624; *People v. Stephens*, 71 N. Y. 527; *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 477. "Ordinarily the state is liable for prospective profits, on breach of contract, to the same extent as an individual." *Chalstran v. Board of Education*, 244 Ill. 470, 91 N. E. 712; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277. "A state is not presumed to have parted with any part of its property in the absence of conclusive proof of an intention to do so. Any ambiguity must operate against the grantee and in favor of the public." *United States v. Michigan*, 190 U. S. 379, 47 L. ed. 1103. Also, *McCarter v. Lehigh Valley R. Co.*, 78 N. J. Eq. 346, 79 Atl. 93.

¹⁰ *Clark v. United States*, 95 U. S. 539, 24 L. ed. 67, 12 Ct. Cl. (U. S.) 60;

if entered into voluntarily.¹¹ Thus, it may prohibit contracts of purchase on behalf of the United States unless they are authorized by law or made under an appropriation adequate therefor.¹²

A state may enter into a contract through its agent, but the limits of his power must be strictly observed.¹³ For, contrary to the general rule, a state is ordinarily not bound by contracts entered into on its behalf by its agent, even though when made within the apparent scope of his authority, if in fact he acted without authority.¹⁴ It is the duty of persons dealing with pub-

United States v. Bradley, 10 Pet. (U. S.) 343, 9 L. ed. 448.

¹¹ United States v. Bradley, 10 Pet. (U. S.) 343, 9 L. ed. 448. While the legislature may modify the charter of a municipal corporation or abolish it altogether, yet the rights of a creditor based thereon and being an obligation in contract cannot be impaired by subsequent legislation. Chalstran v. Board of Education, 244 Ill. 470, 91 N. E. 712.

¹² Revised Statutes of United States, § 37. There are certain exceptions made relative to the war and navy departments. Chase v. United States, 155 U. S. 489, 39 L. ed. 284, 15 Sup. Ct. 174. See in this connection Kauffmann v. Cooper, 46 Nebr. 644, 65 N. W. 796; Van Dusen v. State, 11 S. Dak. 318, 77 N. W. 201.

¹³ United States v. Cosgrove, 26 Fed. 908; Mason & Co. v. Commonwealth (Ky.), 36 S. W. 570; Osborn v. Tunis, 25 N. J. L. 633; Boyers v. Crane, 1 W. Va. 176; Slaughter v. State, 132 Ind. 465, 31 N. E. 1112; People v. Stephens, 71 N. Y. 527; Brown v. State, 14 S. Dak. 219, 84 N. W. 801; State v. Hamilton, 11 Humph. (Tenn.) 47; Floyd Acceptances, 7 Wall. (U. S.) 666, 19 L. ed. 169, 7 Ct. Cl. (U. S.) 65; Pierce v. United States, 1 Ct. Cl. (U. S.) 270. See also, Hove v. United States, 218 U. S. 322, 54 L. ed. 1055, 31 Sup. Ct. 85; McClenny v. United States, 45 Ct. Cl. (U. S.) 305.

¹⁴ People v. Talmage, 6 Cal. 256; Mullan v. State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 362; Penitentiary Co. No. 2 v. Gordon, 85 Ga. 159, 11 S. E. 584; State v. Southwestern R. R., 70 Ga. 11; Julian v. State, 140 Ind. 581, 39 N. E. 923;

McCaslin v. State, 99 Ind. 428; Fries v. Porch, 49 Iowa 351; Martin's Admr. v. United States, 4 T. B. Mon. (Ky.) 487; Baltimore v. Reynolds, 20 Md. 1; Ellis v. State Auditors, 107 Mich. 528, 65 N. W. 577; Stanser v. Cather, 85 Nebr. 305, 123 N. W. 316, 124 N. W. 102; State v. Horton, 21 Nev. 466, 30 Pac. 876; Delafield v. State, 2 Hill (N. Y.) 159, 26 Wend. (N. Y.) 192; State v. Bevers, 86 N. Car. 588; Commonwealth v. Sanderson, 40 Pa. Super. Ct. 416; Floyd Acceptances, 7 Wall. (U. S.) 666, 19 L. ed. 169, 7 Ct. Cl. (U. S.) 65; Young v. State, 19 Wash. 634; State v. Hastings, 10 Wis. 518; Kneeland v. Milwaukee, 18 Wis. 431. The usual statement of the rule is as follows: "All persons dealing with public officers, whose power and authority to represent and bind the state, or some subordinate municipality thereof, depends upon or is limited by statute, are charged at their peril with notice of the scope of the power of such officers under the statute." Hord v. State, 167 Ind. 622, 79 N. E. 916. "The government of a state is its mere agent, and all its officers act in a representative capacity, binding the state by their acts only in those instances in which they have authority to act for her. The law under which they act constitutes their power of attorney or warrant of authority, and when, for any reason, that law is void, the act done under it is likewise void, and amounts to a wrong and a trespass. As, in such case, the state cannot be deemed to have authorized the wrongful act, the person who did it, although an officer in name, is deemed to have acted in his individual capacity." Coal & C. R. Co.

lic officials to inform themselves as to the power of such official to bind the government.¹⁵

A state may bring and maintain suit the same as an individual; it may sue within the courts of its own jurisdiction, or in the courts of another state, or in the federal courts. The federal government may in turn sue in the state courts.¹⁶ Thus, when a state becomes a party to a suit and voluntarily submits its right to judicial determination it is bound by the same principles that govern individuals. It voluntarily submits to the law and places itself upon an equality with other litigants.¹⁷ Thus it has been held that in a suit by the state to recover for the services of convicts, which it had leased to a contractor, the latter is entitled to recoupment for damages for failure to furnish the number of convicts called for by the contract.¹⁸

Under the old common-law rule the sovereign was exempted from being a defendant in his own court. This rule is enforced

v. Conley, 67 W. Va. 129, 67 S. E. 613. In the absence of a statute creating liability, neither a state nor the United States is legally liable to respond in damages to a person for an injury resulting from the misconduct, negligence or tortious acts of its officers or agents. *State v. Mutual Life Ins. Co. (Ind.)*, 93 N. E. 213.

¹⁵ *Woodward v. Campbell*, 39 Ark. 580; *United States v. Cosgrove*, 26 Fed. 908; *Hume v. United States*, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. 134; *Pierce v. United States*, 1 Ct. Cl. (U. S.) 270. See also, *Jobe v. Urquhart (Ark.)*, 143 S. W. 121. The state may, however, be liable on a contract entered into by its agent under an implied power when reasonably necessary for the exercise of the power given. *Kirby v. State*, 68 Misc. (N. Y.) 626, 125 N. Y. S. 742.

¹⁶ *United States v. Holmes*, 105 Fed. 41; *People v. St. Louis*, 5 Gilm. (Ill.) 351, 48 Am. Dec. 339; *United States v. Murdock*, 18 La. 305, 89 Am. Dec. 651; *United States v. Burrill*, 107 Maine 382, 78 Atl. 568 (holding that the United States may maintain an action of forcible entry and detainer); *State v. Grant*, 10 Minn. 39; *Spencer v. Brockway*, 1 Ohio 259, 13 Am. Dec. 615; *United States v. Barker*, 1 Paine (U. S.) 156; *State*

v. *Burkeholder*, 30 W. Va. 593, 5 S. E. 439.

¹⁷ *United States v. Beebee*, 17 Fed. 36; *Cleveland Terminal & C. R. Co. v. State (Ohio)*, 97 N. E. 967; *Clark v. United States*, 6 Wall. (U. S.) 543, 18 L. ed. 916, 3 Ct. Cl. (U. S.) 451; *In re Smoot's Case*, 15 Wall. (U. S.) 36; *Amoskeag Mfg. Co. v. United States*, 17 Wall. (U. S.) 592, 21 L. ed. 715, 9 Ct. Cl. (U. S.) 50; *In re The Siren*, 7 Wall. (U. S.) 152, 19 L. ed. 129; *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65; *United States v. Smith*, 94 U. S. 214, 24 L. ed. 115; *Chicago & C. R. Co. v. United States*, 104 U. S. 680, 26 L. ed. 891, 17 Ct. Cl. (U. S.) 435; *Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. ed. 169, 7 Ct. Cl. (U. S.) 65; *In re Mann's Case*, 3 Ct. Cl. (U. S.) 404; *Spofford v. United States*, 32 Ct. Cl. (U. S.) 452; *Clifford v. United States*, 34 Ct. Cl. (U. S.) 223. When sued by the state the defendant has the right to set up defensive matter. *Texas Channel & C. Co. v. State (Tex.)*, 135 S. W. 522.

¹⁸ *State v. Arkansas & C. Mfg. Co.*, 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376, and note. There is a conflict of authority as to the right of set-off or counterclaim in an action by the state. See note in 33 L. R. A. (N. S.) 376.

in this country and neither the United States¹⁹ nor a state²⁰ can be sued without its consent. By this means it may defeat recovery on a contract. This exemption from suit may, however, be waived,²¹ or it may by statutory enactment or constitutional provision consent to be sued.²² Thus the United States has established the court of claims and has thereby given permission to be sued in that court on contracts. Since the right to sue the sovereign is not an inherent right but one acquired only by permission, the state may in granting such permission impose any restriction or condition thereupon it sees fit.²³

¹⁹ *United States v. Murdock*, 18 La. Ann. 305, 89 Am. Dec. 651; *Orleans Navigation Co. v. The Amelia*, 7 Martin (La.) 632, 12 Am. Dec. 516; *United States v. Clarke*, 8 Pet. (U. S.) 436, 8 L. ed. 1001; *In re The Siren*, 7 Wall. (U. S.) 152, 19 L. ed. 129; *Ute Indians v. United States*, 45 Ct. Cl. (U. S.) 440 (holding that interest can be recovered from the sovereign only with the sovereign's consent).

²⁰ *Pitcock v. State*, 91 Ark. 527, 121 S. W. 742, 134 Am. St. 88; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130; *Pattison v. Shaw*, 6 Ind. 377; *Carr v. State*, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. 624; *State v. Mutual Life Ins. Co.* (Ind.), 93 N. E. 213; *Troy & C. R. Co. v. Commonwealth*, 127 Mass. 43; *Michigan State Bank v. Hammond*, 1 Doug. (Mich.) 527; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *Sanders v. Saxton*, 182 N. Y. 477, 75 N. E. 529, 1 L. R. A. (N. S.) 727n, 108 Am. St. 826n; *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372; *Carolina Glass Co. v. State*, 87 S. Car. 270, 69 S. E. 391. If the state is the real party in interest, though only its officers and agents are parties, then it is in effect a suit against the state, and falls within the rule of prohibition. *Pitcock v. State*, 91 Ark. 527, 121 S. W. 742, 134 Am. St. 88; *Jobe v. Urquhart*, 98 Ark. 525, 136 S. W. 663; *Sanders v. Saxton*, 182 N. Y. 477, 75 N. E. 529, 1 L. R. A. (N. S.) 127n, 108 Am. St. 826n; *General Oil Co. v. Crain*, 117 Tenn. 82, 95 S. W. 824, 121 Am. St. 967n; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. 699. In

this connection see *Coal & C. R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613, for an illustration of when the state is not, in fact, the real party at interest. As to what are suits against the state, see *Texas Channel & C. Co. v. State* (Tex.), 135 S. W. 522. It has been held that county commissioners cannot be restrained from using a ventilating apparatus placed in a courthouse by a contractor for its construction, on the ground that its use infringes a patent. *McCreery Engineering Co. v. Massachusetts Fan Co.*, 180 Fed. 115.

²¹ *Hanly v. Sims* (Ind.), 94 N. E. 401; *Sinking Fund Commissioners v. Northern Bank*, 1 Metc. (Ky.) 174; *Garr v. Bright*, 1 Barb. Ch. (N. Y.) 157; *Cohen v. Virginia*, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

²² *Green v. State*, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 439, 18 Am. Dec. 194; *Wesson v. Commonwealth*, 144 Mass. 60, 10 N. E. 762; *County Board of Education v. State Board*, 106 N. Car. 81, 10 S. E. 1002; *Nicholl v. United States*, 7 Wall. (U. S.) 122, 19 L. ed. 125; *Finn v. United States*, 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. 82, 23 Ct. Cl. (U. S.) 486; *United States v. Cumming*, 130 U. S. 452, 32 L. ed. 1029. A constitutional provision, to the effect that "suits may be brought against the state in such manner and in such courts as the legislature may by law direct," is not self-executing. *General Oil Co. v. Crain*, 117 Tenn. 82, 95 S. W. 824, 121 Am. St. 967.

²³ *Ball v. Halsell*, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. 554, *Treat v. Farmers' Loan & C. Co.*, 185 Fed. 760;

§ 264. **Foreign governments and representatives.**—The principle applicable to contracts of the United States and states are in the main applicable to those of a foreign country. A foreign state, its sovereign or representatives, are none of them subject to the jurisdiction of the courts of another country unless they submit themselves thereto. Consequently, a contract entered into in this country with the before-mentioned persons cannot be enforced against them without their consent, although they have the right to enforce it.²⁴ Thus the courts of England have refused to enforce a promise of marriage made by a sovereign of a foreign country, the fact that he was ruler over a petty state having nothing to do with the question.²⁵

Wailes v. Smith, 157 U. S. 271, 39 L. ed. 698; Spalding v. Vilas, 161 U. S. 483; Satterlee v. United States, 30 Ct. Cl. (U. S.) 31; State v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226n, 63 Am. St. 47. By establishing the court of claims the United States did not give permission to be sued in state courts. Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754. The action must be confined to such claims as are contemplated by the statute. State v. Mutual Life Ins. Co. (Ind.), 93 N. E. 213. "The principle that a state, in entering into a contract, binds itself, substantially, as an individual does under similar circumstances necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract. It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break faith, since that would involve the manifest contradiction that a state is bound and yet not bound by its obligation. It may have the might and means of defeating the enforcement of the contract, yet, in a just sense, have no power to do so. Might and opportunity do not constitute power in a true sense. To constitute power, another element must be present, and that element is right. If right is absent, there is no power. Legislatures may, by a failure to make an appropriation, defeat a just claim, or, indeed, block the wheels of government; but under the

constitution they have no power to do any such thing. It seems very clear, therefore, that there is no constitutional power to annul or impair a valid contract entered into by a state, and so it has long been settled." Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. 624. "The only remedy for a party who has entered into a contract with a state, is by an appeal to the legislature, who, it is fair to presume, will, from motives of public duty, make provisions for its full execution, and do ample justice to the party with whom it may have contracted; or else refer the case to the decision and judgment of the judiciary, by a special legislative enactment." Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549. As to the assignment of claims against the United States, see post, Ch. 33, Assignments.

²⁴ Taylor v. Best, 14 C. B. 487; Hullet v. King of Spain, 1 Dow & C. 169; Tagart v. State, 15 Mo. 209; King of Prussia v. Kuepper's Admr., 22 Mo. 550, 66 Am. Dec. 639; Republic of Mexico v. De Arrangois, 11 How. Pr. (N. Y.) 1; King of Spain v. Oliver, 1 Pet. (U. S.) 276.

²⁵ "This case must be decided upon exactly the same considerations as if the ruler of some undoubted great power—such as King of Italy, or the president of the French Republic—had been sued in the courts of this country. To begin with, there is no precedent for saying that an inde-

§ 265. **Aliens.**—An alien may be defined as a citizen or subject of a foreign nation not naturalized under our laws.²⁶ Aliens may be divided into two classes: alien friends and alien enemies. Whether one not a citizen of this country is an alien friend or enemy depends on whether the nation to which he owes his allegiance is at peace or war with this country.²⁷ An alien friend may ordinarily legally enter into a contract with a subject of this country either here or abroad, and may during peace maintain an action thereon, the same as in the case of contracts in which both parties are subjects of this country.²⁸ In times of peace they have practically the same privileges that are extended to citizens in respect to personal property and the obligations arising out of contracts. It is the common-law rule, which is in effect in this country, that an alien may acquire and hold any and all beneficial estates in personalty.²⁹ Any other rule would render commerce between nations impossible. He cannot, how-

pendent sovereign ruler can be sued in our courts. On the contrary, the proposition is opposed to every principle of international law as applied to the persons of sovereigns or those who represent them. The ground upon which the immunity of sovereign rulers from process in our courts is recognized by our law is that it would be absolutely inconsistent with the status of an independent sovereign that he should be subject to the process of a foreign tribunal. * * *

It is one thing to say that a foreign sovereign is capable of making an effectual contract in this country; it is quite another thing to say that he can be sued in the courts of this country." *Mighell v. Sultan of Johore*, 1 Q. B. 149 (1894).

²⁶ *Martin v. Brown*, 7 N. J. L. 305; *Milne v. Huber*, 3 McClean (U. S.) 212, Fed. Cas. No. 9617.

²⁷ 1 Blackstone Comm. 371; 1 Kent's Comm. 73; Black's Law Dict. 59.

²⁸ *Roberts v. Knights*, 7 Allen (Mass.) 449; *Barrell v. Benjamin*, 15 Mass. 354; *Arbuckle v. Reaume*, 96 Mich. 243, 55 N. W. 808; *McKee v. Jones*, 67 Miss. 405, 7 So. 348; *Bradstreet v. Oneida County Sup'rs*, 13 Wend. (N. Y.) 546; *Franco-Texan Land Co. v. Chaptive (Tex.)*, 3 S.

W. 31; *Openheimer v. Levy*, 2 Strange (U. S.) 1082; *Taylor v. Carpenter*, 3 Story (U. S.) 458, Fed. Cas. No. 13784. For an interesting case of the power of an alien to maintain suit in this country, see *Disconto Gesellschaft v. Unbreit*, 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045n. In this case it appears that the original action was between two non-resident aliens upon a foreign cause of action; it was held that the action could not be maintained as a matter of right, but only, if at all, on the principles of comity, and under the facts of this particular case the right of action was denied.

²⁹ In *re Calvin's Case*, 7 Coke 17; *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278; *Greenheld v. Morrison*, 21 Iowa 538; *Greenia v. Greenia*, 14 Mo. 526; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Commonwealth v. Detwiler*, 131 Pa. 614, 18 Atl. 990, 7 L. R. A. 357 (holding that a citizen of one state may own shares of stock in a company incorporated under the laws of another state); *Franco-Texan Land Co. v. Chaptive (Tex.)*, 3 S. W. 31; *Craig v. Leslie*, 3 Wheat. (U. S.) 563, 4 L. ed. 460; 1 Blackstone Comm. 372; 2 Kent Comm. 62. A statute which arbitrarily forbids aliens to en-

ever, at common law, hold any beneficial estate, either legal or equitable, in real property.³⁰

The right of aliens to acquire and hold real property is generally regulated by statute in the various states. In some they have the right to acquire, hold and transfer real property, in others these privileges are withheld from them.³¹ However, it is held that an alien may take by deed or devise and hold real estate against any one but the sovereign until office found.³² Consequently, a grantor who conveys land to an alien divests himself of title thereto, and is in no position to question its validity. The alien grantee takes what is known as a defeasible estate as against the state only.³³

gage in ordinary kinds of business to earn their living is unconstitutional and void. *Commonwealth v. Hana*, 195 Mass. 262, 81 N. E. 149, 122 Am. St. 251.

³⁰ *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278; *Craig v. Leslie*, 3 Wheat. (U. S.) 563, 4 L. ed. 460; 1 Blackstone Comm. 372; 2 Blackstone Comm. 249. He cannot hold by descent or otherwise. *Ahrens v. Ahrens*, 144 Iowa 486, 123 N. W. 164, Ann. Cas. 1912A. 1098; *Scottish-American Mort. Co. v. Butler* (Miss.), 54 So. 666; *Reese v. Waters*, 4 W. & S. (Pa.) 145. Nor could he convey valid title to another. *Beavan v. Went*, 155 Ill. 592, 41 N. E. 91, 31 L. R. A. 85, and note; *Murray v. Kelly*, 27 Ind. 42; *Jackson v. Fitzsimmons*, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 4 L. ed. 613; *Levy v. M'Cartee*, 6 Pet. (U. S.) 102; 2 Blackstone Comm. 249; 2 Kent Comm. 62. See note to *Easton v. Huott*, 95 Iowa 473, 64 N. W. 408, 31 L. R. A. 177, where many cases in support of these propositions are cited. As to the right of a citizen to inherit from an alien under the New York law, see *Douglass v. Douglass*, 70 Misc. (N. Y.) 412, 126 N. Y. S. 912. See *Cramer v. McCann*, 83 Kans. 719, 112 Pac. 832, for the Kansas law on this subject.

³¹ *State v. Smith*, 70 Cal. 153; *Kalies v. Ewert*, 248 Ill. 612, 94 N. E. 105 (construing Illinois statute); *Douglass v. Douglass*, 70 Misc. (N. Y.)

412, 128 N. Y. S. 912; *Simpson Statute Law* 6013. An alien may be given the right to inherit real estate on such conditions as the state may impose. In *re Colbert's Estate*, 44 Mont. 259, 119 Pac. 791. See *Ahrens v. Ahrens*, 144 Iowa 486, 123 N. W. 164, Ann. Cas. 1912A. 1098, and note on the suspension of a statute prohibiting aliens from acquiring real estate by a treaty giving non-resident alien heirs certain rights in the real estate of their ancestor.

³² *Harley v. State*, 40 Ala. 689, and cases cited; *Guyer v. Smith*, 22 Md. 239, 85 Am. Dec. 650; *Waugh v. Riley*, 8 Metc. (Mass.) 290; *Cross v. De Valle*, 1 Wall. (U. S.) 5, 17 L. ed. 515; *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332, 6 L. ed. 488; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603, 3 L. ed. 453; *Phillips v. Moore*, 100 U. S. 208, 25 L. ed. 603; *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 122 Am. St. 914. Consequently he can devise lands so acquired and his devisee will hold against all save the sovereign. In *re Palmer Window Glass Co.*, 183 Fed. 902; *Williams v. Wilson*, Mart. & Y. (Tenn.) 248. The party to whom he conveys title holds subject to divestiture by the state. *Bradstreet v. Oneida County Suprs.*, 13 Wend. (N. Y.) 548. See, to the same effect, *Harley v. State*, 40 Ala. 689; *Purcell v. Smidt*, 21 Iowa 540; *Waugh v. Riley*, 8 Metc. (Mass.) 290.

³³ *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 122 Am. St. 914. See

By the law of nations all intercourse between citizens of countries at war with each other which is inconsistent with a state of hostilities is prohibited. Within that prohibition is included any act or contract which tends to increase the enemy's resources, and every kind of trading or commercial dealing or intercourse, directly or indirectly, between the two countries in any form.³⁴ Except as mentioned in the preceding note an alien enemy cannot, except with the license or permission of the government,³⁵ make a valid contract,³⁶ nor enforce a prior existing agreement,³⁷ so long as the war continues.³⁸ Ordinarily contracts entered into prior to the dec-

Scottish-Am. Mort. Co. v. Butler (Miss.), 54 So. 666, construing the Mississippi statute. See also, Bunkley v. Scottish-Am. Mort. Co., 185 Fed. 783, 31 L. R. A. (N. S.) 598. Thus, in case an alien locates a mining claim it is held by the modern doctrine that such location is voidable only and not void. Its validity can be attacked only by the government, and that defect may be cured by the alien conveying to a citizen. Stewart v. Gold & Co., 29 Utah 443, 82 Pac. 475, 110 Am. St. 719. See also, note in 7 L. R. A. (N. S.) 813-814.

³⁴ Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Shaw v. Carlisle, 9 Heisk. (Tenn.) 594; Briggs v. United States, 143 U. S. 346, 36 L. ed. 180, 12 Sup. Ct. 391. As to status of citizens of the North and South during the Civil War, see The Prize Cases, 2 Black. (U. S.) 635, 17 L. ed. 459. The following agreements are recognized as valid: (1) agreements for the ransom of persons; (2) property from the enemy's hands; (Brandon v. Nesbit, 6 T. R. 28; Goodrich v. Gordon, 15 Johns. (N. Y.) 6; Crawford v. The William Penn, 3 Wash. (U. S.) 484, Fed. Cas. No. 3373); (3) contracts by prisoners of war made for their subsistence while in the hands of the enemy (Crawford v. The William Penn, 3 Wash. (U. S.) 484, Fed. Cas. No. 3373); (4) or contracts to enable a shipmaster in an enemy's harbor to return the vessel to her home port (Crawford v. The William Penn, 3 Wash. (U. S.) 484, Fed.

Cas. No. 3373; Hallet v. Jenks, 3 Cranch (U. S.) 210, 2 L. ed. 414).

³⁵ Matthews v. McStea, 91 U. S. 7, 23 L. ed. 188. License may be implied from such aliens being permitted to remain in the country after the outbreak of hostilities. Zacharie v. Godfrey, 50 Ill. 186; Parkinson v. Wentworth, 11 Mass. 26; Hutchinson v. Brock, 11 Mass. 119; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Clark v. Morey, 10 Johns. (N. Y.) 68; Bradwell v. Weeks, 13 Johns. (N. Y.) 1; Russel v. Skipwith, 6 Bin. (Pa.) 241; Otteridge v. Thompson, 2 Cranch (U. S.) 108, Fed. Cas. No. 10618. It may be implied from a general relaxation of the rule against nonintercourse. Blackburne v. Thompson, 15 East 81.

³⁶ Hill v. Baker, 32 Iowa 302, 7 Am. Rep. 193; Phillips v. Hatch, 1 Dill. (U. S.) 571, Fed. Cas. No. 11094; Wright v. Graham, 4 W. Va. 430.

³⁷ Semmes v. City Fire Ins. Co., 36 Conn. 543; Brooke v. Filer, 35 Ind. 402; Bell v. Chapman, 10 Johns. (N. Y.) 183; Jackson v. Decker, 11 Johns. (N. Y.) 418; Blackwell v. Willard, 65 N. Car. 555, 6 Am. Rep. 749; Wilcox v. Henry, 1 Dall. (U. S.) 69; Mumford v. Mumford, 1 Gall. (U. S.) 366, Fed. Cas. No. 9918; Haymond v. Camden, 22 W. Va. 180; Sturm v. Fleming, 22 W. Va. 404.

³⁸ Marchand v. Coyle, 18 La. Ann. 632; Shotwell v. Ellis, 42 Miss. 439; In re The Rapid, 8 Cranch (U. S.) 155, 3 L. ed. 520; In re The Eliza, 2

laration of war are merely suspended during its continuance and revive upon its termination.³⁹ But commercial partnerships or other executory contracts, continuing in their nature, which cannot be performed without violating the laws governing a state of war, are dissolved thereby. This applies to any contract entered into prior to hostilities that contemplates or necessitates intercourse with the enemy during hostilities.⁴⁰ Nor can a contract not licensed by the government, entered into during the war, be enforced after peace is declared.⁴¹ Legal proceedings may, however, be maintained on a subsisting contract against an alien enemy or his property, if found within the jurisdiction of the courts of this country; if this were not true an enemy would be more advantageously situated than a friend.⁴² An agreement

Gall. (U. S.) 4; *Crawford v. The William Penn*, 3 Wash. 484, Fed. Cas. No. 3373.

³⁹ *Harmon v. Kingston*, 3 Camp. 150; *Flindt v. Waters*, 15 East. 260; *Stiles v. Easley*, 51 Ill. 275; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639; *Wheelan v. Cook*, 29 Md. 1; *Kershaw v. Kelsey*, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; *Hutchinson v. Brok*, 11 Mass. 119; *Bell v. Chapman*, 10 Johns. (N. Y.) 183; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Kierstad v. Orange & Co.*, 1 Hun (N. Y.) 151, 54 How. Pr. (N. Y.) 29, revd., 69 N. Y. 343, 25 Am. Rep. 199; *Sanderson v. Morgan*, 39 N. Y. 231; *Semmes v. City Fire Ins. Co.*, 6 Blatchf. (U. S.) 445, affd., 13 Wall. (U. S.) 158, 20 L. ed. 590; *New York Life Ins. Co. v. Stratham*, 93 U. S. 24, 23 L. ed. 789; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. 221; *Hanger v. Abbott*, 6 Wall. (U. S.) 532, 18 L. ed. 939; *Brown v. Hiatts*, 15 Wall. (U. S.) 177, 21 L. ed. 128; *Ross v. Jones*, 22 Wall. (U. S.) 576, 22 L. ed. 730; *Ware v. Hilton*, 3 Dall. (U. S.) 199; *Dunlop v. Ball*, 2 Cranch (U. S.) 180, 2 L. ed. 247; *Ahnert v. Zaun*, 40 Wis. 622.

⁴⁰ *Esposito v. Bowden*, 7 E. & B. 763; *Williams v. State*, 37 Ark. 463; *Yeaton v. Berney*, 62 Ill. 61; *Brown v. Delano*, 12 Mass. 370; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741; *Griswold v.*

Waddington, 15 Johns. (N. Y.) 57, 16 Johns. (N. Y.) 438; *Woods v. Wilder*, 43 N. Y. 164; *Cohen v. New York & Co. Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594; *The William Bagaley*, 5 Wall. (U. S.) 377, 18 L. ed. 583; *University v. Finch*, 18 Wall. (U. S.) 106, 21 L. ed. 818; *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188; *Cramer v. United States*, 7 Ct. Cl. (U. S.) 302; *Booker v. Kirkpatrick*, 26 Grat. (Va.) 145.

⁴¹ *Willison v. Patteson*, 7 Taunt. 436; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617, and note; *United States v. Grossmayer*, 9 Wall. (U. S.) 72, 19 L. ed. 627; *Scholefield v. Tickelberger*, 7 Pet. (U. S.) 586, 8 L. ed. 793; *Hart v. United States*, 15 Ct. Cl. (U. S.) 414; *Mixer v. Sibley*, 53 Ill. 61; *Seymour v. Bailey*, 66 Ill. 288; *Buford v. Speed*, 11 Bush (Ky.) 338; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617, and note; *Dorsey v. Thompson*, 37 Md. 25; *Dejarnette v. DeGiverille*, 56 Mo. 440; *Foreman v. Carter*, 9 Kans. 674.

⁴² *McVeigh v. United States*, 11 Wall. (U. S.) 259, 20 L. ed. 80; *University v. Finch*, 18 Wall. (U. S.) 106, 21 L. ed. 818. The courts are closed, however, against the alien enemy during the continuance of hostilities except with permission of the government. *Wells v. Williams*, 1

by a citizen in a neutral state to deliver goods in a neutral country to a subject of that country at a stipulated price and on certain conditions, the consignor taking all risks attending the transportation, is a legal and valid agreement in reference to the belligerent and does not destroy the neutral character of the property.⁴³

§ 266. **Convicts.**—Under the English common-law rule a person convicted of a felony, or attainted of certain crimes, was civilly dead. He lost the protection of the law, and forfeited his goods, chattels and chose in action to the crown.⁴⁴ He could not make a valid contract, nor could he enforce a contract made prior to his conviction.⁴⁵ A convict might, however, be sued on contracts made by him prior to or during outlawry or conviction.⁴⁶ These disabilities attaching to the convict might be removed by a pardon or a reversal of the judgment of outlawry.⁴⁷ The disabilities which under the common law attached to convicts do

Salk. 46; *Hoskins v. Gentry*, 2 Duv. (Ky.) 285; *Dorsey v. Thompson*, 37 Md. 25; *Clark v. Morey*, 10 Johns. (N. Y.) 68.

⁴³*Ludlow v. Bowne*, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277; *DeWolf v. New York & C. Ins. Co.*, 20 Johns. (N. Y.) 214. A woman who is abandoned by her husband, he becoming an alien enemy, is accorded the right of a feme sole. *Kay v. Duchess De Pienne*, 3 Camp. 123; *Cornwall v. Hoyt*, 7 Conn. 420; *Gregory v. Paul*, 15 Mass. 31.

⁴⁴*Britton v. Cole*, 1 Salk. 395; 3 Blackstone Comm. 284; *Chitty on Contracts* 151. "Civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of law." *In re Estate of Donnelly*, 125 Cal. 417, 58 Pac. 61, 73 Am. St. 62. A person civilly dead is not a "decendent" within the provisions of the code relative to estates on which letters of administration may be granted. *In re Zeph's Estate*, 50 Hun (N. Y.) 523, 3 N. Y. S. 460.

⁴⁵*Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368; *Chitty on Contracts*, 151; *Wald's Pollock on Contracts* 104. In

Chitty on Contracts, 262, it is said: "So a convict may acquire, but he cannot enjoy; he may acquire, not by virtue of any capacity in himself, but because, if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift. Although the donor cannot reclaim his gift, yet, by the common law, the thing given vested in the crown by its prerogative." Citing *King v. Inhabitants of Haddenham*, 15 East 463. It will be noticed that this is the same rule that applies in conveyances of real estate to aliens where their disability to hold real estate has not been removed. See ante, § 265, Aliens.

⁴⁶*MacDonald v. Ramsey*, Post. Cr. Cas. 61; *Wald's Pollock on Contracts*, 104; *Chitty on Contracts*, 151. It has been held by the courts in this country that, under statutes suspending the civil rights of a convict, the civil rights of his creditors are not suspended. *Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. 99; *In re Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111. See also, *Dunham v. Drake*, 1 N. J. L. 315; *Bonnell v. Rome & C. R. Co.*, 12 Hun (N. Y.) 218.

⁴⁷*Chitty on Contracts*, 151.

not as a general rule obtain in this country.⁴⁸ In the absence of a statute declaring him to be such, a convict is not civilly dead.⁴⁹ He may enter into contracts and sue and be sued thereon.⁵⁰ By the statutes of most of the states some disabilities are imposed upon the convict during his term of imprisonment. Reference must be had to the statutes of the various states in order to determine what those disabilities are.⁵¹

§ 267. Effect of laws requiring license or the like.—Ordinarily a contract entered into by an unlicensed person who is following, and which contract is made in the course of, a trade or profession required to be licensed, cannot be enforced by such person if it appears that the law was designed to protect the public from its own ignorance and the dishonesty of those who may engage in such calling.⁵² However, if the purpose of the statute is to raise revenue only, the contract may be valid, notwithstanding the want of a license.⁵³ The foregoing is the general rule

⁴⁸ *In re Nerac*, 35 Cal. 392, 95 Am. Dec. 111; *Cannon v. Windsor*, 1 *Houst.* (Del.) 143; *Willingham v. King*, 23 Fla. 478, 2 So. 851; *Presbury v. Hull*, 34 Mo. 29; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118; *Frazer v. Fulcher*, 17 Ohio 260; *Kenyon v. Sanders*, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232; *Davis v. Laning*, 85 Tex. 39, 19 S. W. 846, 18 L. R. A. 82, 34 Am. St. 784; *United States Constitution*, Art. 3, § 3; *Stimpson Am. Stat. L.*, §§ 143, 1162.

⁴⁹ *Cannon v. Windsor*, 1 *Houst.* (Del.) 143; *Dade Coal Co. v. Haslett*, 83 Ga. 550, 10 S. E. 435; *Beck v. Beck*, 36 Miss. 72; *Presbury v. Hull*, 34 Mo. 29; *Williams v. Shackleford*, 97 Mo. 322, 11 S. W. 222; *Davis v. Duffie*, 1 Abb. Dec. (N. Y.) 486; *Kenyon v. Saunders*, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232. A convict is not mere property without any civil rights, but has all the rights of an ordinary citizen which are not expressly or by necessary implications taken from him by law. *Westbrook v. State*, 133 Ga. 578, 66 S. E. 788. See *In re Nerac's Estate*, 35 Cal. 392, 95 Am. Dec. 111; *Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. 99; *Matter of Zeph*, 50 Hun (N. Y.) 523, 3 N. Y. Supp. 460; *Avery v. Everett*, 110 N.

Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368.

⁵⁰ *Willingham v. King*, 23 Fla. 478, 2 So. 851; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118; *Stephani v. Lent*, 30 Misc. (N. Y.) 346, 63 N. Y. S. 471; *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368; *Kenyon v. Saunders*, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

⁵¹ For illustration of the nature and effect of statutes taking away the civil rights of convicts, see *In re Donnelly*, 125 Cal. 417, 58 Pac. 61, 73 Am. St. 62; *Gray v. Stewart*, 70 Kans. 429, 78 Pac. 852, 109 Am. St. 461; *Harmon v. Bowers*, 78 Kans. 135, 96 Pac. 51, 17 L. R. A. (N. S.) 502n; *Smith v. Becker* (Kans.), 53 L. R. A. 141; *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368.

⁵² *Cope v. Rowland*, 2 Mees. & Wels. 149; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671n; *Levinson v. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, and note; *Taliaferro v. Moffett*, 54 Ga. 150; *Randall v. Tuell*, 89 Maine 443, 36 Atl. 910, 38 L. R. A. 143; *Puckett v. Alexander*, 102 N. Car. 95, 8 S. E. 767, 3 L. R. A. 43.

⁵³ *Vermont Loan & Co. v. Hoffman*, 5 Idaho 376, 49 Pac. 314, 37 L.

underlying such statutes and is given application in those instances where the statute does not specifically declare a contract entered into by an unlicensed person void or unenforcible or does not declare its violation a criminal offense. In many instances the statute itself declares the contract void or unenforcible.⁵⁴

Consequently, it has been held either on the ground of public policy or because expressly so provided by the statute requiring the procurement of a license, that no recovery could be had for services rendered by a physician or surgeon,⁵⁵ lawyer,⁵⁶ a teacher in the public schools,⁵⁷ brokers in real estate or other property,⁵⁸ pawnbrokers and other persons who lend

R. A. 509, 95 Am. St. 186; *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346; *Mandelbaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433; *Ruckman v. Bergholz*, 37 N. J. L. 437.

⁵⁴ *Mabry v. Bullock*, 7 Dana (Ky.) 337; *Sun Mutual Insurance Co. v. Searles*, 73 Miss. 62; *Rearden v. Henson* (Miss.), 29 So. 764; *Johnston v. Dahlgren*, 31 App. Div. (N. Y.) 204, 52 N. Y. S. 555. See also, *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348, 90 Am. St. 167.

⁵⁵ *D'Allax v. Jones*, 2 Jur. (N. S.) 979; *Harrison v. Jones*, 80 Ala. 412. In the above case the statute made it a misdemeanor to practice without a license. *Quarles v. Evans*, 7 La. Ann. 543; *Fox v. Dixon*, 58 Hun (N. Y.) 605, 34 N. Y. St. 710, 12 N. Y. S. 267. (In the above case the statute made it a misdemeanor to practice medicine without a license.) *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. 922. In the above case it was held that as long as the contract remains executory money paid thereunder may be recovered. In case the legislature repeals that part of the statute which prevents recovery, a physician not provided with a statutory certificate may then recover for his services. *Smythe v. Hanson*, 61 Mo. App. 285. See also, *Gremare v. Le Clerc Bois Valon*, 2 Comp. 144; *Prietto v. Lewis*, 11 Mo. App. 601; *Prince v. Eighth St. Baptist Church*, 20 Mo. App. 332.

⁵⁶ *Taylor v. Crowland Gas & Co.*,

10 Exch. 293; *Hall v. Bishop*, 3 Daly (N. Y.) 109. In the case of *Hittson v. Brown*, 3 Colo. 304, it is held that two persons practicing law as partners cannot recover for joint professional services unless both have procured the required license.

⁵⁷ *Wells v. People*, 71 Ill. 532; *Hosmer v. Sheldon School District*, 4 N. Dak. 197, 59 N. W. 1035, 25 L. R. A. 383, 50 Am. St. 639.

⁵⁸ *Gunter v. Lecky*, 30 Ala. 591; *Hustis v. Pickands*, 47 Ill. App. 270; *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348, 90 Am. St. 167; *Richardson v. Brix*, 94 Iowa 626, 36 N. W. 325; *Harding v. Hagar*, 60 Maine 340, 63 Maine 515; *Black v. Surety Mutual Life Assn.*, 95 Maine 35, 49 Atl. 51, 54 L. R. A. 939; *Pratt v. Burdon*, 168 Mass. 596, 47 N. E. 419; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. 637; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737. In the above case the statute did not declare that the contract should be void, but only inflict a penalty on the offender. The court laid down the rule "that if a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him." In connection with this case see *Rahper v. First Nat. Bank*, 92 Pa. 393, and also *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131, where the whole case was reaffirmed. *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *Saule v. Ryan* (Tenn. Ch. App.), 53 S. W. 977. See, however, *Prince v. Eighth*

money,⁵⁹ merchants and druggists,⁶⁰ hawkers and peddlers,⁶¹

St. Baptist Church, 20 Mo. App. 332; *Lindsey v. Rutherford*, 17 B. Mon. (Ky.) 245. In the above case it is held that if the license tax is imposed merely for the purpose of raising a revenue a contract formed without securing such license is not invalidated. To same effect, *Fairley v. Wampoo Mills*, 44 S. Car. 227, 22 S. E. 108, 29 L. R. A. 215. In the above case it is said: "It seems to us, however, that even where the statute does not, in express terms, declare the act unlawful, or prohibit the carrying on of the business in question without a license, yet if it appears, from a consideration of the terms of the legislation in question, that the legislative intent was to declare the act unlawful, or to prohibit the carrying on of the business without a license, then no contract in pursuance of such business can be enforced. In other words, the inquiry is as to the legislative intent, and that may be found, not only in the express terms of the statute, but also may be implied from the several provisions thereof."

⁵⁹ *Victorian Daylesford Syndicate v. Dott*, 74 L. J. Ch. (N. S.) 673, 2 Ch. (1905) 624; *Bonnard v. Dott*, 1906, 1 Ch. 740; *Lodge v. National Union Inv. Co.*, 1907, 1 Ch. 300; *Ferguson v. Norman*, 5 Bing. N. C. 76. In the above case it is held that the pawnbroker acquires no property in the pledge nor lien upon it as against an assignee in bankruptcy of the pledgor. *Levison v. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575n. In the above case the decision is based on grounds of public policy, the court saying: "It is to be noted that the business of a pawnbroker is one which has always been regarded as subject to police regulations for the benefit of the public, and to prevent frauds upon it." *Vermont & C. v. Hoffman*, 5 Idaho 376, 49 Pac. 314, 37 L. R. A. 509, 95 Am. St. 186. In the above case it is held that the contract is not void if the license fee is imposed to raise revenue only.

⁶⁰ *Watkins Medical Co. v. Paul*, 87 Ill. App. 278 (statute requiring license held to be a police measure). In the case of *Larned v. Andrews*,

106 Mass. 435, 8 Am. Rep. 346, it is held that it is no defense to an action for the price of goods that the special internal revenue tax imposed had not been paid. See also, *Johnson v. Hudson*, 11 East 180.

⁶¹ *Rash v. Holloway*, 82 Ky. 674, 6 Ky. L. 711; *Rash v. Farley*, 91 Ky. 344, 12 Ky. L. 913, 34 Am. St. 233, 15 S. W. 862. In the above cases lightening rods were sold by an unlicensed peddler and it was held he could not recover on his contract. *Stewartson v. Lothrop*, 12 Gray (Mass.) 52; *Best v. Bauder*, 29 How. Pr. (N. Y.) 489. In the above case it is said: "The question after all, I apprehend is, does the statute prohibit the sale without license? If it does the circumstance that it prohibited for revenue purposes is of no consequence for in such case as well as in any other the sale in violation of the prohibition is illegal and void and no action can be maintained without it."

In the case of hawkers and peddlers it is held in general, however, that the license fee imposed is merely for the purpose of raising revenue only, and that the contract entered into by a peddler who does not hold a license is not void and that he may recover the price of the goods sold. *Banks v. McCoster*, 82 Md. 518, 34 Atl. 539, 51 Am. St. 478; *Mandlebaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433, per Bronson, C. J., "in delivering the opinion of the court in *Griffith v. Wells*, 3 Denio (N. Y.) 226, said: 'When a license to carry on a particular trade is required for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, it may be that a sale without a license would be valid. * * *

But if the statute looks beyond the question of revenue, and has in view the protection of the public health or morals, or the prevention of frauds by the seller, then, although there be nothing but a penalty, a contract which infringes the statute cannot be supported.' * * *

We are of opinion that the plaintiff is entitled to maintain this action for the value of the goods, wares and merchandise sold and delivered to the

innkeepers,⁶² stock-breeders,⁶³ engineers,⁶⁴ plumbers,⁶⁵ or cartmen and scavengers⁶⁶ who have not obtained the required license. An agreement to share in the profits of an unlicensed theater has been held unenforceable where both parties thereto knew that the theater was unlicensed.⁶⁷

In many of the states similar restrictions are placed on foreign corporations. They are required to take out a license before doing business within the state. As a general rule, contracts entered into by such corporations without complying with the statutory provisions will not support an action in favor of the corporation.⁶⁸ The effect of these statutes forbidding corporations

defendant, notwithstanding the fact that at the time of the sale he had not procured the license required by § 67 of the revenue act. *Drexler v. Tyrrell*, 15 Nev. 136, 137; *Lindsey v. Rutherford*, 17 B. Mon. (Ky.) 245; *Hill v. Smith, Morris* (Iowa) 75; *Smith v. Mawhood*, 14 Mees. & Wels. 452; *Johnson v. Hudson*, 11 East 180, 10 R. R. 465; *Brown v. Duncan*, 10 B. & C. 93; *Witherell v. Jones*, 3 Barn. & Ad. 222; *Armstrong v. Toler*, 11 Wheat. (U. S.) 260. *Eberhardt v. Jones*, 19 Tex. Civ. App. 480, 48 S. W. 558. In this connection see *Commonwealth v. Hana*, 195 Mass. 262, 122 Am. St. 251, 81 N. E. 149, in which it is held that a state may, in the exercise of its police power, restrict the right to carry on the business of peddlers or hawkers or persons who are, or have declared their intention of becoming citizens of the United States. To same effect, *Trageser v. Gray*, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780n, 25 Am. St. 587. *Contra*, *State v. Montgomery*, 94 Maine 192, 47 Atl. 165, 80 Am. St. 386.

⁶² *Stanwood v. Woodward*, 38 Maine 192. In the above case it is held that the unlicensed innkeeper has no lien upon the property of his guest for board and lodging. *Randall v. Tuell*, 89 Maine 443, 36 Atl. 910, 38 L. R. A. 143. In the above case it is held he cannot recover the board and lodging furnished.

⁶³ *Smith v. Robertson*, 106 Ky. 472, 50 S. W. 852, 45 L. R. A. 510. See, however, *Wyman v. Wentworth*, 80 Maine 463, 10 Atl. 454, in which it is

held that the statute does not apply to a contract between other parties that one shall pay to the other the charge for services of a stallion as a part of the consideration in the sale of a horse.

⁶⁴ *The Pioneer, Deady* 72, Fed. Cases No. 11177.

⁶⁵ *Johnston v. Dahlgren*, 31 App. Div. 204, 52 N. Y. S. 555. In this connection see *Schnaier v. Navarre Hotel Importation Co.*, 182 N. Y. 83, 74 N. E. 561, 70 L. R. A. 722, 108 Am. St. 790, in which it is held that the legislature cannot prevent the formation of a partnership one of the members thereof being a licensed plumber, the other being unlicensed, and having nothing to do with the actual work but furnishing the money necessary to carry on the business.

⁶⁶ *Ferdon v. Cunningham*, 20 How. Pr. (N. Y.) 154; *De Wit v. Lander*, 72 Wis. 120, 39 N. W. 349.

⁶⁷ *De Begnis v. Armistead*, 10 Bing. 107. However, an actor has been held entitled to recover for services he rendered an unlicensed theater where he did not know at the outset that the theater was unlicensed. *Roys v. Johnson*, 7 Gray (Mass.) 162. A contract made with an architect in advance of the issuance to him of his certificate has been held not invalid. *Fitzhugh v. Mason*, 2 Cal. App. 220, 83 Pac. 282.

⁶⁸ *Dudley v. Collier*, 87 Ala. 431, 6 So. 304, 13 Am. St. 55; *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 7 So. 200; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Franklin*

from doing business in the state, except on compliance with their terms, depends necessarily on the wording and construction of such enactments.⁶⁹

The statutes of some of the states prohibit in express terms or by clear implication a foreign corporation from maintaining any action in the courts of the state until it has complied with the provisions prescribing the conditions upon which such a corporation shall do business in the state.⁷⁰ It must be borne in mind that statutes of the foregoing character are for the protection of the public generally, and are to be construed with that end in view. Consequently, a physician practicing without a license may be liable for malpractice, even though not able to recover for beneficial services he might render.⁷¹ The

Insur. Co. v. Louisville & A. Packet Co., 9 Bush (Ky.) 590; *Washington County Mut. Ins. Co. v. Hastings*, 2 Allen (Mass.) 398; *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877; *American Ins. Co. v. Smith*, 73 Mo. 368; *Barbor v. Boehm*, 21 Nebr. 450, 36 N. W. 221; *Stewart v. Northampton Mut. Live Stock Ins. Co.*, 38 N. J. L. 436; *Pennington & Kean v. Townsend*, 7 Wend. (N. Y.) 276; *Bank of British Columbia v. Page*, 6 Ore. 431; *Thorne v. Travellers Ins. Co.*, 80 Pa. 15, 21 Am. Rep. 89; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587; *Lycoming Fire Ins. Co. v. Medad Wright & Son*, 55 Vt. 526; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394.
⁶⁹ 5 *Thomp. Corp.* (2d ed.), § 6704.

⁷⁰ *Crefeld Mills v. Goddard*, 69 Fed. 141; *Goddard v. Crefeld Mills*, 75 Fed. 818, 21 C. C. A. 530; *Sullivan v. Beck*, 79 Fed. 200; *Caesar v. Capell*, 83 Fed. 403; *Simplex Dairy Co. v. Cole*, 86 Fed. 739; *Eastern Bldg. & C. Assn. v. Bedford*, 88 Fed. 7; *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 76 C. C. A. 172; *Wood Mowing & C. Mach. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Domestic Sewing Mach. Co. v. Hatfield*, 58 Ind. 187; *American Ins. Co. v. Pettijohn*, 62 Ind. 382; *Daly v. National Life Ins. Co.*, 64 Ind. 1; *Singer Mfg. Co. v. Brown*, 64 Ind. 548; *Johnson v. State*, 65 Ind. 204; *Behler v. German Mut. & C. Ins. Co.*, 68 Ind. 347; *American Ins. Co. v. Wellman*,

69 Ind. 413; *Singer Mfg. Co. v. Effinger*, 79 Ind. 264; *Elston v. Piggott*, 94 Ind. 14; *Security Sav. & C. Assn. v. Elbert*, 153 Ind. 198, 54 N. E. 753; *National Mut. Fire Ins. Co. v. Pursell*, 10 Allen (Mass.) 231; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *Neuchatel Asphalt Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043; *Davis Provision Co. v. Fowler Bros.*, 20 App. Div. (N. Y.) 626, 47 N. Y. S. 205, *aff.*, 163 N. Y. 580, 57 N. E. 1108; *Providence Steam & C. Co. v. Connell*, 86 Hun (N. Y.) 319, 67 N. Y. St. 196, 33 N. Y. S. 482; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073. The courts of Pennsylvania refuse to lend their aid to enforce a contract entered into by a corporation without procuring a license of authority, because it is in contravention of its statutes and involves the commission of a crime. The general rule in New York is that illegal and prohibited contracts are void, without being so expressly declared by statute. *Swing v. Dayton*, 108 N. Y. S. 155. (In the above case the court refused to enforce a contract made in Pennsylvania and illegal by the laws of that state).

⁷¹ *Musser's Exr. v. Chase*, 29 Ohio St. 577. See also, *Wellman v. Jones*, 124 Ala. 580, 27 So. 416, where it is held that a third person who advanced the amount demanded of the patient with the understanding that if a cure

same is true of contracts entered into by foreign corporations that have not obtained the right to do business in the state. A distinction must be drawn between those cases in which the corporation sets up its own default as a defense and the right of the other party to defeat a recovery when sued on the contract by the foreign corporation. The law is intended to protect the citizens and the contract should be construed as voidable at his option.⁷² This would seem to be the rule which should govern all contracts of this character. They should be deemed voidable and not void, otherwise the statute might defeat the very purpose for which it was intended.⁷³ On the other hand, the citizen cannot take the law into his own hands and destroy property, notwithstanding it may have been illegally kept for sale.⁷⁴

§ 268. **Youth or lack of age.**—All persons, male or female, under the age of twenty-one were by the common law declared minors.⁷⁵ The foregoing common-law rule has been made stat-

was not effected the money would be refunded, might recover the amount advanced upon the failure of the treatment. See also, *Bemis v. Becker*, 1 Kans. 226; *Mason v. McLeod*, 57 Kans. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. 327.

⁷² *Manhattan Ins. Co. v. Ellis*, 32 Ohio St. 388; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67.

⁷³ In 5 *Thomp. Corp.* (2d ed.), § 6711, it is said: "It is quite clear and thoroughly well settled that a foreign corporation that has not complied with the local statute permitting it to do business in a state cannot, when sued on a contract made by it, or for damages for its breach, plead as a defense its failure to comply with such statute."

⁷⁴ "Intoxicating liquors, whether exposed for sale unlawfully or not, are property in the District of Columbia, and cannot be taken or destroyed, save by the process of law. Assuming, for the sake of the argument, that the keeping for sale without license constitutes a public nuisance, as well as an offense, the fact affords neither justification nor excuse for their destruction by the defendant. The sale of intoxicating liquors without license is prohibited by law, and

may be prevented and punished, but this can only be done through the agencies and in the manner provided by the law. The abatement of public nuisances and the enforcement of the penal laws are matters of public duty and administration, and the interference of private persons, save in the making of complaints before the proper public officers and tribunal, is itself a nuisance, which, if accompanied by acts of violence, renders the wrongdoer liable both to civil action and criminal prosecution. Mob law can have no recognition in our system, and should be sternly repressed in its beginning." *Carry Nation v. District of Columbia*, 34 App. Cas. D. C. 453, 26 L. R. A. (N. S.) 996; *Turner v. Hitchcock*, 20 Iowa 310; *Brown v. Perkins*, 12 Gray (Mass.) 89; *State v. Paul*, 5 R. I. 185. See also, *State v. May*, 20 Iowa 305 (in which it is held that one may be guilty of larceny of liquor kept in violation of law).

⁷⁵ The law does not take into consideration fractions of a day. Consequently a person attains his majority on the day next preceding his twenty-first birthday. *Wells v. Wells*, 6 Ind. 447; *Hamlin v. Stevenson*, 4 Dana (Ky.) 597; *Bardwell v. Purrington*,

utory in the various states of the Union, except that in some of them females at least for some purpose or purposes, attain their majority at the age of eighteen. With but few exceptions the contracts of persons under age are voidable at the option of the infant and not void, and this is true no matter whether the contract is executory or executed.⁷⁶

It follows that a contract entered into with an infant is binding on the adult until rescinded by the minor.⁷⁷ The right to rescind is personal to the infant and cannot be taken advantage of by a third person.⁷⁸ However, in case the minor dies, becomes insane, or is by any other means rendered incapable of exercising this right, the contract may then be avoided or affirmed by his heirs, personal representative or guardian.⁷⁹

107 Mass. 419; *Phelan v. Douglas*, 11 How. Pr. (N. Y.) 193; *Ross v. Morrow*, 85 Tex. 172, 19 S. W. 1090, 16 L. R. A. 542.

⁷⁶ *Flexner & Lichten v. Dickerson*, 72 Ala. 318; *Weaver v. Jones*, 24 Ala. 420; *Riley v. Mallory*, 33 Conn. 201; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Tunison v. Chamblin*, 88 Ill. 378; *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Cole v. Pennoyer*, 14 Ill. 158; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216; *Petrow v. Wiseman*, 40 Ind. 148; *Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Leacox v. Griffith*, 76 Iowa 89, 40 N. W. 109; *Beickler v. Guenther*, 121 Iowa 419, 96 N. W. 895; *Vallandingham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Hoffert v. Miller*, 86 Ky. 572, 9 Ky. L. 732, 6 S. W. 447; *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17; *Mansfield v. Gordon*, 144 Mass. 169, 10 N. E. 773; *Reed v. Batchelder*, 1 Metc. (Mass.) 559; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Nichols & S. Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Philpot v. Sandwich Mfg. Co.*, 18 Nebr. 54, 24 N. W. 428; *Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. 665; *Boal v. Mix*, 17 Wend. (N. Y.) 119; *Slocum v. Hooker*, 13 Barb. (N. Y.) 536; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Lem-*

mon v. Beeman, 45 Ohio St. 505, 15 N. E. 476; *Union & C. Ins. Co. v. Hilliard*, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462n, 81 Am. St. 644; *Dolph v. Hand*, 156 Pa. 91, 27 Atl. 114, 36 Am. St. 25; *Brown v. Farmers' & C. Bank*, 88 Tex. 265, 31 S. W. 285; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. ed. 800; *Reed v. Lane*, 61 Vt. 481, 17 Atl. 796; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630; *Mustard v. Wohlfard's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043.

⁷⁷ *Field v. Herrick*, 101 Ill. 110; *Johnson v. Rockwell*, 12 Ind. 76; *Beeson v. Carlton*, 13 Ind. 354; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; *Monaghan v. Agricultural & C. Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Voorhees v. Wait*, 15 N. J. L. 343; *Patterson v. Lippincott*, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; *Titman v. Titman*, 64 Pa. 480; *Davies v. Turton*, 13 Wis. 185.

⁷⁸ *Dentler v. O'Brien*, 56 Ark. 49, 19 S. W. 111; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Hill v. Taylor*, 125 Mo. 331, 28 S. W. 599; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Continental Nat. Bank v. Strauss*, 137 N. Y. 148, 32 N. E. 1066.

⁷⁹ *Sharp v. Robertson*, 76 Ala. 343;

A minor may ratify his contract after reaching his majority. This may be done by an express ratification,⁸⁰ or by conduct.⁸¹ Should he fail to rescind within a reasonable time after attaining his majority⁸² he may be estopped⁸³ to plead infancy and barred by the statute of limitations.⁸⁴

§ 269. Mental incapacity.—Persons suffering from a mental incapacity to a greater or less degree may be divided into three classes. They are: idiots, lunatics, and those who are not legally totally incapacitated, but are mentally weak. An idiot is one who has been insane from birth. A lunatic is one who was at one time sane, but who from some cause or other has lost the use of his reason. The third class includes all forms of mental weakness which do not render the person affected totally incapable of transacting business or managing his affairs.⁸⁵

The contract of one so insane as to be unable to understand its nature and effect⁸⁶ is voidable at his option, except when for ne-

Jefford v. Ringgold, 6 Ala. 544; Shropshire v. Burns, 46 Ala. 108; Illinois Land Co. v. Bonner, 75 Ill. 315; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; Gillenwater v. Campbell, 142 Ind. 529, 41 N. E. 1041; Dinsmore v. Webber, 59 Maine 103; Kendall v. Lawrence, 22 Pick. (Mass.) 540; Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28; Hussey v. Jewett, 9 Mass. 100; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Harvey v. Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 411; Parsons v. Hill, 8 Mo. 135; O'Rourke v. Hall, 38 App. Div. (N. Y.) 534, 56 N. Y. S. 571; Tillinghast v. Holbrook, 7 R. I. 230; Walton v. Gaines, 94 Tenn. 420, 29 S. W. 458; Veal v. Fortson, 57 Tex. 482; Person v. Chase, 37 Vt. 647, 88 Am. Dec. 630.

⁸⁰ Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229n; Morse v. Wheeler, 4 Allen (Mass.) 570; Taft v. Sergeant, 18 Barb. (N. Y.) 320.

⁸¹ American Freehold &c. Co. v. Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538; Hilton v.

Shepherd, 92 Maine 160, 42 Atl. 387; Tobey v. Wood, 123 Mass. 88; Ferguson v. Bell, 17 Mo. 347; Bloomer v. Nolan, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. 690; Aldrich v. Grimes, 10 N. H. 194; Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; Morrill v. Aden, 19 Vt. 505; Darragh v. Blackford, 84 Va. 509, 5 S. E. 542.

⁸² Goodnow v. Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798.

⁸³ Fox v. Drewry, 62 Ark. 316, 35 S. W. 533; Stringer v. Northwestern Mut. Life Ins. Co., 82 Ind. 107; Hartman v. Kendall, 4 Ind. 403; Wheaton v. East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251.

⁸⁴ Stringer v. Northwestern Mut. Life Ins. Co., 82 Ind. 100. In the above section it is only intended to lay down three or four of the fundamental principles applicable to contracts entered into by infants. The subject is treated at length in the succeeding chapter.

⁸⁵ Chitty on Contracts, 108.

⁸⁶ White v. Farley, 81 Ala. 563, 8 So. 215; Hale v. Hills, 8 Conn. 39; Titcomb v. Vantyle, 84 Ill. 371; English v. Porter, 109 Ill. 285; Sands v.

cessaries.⁸⁷ This is a privilege personal to the insane party and the agreement cannot be avoided by the other party or a third person.⁸⁸ However, it is generally true that when the insane person is not under a guardian or conservator and the other contracting party has no reasonable cause to believe him otherwise insane, the agreement is valid if equitable and beneficial to such insane person, and it has been so far executed that the other party cannot be placed *in statu quo*.⁸⁹ A person of unsound mind is lia-

Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. 253; Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; Elwood v. O'Brien, 105 Iowa 239, 74 N. W. 740; Wall v. Hill's Heirs, 1 B. Mon. (Ky.) 290, 36 Am. Rep. 578; Hovey v. Chase, 52 Maine 304, 83 Am. Dec. 514; Bond v. Bond, 7 Allen (Mass.) 1; Devereaux v. Hubbard, 117 Mich. 119, 75 N. W. 450; Cutler v. Zollinger, 117 Mo. 92, 22 S. W. 895; Boggess v. Boggess, 127 Mo. 305, 29 S. W. 1018; Hay v. Miller, 48 Nebr. 156, 66 N. W. 1115; Young v. Stevens, 48 N. H. 133, 97 Am. Dec. 592; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; White v. White, 60 N. J. Eq. 104, 45 Atl. 767; Wilkinson v. Sherman, 45 N. J. Eq. 413, 18 Atl. 228; Stewart v. Lispenard, 26 Wend. (N. Y.) 255; Carnagie v. Diven, 31 Ore. 366, 49 Pac. 891; Noel v. Karper, 53 Pa. St. 97; Elcessor v. Elcessor, 146 Pa. St. 359, 23 Atl. 230; Kedward v. Campbell, 166 Pa. St. 365, 31 Atl. 114; King v. Cummings, 60 Vt. 502, 11 Atl. 727; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383; Brothers v. Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. 932; Mulligan v. Albersz, 103 Wis. 140, 78 N. W. 1093.

⁸⁷ Castro v. Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. 84; Coburn v. Raymond, 76 Conn. 484, 57 Atl. 116, 100 Am. St. 1000; Woolley v. Gaines, 114 Ga. 122, 39 S. E. 892, 88 Am. St. 22; Burnham v. Kidwell, 113 Ill. 425; Mead v. Stegall, 77 Ill. App. 679; Ætna Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. 481; Downham v. Holloway, 158 Ind. 626, 64 N. E. 82, 92 Am. St. 330; Allen v. Berryhill, 27 Iowa 534, 1 Am. Rep. 309; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am.

St. 443; Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Howe v. Howe, 99 Mass. 88; Wolcott v. Ins. Co., 137 Mich. 309, 100 N. W. 569; Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1; McAnaw v. Tiffin, 143 Mo. 667, 45 S. W. 656; Gingrich v. Rogers, 69 Neb. 527, 96 N. W. 156; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Blakeley v. Blakeley, 33 N. J. Eq. 502; Blinn v. Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. 806; Creekmore v. Baxter, 121 N. Car. 31, 27 S. E. 994; Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766; Pearson v. Cox, 71 Tex. 246, 9 S. W. 124, 10 Am. St. 740; Luhrs v. Hancock, 181 U. S. 567, 45 L. ed. 1005, 21 Sup. Ct. 726; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910.

⁸⁸ Mead v. Stegall, 77 Ill. App. 679; Rollett v. Heiman, 120 Ind. 511, 22 N. E. 666, 16 Am. St. 340; Allen v. Berryhill, 27 Iowa 534, 1 Am. Rep. 309; Carrier v. Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707; Atwell v. Jenkins, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. 463; Hunt v. Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. 563; McAnaw v. Tiffin, 143 Mo. 667, 45 S. W. 656; Ingraham v. Baldwin, 9 N. Y. 45; Lee v. Yandell, 69 Tex. 34, 6 S. W. 665.

⁸⁹ Molton v. Camroux, 4 Exch. 17; Coburn v. Raymond, 76 Conn. 484, 57 Atl. 116, 100 Am. St. 1000; Scanlan v. Cobb, 85 Ill. 296; Ronan v. Bluhm, 173 Ill. 277, 50 N. E. 694; Eldredge v. Palmer, 185 Ill. 618, 57 N. E. 770, 76 Am. St. 59; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Abbott v. Creal, 56 Iowa 175, 9 N. W. 115; Harrison v. Otley, 101 Iowa 652, 70 N. W. 724; Gribben v. Maxwell, 34 Kans. 8, 7 Pac. 584, 55 Am. Rep.

ble on his contract for necessities.⁹⁰ Nor does mere mental weakness from whatever cause, which does not totally destroy the ability to comprehend the nature and effect of the transaction, furnish ground for the avoidance of a contract entered into by such persons in the absence of evidence showing fraud, duress or undue influence.⁹¹

§ 270. Deaf mutes.—The first thought of the law on this subject was to the effect that deaf mutes were presumed to be

233; *Myers v. Knabe*, 51 Kans. 720, 33 Pac. 602; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. 418; *Shoulters v. Allen*, 51 Mich. 529, 16 N. W. 888; *Moran v. Moran*, 106 Mich. 8, 63 N. W. 989, 58 Am. St. 462; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; *Jamison v. Culligan*, 151 Mo. 410, 52 S. W. 224; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592; *Yanger v. Skinner*, 14 N. J. Eq. 389; *Matthiessen Weickers Refining Co. v. McMahon's Admr.*, 38 N. J. L. 526; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Riggs v. American Tract Society*, 84 N. Y. 330; *Rigan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. 720; *Lancaster &c. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *Wirebach v. First Nat. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821. But see, *Woollery v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. 22; *Hovey v. Hobson*, 53 Maine 451, 89 Am. Dec. 705; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Rea v. Bishop*, 41 Nebr. 202, 59 N. W. 555; *Wager v. Wagoner*, 53 Nebr. 511, 73 N. W. 937; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766.

⁹⁰ *In re Rhodes*, 44 Ch. Div. 94; *Borum v. Bell*, 132 Ala. 85, 31 So. 454; *Palmer v. Hudson River State Hospital*, 10 Kans. App. 98, 61 Pac. 506; *Hallett v. Oakes*, 1 Cush. (Mass.) 296; *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; *Sceva v. True*, 53 N. H. 627; *Van Horn v. Hann*, 39 N. J. L. 207;

Waldron v. Davis, 70 N. J. L. 788, 58 Atl. 293, 66 L. R. A. 591; *Ingraham v. Baldwin*, 9 N. Y. 45; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. 720; *La Rue v. Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700; *Wirebach v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821.

⁹¹ *Miller v. Craig*, 36 Ill. 109; *Burt v. Quisenbury*, 132 Ill. 385, 24 N. E. 622; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Argo v. Coffin*, 142 Ill. 368, 32 N. E. 679, 34 Am. St. 86; *Peabody v. Kendall*, 145 Ill. 519, 32 N. E. 674; *Graham v. Castor*, 55 Ind. 559; *Elwood v. O'Brien*, 105 Iowa 239, 74 N. W. 740; *Darby v. Hayford*, 56 Maine 246; *Richardson v. Travelers' Ins. Co. (Maine)*, 82 Atl. 1005; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Milks v. Milks*, 129 Mich. 164, 88 N. W. 402; *Trimbo v. Trimbo*, 47 Minn. 389, 50 N. W. 350; *Sprinkle v. Wellborn*, 140 N. Car. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. 827; *Hill v. Day*, 34 N. J. Eq. 150; *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264; *Swank v. Swank*, 37 Ore. 439, 61 Pac. 846; *Aiman v. Stout*, 42 Pa. 114; *Hepler v. Hosack*, 197 Pa. 631, 47 Atl. 847; *Moorhead v. Scovel*, 210 Pa. 446, 60 Atl. 13; *Cooney v. Lincoln*, 21 R. I. 246, 42 Atl. 867, 79 Am. St. 799; *Ralston v. Turpin*, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. 420; *Miller v. Rutledge's Committee*, 82 Va. 863, 1 S. E. 202; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. 788. Contracts of those suffering from mental incapacity will be found discussed at length in a subsequent chapter. See post, Ch. 12, Insane Persons.

non compos mentis.⁹² This presumption no longer obtains and it is immaterial whether the affliction is congenital or comes upon one at some period in life after birth.⁹³ But the contracts of a deaf mute are binding, if it appears he has sufficient mental capacity to understand the transaction.⁹⁴ There is an obiter statement to the effect that "if, superadded to the deprivation of the two senses before mentioned, the grantor had been blind, he would be considered in law as incapable of any understanding, being deficient in those inlets which furnish the human mind with ideas. But this is not predicable of persons who, from their nativity, are both deaf and dumb only."⁹⁵ However, in view of the success accomplished by modern methods in instructing those who are deaf, dumb and blind, the presumption of incapacity which arises in such cases is probably rebuttable.⁹⁶

§ 271. **Coverture.**—The common law as a general rule considers married women incapable of entering into a valid executory contract and holds such an agreement void. A woman under coverture was considered as having no separate existence

⁹² 1 Hale, P. C. 34; 1 Bl. Comm. 304; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329. In *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441, Chancellor Kent said: "Perhaps, after all, the presumption, in the first instance, is, that every such (deaf and dumb) person is incompetent. It is a reasonable presumption, in order to insure protection, and prevent fraud, and is founded on the notorious fact, that the want of hearing and speech exceedingly cramps the powers, and limits the range of the mind. The failure of the organs requisite for general intercourse and communion with mankind oppresses the understanding." 8 Am. & Eng. Encyc. of Law (2d ed.) 842.

⁹³ *Alexier v. Matzke*, 151 Mich. 36, 115 N. W. 251, 123 Am. St. 255; *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *Christmas v. Mitchell*, 38 N. Car. 535; *Barnett v. Barnett*, 54 N. Car. (1 Jones Eq.) 221.

⁹⁴ *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187. In the case last cited the deaf and dumb party had been so afflicted from birth. *Alexier v.*

Matzke, 151 Mich. 36, 115 N. W. 251, 123 Am. St. 255. In the above case the deaf and dumb party to the contract had been in that condition ever since the age of three. He had never been instructed by the usual methods used by the deaf and dumb mutes to communicate with others. It appeared, however, that he did not lack ordinary intelligence and that he understood the contract when he signed it, consequently the courts held him bound.

⁹⁵ *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187.

⁹⁶ See *Barnett v. Barnett*, 54 N. Car. 221. A speechless paralytic has been held capable of making a will. *Rothrock v. Rothrock*, 22 Ore. 551, 30 Pac. 453. The mere fact the testator was unable to speak articulately does not cast upon the proponent of the will for probate the burden of proving mental capacity. In re *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441. See also, In re *Biddulph's Trusts*, 5 DeG. & Sm. 469; *Dickenson v. Blissett*, 1 Dickens 268.

from that of her husband. The common-law rule relative to her ability to contract still obtains except as changed by statute in the various states.⁹⁷ However, the common law recognizes exceptions to this general rule, certain of which arose out of necessity. Thus the wife of one civilly dead by being outlawed or convicted of a felony might contract as a feme sole.⁹⁸ Likewise, if the husband has never resided within the state or has gone beyond its jurisdiction with the intention of abandoning his wife and wholly renouncing his marital rights and duties, she has the right to contract.⁹⁹ By the custom of London if a feme covert, the wife

⁹⁷ *Loyd v. Lee*, 1 Strange 94; *Johnson v. Gallagher*, 3 DeG. F. & J. 494; *Smith v. Plomer*, 15 East 607; *Threefoot v. Hilman*, 130 Ala. 244, 30 So. 513, 89 L. R. A. 39, 89 Am. St. 39; *Dobbin v. Hubbard*, 17 Ark. 189, 65 Am. Dec. 425; *Butler v. Buckingham*, 5 Day (Conn.) 492, 5 Am. Dec. 174; *Ross v. Singleton*, 1 Del. Ch. 149, 12 Am. Dec. 86; *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684, 5 Am. St. 526; *Stevens v. Parish*, 29 Ind. 260, 95 Am. Dec. 636; *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. 456; *Graham v. Graham*, 22 Ky. L. 123, 56 S. W. 708; *Gilbert v. Brown*, 29 Ky. L. 1248, 97 S. W. 40, 7 L. R. A. (N. S.) 1053; *Brown v. Dalton*, 105 Ky. 669, 20 Ky. L. 1484, 49 S. W. 443, 88 Am. St. 325; *Robinson v. Robinson*, 11 Bush (Ky.) 174; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Lee v. Lanahan*, 59 Maine 479; *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171; *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; *Bassett v. Bassett*, 112 Mass. 99; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *McFarland v. Heim*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. 629; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Citizens' State Bank v. Smout*, 62 Nebr. 223, 86 N. W. 1068; *Harris v. Webster*, 58 N. H. 481; *Wadleigh v. Glines*, 6 N. H. 17, 23 Am. Dec. 705; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259; *Jackson v. Vanderheyden*, 17

Johns. (N. Y.) 167, 8 Am. Dec. 378; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; *Brown v. Brown*, 121 N. Car. 8, 27 S. E. 998, 38 L. R. A. 242; *Terry v. Robbins*, 128 N. Car. 140, 38 S. E. 470, 83 Am. St. 663; *Dorrance v. Scott*, 3 Whar. (Pa.) 309, 31 Am. Dec. 509; *McKinley v. McGregor*, 3 Whar. (Pa.) 369, 31 Am. Dec. 522; *Foster v. Wilcox*, 10 R. I. 443, 14 Am. Rep. 698; *First Nat. Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 498, 97 Am. St. 840; *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; *Hollis v. Francois*, 5 Tex. 195, 51 Am. Dec. 760; *Canal Bank v. Partee*, 99 U. S. 325, 25 L. ed. 390; *Norton v. Meader*, Fed. Cas. No. 10351, 4 Sawy. (U. S.) 603, affd., 11 Wall. 442, 20 L. ed. 184; *Drury v. Foster*, 2 Wall. (U. S.) 24, 17 L. ed. 780; *Hayward v. Baker*, 52 Vt. 429, 36 Am. Rep. 762; *Sherwin v. Sanders*, 59 Vt. 499, 9 Atl. 239, 59 L. R. A. 750, 59 Am. Rep. 750; *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624; *Pickens' Exrs. v. Kniseley*, 36 W. Va. 794, 15 S. E. 997; *Weisbrod v. Chicago & C. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743. See also, *Haggett v. Hurley*, 91 Maine 542, 40 Atl. 561, 41 L. R. A. 362.

⁹⁸ *Ex parte Franks*, 7 Bing. 762, 1 M. & Sc. 1; *Hatchett v. Baddeley*, 2 W. Bl. 1079; *Carrol v. Blencow*, 4 Esp. 27; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174, 15 Am. Dec. 673; *Wald's Pollock on Contracts*, p. 90.

⁹⁹ *Carrol v. Blencow*, 4 Esp. 27 (abjured the realm); *Walford v. Duchess of Pienne*, 2 Esp. 554 (abjured the realm); *Robinson v. Reynolds*, 1 Aik. (Vt.) 174, 15 Am. Dec.

of a free man, traded for herself in a trade free from her hus-

673 (abjured the realm); Countess of Portland v. Prodggers, 2 Vern. 104 (husband banished); Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Mead v. Hughes' Admr., 15 Ala. 141, 50 Am. Dec. 123; Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707; Blumenberg v. Adams, 49 Cal. 308; Cornwall v. Hoyt, 7 Conn. 420; Clark v. Valentino, 41 Ga. 143; Love v. Moynahan, 16 Ill. 277, 63 Am. Dec. 306; Rawson v. Spangler, 62 Iowa 59, 17 N. W. 173; Smith v. Silence, 4 Iowa 321, 66 Am. Dec. 137; Waugh v. Bridgeford, 69 Iowa 334, 28 N. W. 626 (she may dispose of his exempt property and her husband's creditors cannot interfere); Ayer v. Warren, 47 Maine 217; Wolf v. Banereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680n; Gregory v. Paul, 15 Mass. 31; Gregory v. Pierce, 4 Metc. (Mass.) 478; Abbot v. Bayley, 6 Pick. (Mass.) 89; Phelps v. Walther, 78 Mo. 320, 47 Am. Rep. 112; Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780; Gallagher v. Delargy, 57 Mo. 29; Palmer v. McMasters, 6 Mont. 169, 9 Pac. 898; Osborn v. Nelson, 59 Barb. (N. Y.) 375; McArthur v. Bloom, 2 Duer. (N. Y.) 151; Levi v. Marsha, 122 N. Car. 565, 29 S. E. 882; Rosenthal v. Mayhugh, 33 Ohio St. 155; Wagg's Exr. v. Gibbons, 5 Ohio St. 580; Starrett v. Wynn, 17 Serg. & R. (Pa.) 130, 17 Am. Dec. 654; Bean v. Morgan, 4 McCord (S. Car.) 148 (questioned in Boyce v. Owens, 1 Hill (S. Car.) 8); Heagy v. Kastner (Tex. Civ. App.), 138 S. W. 788 (abandoned by husband, who had gone beyond the limits of the state); Rhea v. Rhenner, 1 Pet. (U. S.) 105, 7 L. ed. 72; Robinson v. Reynolds, 1 Aik. (Vt.) 174, 15 Am. Dec. 673. "It being simply just to the wife that, the husband having deserted her, and gone beyond the limits of the state, with no intention of returning, she, being thus deprived of her marital rights, should be allowed to manage and dispose of her property as though she were a feme sole." Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. 854. She has the power to manage, control and convey the community property. Wright v. Hays, 10

Tex. 130, 60 Am. Dec. 200; Fullerton v. Doyle, 18 Tex. 3; Zimpelman v. Robb, 53 Tex. 274. The rule is the same where the husband has fled from justice. Cheek v. Bellows, 17 Tex. 613, 67 Am. Dec. 686. But see De Wahl v. Braune, 1 Hurl. & Nor. 178, 25 L. J. Exch. 343; Mason v. Jordan, 13 R. I. 193. See also, Stewart v. Conrad's Admr., 100 Va. 128, 40 S. E. 624, in which it is held that the mere fact that a feme sole resided in Pennsylvania during the Civil War while her husband was in the Confederate army did not enlarge her capacity to contract, when it appears she went through the lines to visit her husband and that they always before, during and since the war recognized their marital relations. Separation by mutual consent does not enlarge her capacity at common law. Marshall v. Rutton, 8 T. R. 545; High v. Worley, 33 Ala. 196; Parker's Exr. v. Lambert's Admr., 31 Ala. 89; Chouteau v. Merry, 3 Mo. 254; Freer v. Walker, 1 Bail. (S. Car.) 184; Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Robards v. Hutson & Price, 3 McCord (S. Car.) 475; Robinson v. Reynolds, 1 Aik. (Vt.) 174, 15 Am. Dec. 673. See also, Meyor v. Haworth, 8 Ad. & El. 467; Hatchett v. Baddeley, 2 W. Bl. 1079. By the statutes of New Jersey a married woman living separate from her husband who refuses to support her may, during such separation, apply to the court of chancery for leave to dispose of her real estate as if sole. In re Staheli, 78 N. J. Eq. 74, 78 Atl. 206. Nor did insanity on the part of the husband enlarge her powers. McAnally v. Alabama Insane Hospital, 109 Ala. 109, 19 So. 492, 34 L. R. A. 223, 55 Am. St. 923; Shaw v. Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655. But see Shin v. Bosart, 72 Ind. 105; Harris v. Bohle, 19 Mo. App. 529; Forbes v. Moore, 32 Tex. 195; Gustin v. Carpenter, 51 Vt. 585. The case of Smith v. Howe, 31 Ind. 233, holds that she cannot charge her real estate by her agreement to pay a third person if he will inform her as to the whereabouts of her husband.

band's control, she might make valid contracts in such periods.¹ In case a divorce is procured by either one of the parties the relation of husband and wife is terminated and she may contract as a feme sole.²

§ 272. **Artificial persons and corporations.**—Artificial persons are such as are created and devised by human laws for the purposes of society and government, and are called corporations or bodies politic.³ Such persons have the capacity to make contracts within the scope of the powers conferred upon them by the act of incorporation.⁴ Their very creation gives them the right to do any act or make any contract properly within the scope of their undertaking.⁵ A contract is deemed to be within the scope of a corporation's power if it may fairly be regarded as incidental to or consequential upon the power expressly conferred by its articles of incorporation,⁶ or, in general, when it is necessary, or is an appropriate means of carrying out the express powers granted, and of accomplishing the purposes of its creation,⁷ and which is

¹ *LaVie v. Phillips*, 1 Wm. Bl. 570, 3 Burr. 1776; *Newbiggin v. Pillans*, 2 Bay (S. Car.) 162; *Bracton's Abridgement*, Customs of London, D.

² *Wilkinson v. Gibson*, L. R. 4 Eq. 162. It has been held that a divorce from bed and board gives the woman the right of a feme sole so long as she continues to live separate from her husband. *Dean v. Richmond*, 5 Pick. (Mass.) 461; *Pierce v. Burnham*, 4 Metc. (Mass.) 303. Contra, *Lewis v. Lee*, 3 Barn. & Cr. 291; *Fairthorne v. Blaquiere*, 6 M. & S. 73. Contracts by married women will be discussed at greater length in a subsequent chapter.

³ 1 Bl. Comm. 123; *Chapman v. Brewer*, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. 779.

⁴ *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; *Metropolitan Bank v. Godfrey*, 23 Ill. 579.

⁵ 3 Thomp. Corp. (2d ed.), § 2120.

⁶ *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Brewer & Hoffmann Brewing Co. v. Boddie*, 181 Ill. 622, 55 N. E. 49; *West v. Madison County Agr. Board*, 82 Ill. 205; *Peru Bridge Co. v. Hendricks*, 18 Ind. 11; *Balti-*

more v. Baltimore & O. R. Co., 21 Md. 50; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Morville v. American Tract. Soc.*, 123 Mass. 129; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Ellerman v. Chicago &c. Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Curtis v. Leavitt*, 15 N. Y. 9; *McMasters v. Reed's Exrs.*, 1 Grant's Cas. (Pa.) 36; *Jacksonville &c. R. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. 379.

⁷ *London &c. R. Co. v. Price*, 11 Q. B. D. 485; *In re National Shoe & Leather Bank's Appeal*, 55 Conn. 469, 12 Atl. 646; *People v. Pullman Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; *People v. Chicago Gas Trust Co.*, 130 Ill. 261, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. 319; *Arkansas &c. Town Co. v. Lincoln*, 56 Kans. 145, 42 Pac. 706; *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Crawford v. Longstreet*, 43 N. J. L. 325; *Gas & Fuel Co. v. Davis Co.*, 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395; *Malone v. Lancaster Gas Light Co.*,

not prohibited by the charter itself nor by any rule of law applicable thereto,⁸ nor inconsistent with the purposes for which it was incorporated and not irreconcilable with its nature.⁹ An agreement which is entered into by a corporation and which is outside the scope of the powers conferred upon it by its articles of incorporation is considered *ultra vires*, and invalid.¹⁰

§ 273. Agents and representatives.—Only two phases of the law relative to principal and agent will be mentioned at this point. They are: first, who may form the relation of principal and agent; second, what contracts entered into by the agent on behalf of the principal will be binding on such principal. It has

182 Pa. 309, 37 Atl. 932; *Union Pacific R. Co. v. Chicago &c. R. Co.*, 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. 1173; *Jacksonville &c. R. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. 379; *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239, 71 N. W. 101.

⁸ *Critchfield v. Bermudez Paving Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; *Franklin &c. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; *Commercial Bank v. Nolan*, 7 How. (Miss.) 508; *Marshall v. Baltimore &c. R. Co.*, 16 Howard (U. S.) 314; *Chippeway Valley &c. R. Co. v. Chicago, St. P. &c. R. Co.*, 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601.

⁹ *Chewacla Lime Works v. Dis-mukes*, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100; *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388; *Brunswick Gas Light Co. v. United Gas, Fuel &c. Co.*, 85 Maine 532, 27 Atl. 525, 35 Am. St. 385; *Middlesex R. Co. v. Boston & C. R. Co.*, 115 Mass. 347; *Wolford v. Military Assn.*, 54 Minn. 440, 56 N. W. 56; *Barry v. Merchants' Exchange Co.*, 1 Sands. Ch. (N. Y.) 280; *Alexander v. Cauldwell*, 83 N. Y. 480; *Thomas v. W. Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Louisville &c. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714; *State v. Anderson*, 97 Wis. 114, 72 N. W. 386.

¹⁰ *Steiner v. Lumber Co.*, 120 Ala. 128, 26 So. 494; *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560; *Byrne v. Schuyler Electric Mfg. Co.*, 65

Conn. 336, 31 Atl. 833, 28 L. R. A. 304; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Chicago Gas Light &c. Co. v. People's Gas Light &c. Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; *Fietsam v. Hay*, 122 Ill. 293, 13 N. E. 501, 3 Am. St. 492; *Rogers v. Jewell Belting Co.*, 184 Ill. 574, 56 N. E. 1017; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. 26; *Wheeler v. Bank*, 188 Ill. 34, 58 N. E. 598, 80 Am. St. 161; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Twiss v. Guaranty Life Assn.*, 87 Iowa 733, 55 N. W. 8, 43 Am. St. 418; *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449; *Bankers' Union of the World v. Crawford*, 67 Kans. 449, 73 Pac. 79, 100 Am. St. 465; *M. V. Monarch v. Farmers' & Drovers' Bank*, 105 Ky. 430, 20 Ky. L. 1315, 49 S. W. 317, 88 Am. St. 310; *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *Smith v. Stoughton*, 185 Mass. 329, 70 N. E. 195; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; *Gould v. Fuller*, 79 Minn. 414, 82 N. W. 673; *State v. Trust Co.*, 144 Mo. 562, 46 S. W. 593; *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425; *Sturdevant Bros. v. Bank*, 62 Nebr. 472, 87 N. W. 156; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482.

been held that the act whereby a person of unsound mind¹¹ or an infant¹² attempts to appoint an agent is absolutely void. In other words, they cannot act as a principal. On the other hand, one may act as agent even though he is unable to stand in the position of principal or does not have the capacity to enter into a contract on his own responsibility.¹³ In the absence of ratification by, or estoppel of, the principal, the agent binds his principal only in so far as he acts within the apparent scope of his employment.¹⁴

§ 274. Drunken persons.—A contract entered into by a person when in a state of complete intoxication and deprived of

National Park Bank v. German-American Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; Alexander v. Cauldwell, 83 N. Y. 480; Markley v. Mineral City, 58 Ohio St. 430, 51 N. E. 28, 65 Am. St. 776; Straus v. Eagle Ins. Co., 5 Ohio St. 59; Franklin Bank v. Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594; Commonwealth v. Erie & C. Co., 27 Pa. 339, 67 Am. Dec. 471n; Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699; Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. For a further discussion of corporations and their contracts, see post, ch. 18.

¹¹ Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25; McClun v. McClun, 176 Ill. 376, 52 N. E. 928; Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. 146; Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73.

¹² Philpot v. Bingham, 55 Ala. 435; Trueblood v. Trueblood, 8 Ind. 195; Pyle v. Cravens, 4 Litt. (Ky.) 17; Lawrence v. McArthur, 10 Ohio 37; Rocks v. Cornell, 21 R. I. 532, 45 Atl. 552; Knox v. Flack, 22 Pa. 337; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73. See, however, Coursolle v. Weyerhaeuser, 69 Minn. 328, 72 N. W. 697.

¹³ Lyon v. Kent, 45 Ala. 656; Talbot v. Bowen, 18 Kv. (1 A. K. Marsh.) 436, 10 Am. Dec. 747. It has been held that one adjudged an habitual

drunkard may act as administrator or executor. Sill v. M'Knight, 7 Watts. & S. (Pa.) 244.

¹⁴ See Simon v. Johnson, 101 Ala. 368, 13 So. 491; Birmingham Mineral & C. Co. v. Tennessee R. Co., 127 Ala. 137, 28 So. 679; Snapp v. Stanwood, 65 Ark. 222, 45 S. W. 546; Lakeside & C. Co. v. Campbell, 39 Fla. 523, 22 So. 878; Brandenstein v. Douglas, 105 Ga. 845, 32 S. E. 341; Blackmer v. Summit Coal & Mining Co., 187 Ill. 32, 58 N. E. 289; Kinser v. Clay County, 165 Ill. 505, 46 N. E. 372, affg. 64 Ill. App. 437; Noftsg v. Barkdall, 148 Ind. 531, 47 N. E. 960; Kiefer v. Klinsick, 144 Ind. 46, 42 N. E. 447; Stover v. Flower, 120 Iowa 514, 94 N. W. 1100; Godshaw v. Struck, 109 Ky. 285, 22 Ky. L. 820, 58 S. W. 781, 51 L. R. A. 668; Warren v. Goodwyn, 110 La. 198, 34 So. 411; Munroe v. Whitehouse, 90 Maine 139, 37 Atl. 866; Davies v. Eastern Steamboat Co., 94 Maine 379, 47 Atl. 896, 53 L. R. A. 239; Clark v. Murphy, 164 Mass. 490, 41 N. E. 674; Gore v. Assurance Co., 119 Mich. 136, 77 N. W. 650; Clark v. Haupt, 109 Mich. 212, 68 N. W. 231; Olson v. Great Northern R. Co., 81 Minn. 402, 84 N. W. 219; Perrine v. Cooley's Exrs., 42 N. J. L. 623; Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; Ferguson v. Davis & Rankin Bldg. & Mfg. Co., 118 N. Car. 946, 24 S. E. 710; Thompson v. Sproul, 179 Pa. 266, 36 Atl. 290; Mundis v. Emig, 171 Pa. St. 417, 32 Atl. 1135; Brown v. West, 69 Vt. 440, 38 Atl. 87; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W.

the use of his reason is not binding upon him, and it is immaterial whether he was drawn into that situation by the connivance of the other party or not.¹⁵

§ 275. Where incapacity is such as to make contracts void.

—Much confusion has arisen on this branch of the subject because courts have used the words void and voidable interchangeably. The trend of modern authority, however, is to limit the doctrine which declares contracts entered into by parties, one of whom is incapable of contracting, void. Thus, the only void contracts of an infant, if any, are those whereby he attempts to appoint an agent.¹⁶ The cases which hold that the appointment of an agent by an infant is absolutely void are of doubtful authority, however, and are contrary to the weight of authority.¹⁷ It is difficult to see why a distinction should be drawn between contracts entered into by the infant in person and those negotiated by his agent. If he ratify in the first instance no valid reason exists for denying the right to ratify in the latter.¹⁸

In case a person of unsound mind has been judicially declared insane and a guardian or a conservator appointed, contracts entered into by such person of unsound mind subsequent to the

1099; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740. For a further discussion of this subject see chapter 15 post.

¹⁵ *Nance v. Kemper*, 35 Ind. App. 605, 73 N. E. 937; *Kuhlman v. Wieben*, 129 Iowa 188, 105 N. W. 445, 2 L. R. A. (N. S.) 666; *Cameron-Barkley Co. v. Thorton & Co.*, 138 N. Car. 365, 50 S. E. 695, 107 Am. St. 532; *Barrett v. Buxton*, 3 Aik. (Vt.) 167, 16 Am. Dec. 691. See further on this subject, post, chapter 14.

¹⁶ *Zouch v. Parsons*, 3 Burr. 1794; *Allen v. Allen*, 2 Dru. & War. 307; *Doe v. Roberts*, 16 M. & W. 778; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. 268; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Dana v. Coombs*, 6 Maine 89, 19 Am. Dec. 194; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105.

¹⁷ *Hastings v. Dollarhide*, 24 Cal.

195; *Hardy v. Waters*, 38 Maine 450; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 562; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. 560; *Stiff v. Keith*, 143 Mass. 224, 9 N. E. 577; *Patterson v. Lippincot*, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; *Cummings v. Powell*, 8 Tex. 80; *Voglesang v. Null*, 67 Tex. 465, 3 S. W. 451; *Ferguson v. Houston R. Co.*, 73 Tex. 344, 11 S. W. 347; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

¹⁸ In some jurisdictions it is held that gifts made by an infant are absolutely void and incapable of being ratified. *Robinson v. Coulter*, 90 Tenn. 705, 18 S. W. 250, 25 Am. St. 708. In Tennessee they still adhere to the old common-law rule to the effect that beneficial contracts of an infant are valid, those of questionable benefit voidable, and those to his detriment void.

appointment of the guardian are absolutely void.¹⁹ Certain other contracts are declared void even though entered into prior to the appointment of the guardian, the same as with infants. A person of unsound mind is declared incapable of executing a power of attorney, and it is held that in case he attempts so to do it is absolutely void and not merely voidable.²⁰ By some authorities a lunatic's deed of conveyance has been declared void.²¹ Other authorities lay down the rule that if one contracts with an insane person with knowledge of his insanity the agreement is void.²² By the common-law rule a feme covert cannot bind herself by contract except as previously noted.²³

The doctrine of *ultra vires* as applied to corporate contracts is given a strict construction by the Supreme Court of the United States, the courts of England, and by many courts of last resort in the United States. Where this is true a corporate contract which is *ultra vires* in the proper sense, that is to say, outside

¹⁹ American Trust & Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. 167; Burnham v. Kidwell, 113 Ill. 425; New England Loan & Trust Co. v. Spittler, 54 Kans. 560, 38 Pac. 799; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Bradbury v. Place (Maine), 10 Atl. 461; Lynch v. Dodge, 130 Mass. 458; Leonard v. Leonard, 14 Pick. (Mass.) 280; Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; White v. Palmer, 4 Mass. 147; Payne v. Burdette, 84 Mo. App. 332; Carter v. Backwith, 128 N. Y. 312, 28 N. E. 582; Wadsworth v. Sherman, 14 Barb. (N. Y.) 169; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235; McCreight v. Aiken, Rice (S. Car.) 56; Elston v. Jasper, 45 Tex. 409; Hanley v. Nat. Loan & Co., 44 W. Va. 450, 29 S. E. 1002.

²⁰ Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25; Rigney v. Plaster, 88 Fed. 686; McClun v. McClun, 176 Ill. 376, 52 N. E. 928; Elias v. Enterprise Loan & Assn., 46 S. Car. 188, 24 S. E. 102; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73. See also, Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. 146; Wolcott v. Connecticut General Life Ins. Co., 137 Mich. 319, 100 N. W. 569; Eaton v. Eaton, 37 N. J. L. 117, 18 Am. Rep. 716;

Smith v. Smith, 106 N. Car. 498, 11 S. E. 188; In re Misselwitz, 177 Pa. St. 359, 35 Atl. 722. Contra, Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115. As to the appointment of an agent by less formal means, see Arthurs v. Bridgewater Gas Co., 171 Pa. St. 532, 33 Atl. 88.

²¹ Doughtery v. Powe, 127 Ala. 577, 30 So. 524; Walker v. Winn, 142 Ala. 560, 39 So. 12, 110 Am. St. 50. In the above case it is said that regardless of the holding in other jurisdictions, in Alabama all contracts of an insane person are void. The point in question was the transfer of a note by an insane person. Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175; Van Deusen v. Sweet, 51 N. Y. 378; Brown v. Miles, 61 Hun (N. Y.) 453, 16 N. Y. S. 251; Farley v. Parker, 6 Ore. 105, 25 Am. Rep. 504.

²² Bethany Hospital Co. v. Philippi, 82 Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194. For a further discussion see chapter 12 on Insane Persons.

²³ Here see ante, § 271, Coverture. The agreement of a married woman is altogether void and no action will lie against her husband or herself for the breach of it. Fairhurst v. Liverpool & Co. Assn., 9 Ex. 422, 23 L. J. Ex. 163; In re Comstock, 11 N. B. R. 169;

the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, it is not only voidable but wholly void, and of no legal effect.²⁴ However, most of the American courts recognize an exception or a limitation to the rule in cases where the contract has been executed by one of the parties and the other party retains the benefit therefrom. Good-faith performance by either party and an acceptance by the other party of the benefits of such performance will prevent the latter from setting up the defense of *ultra vires* while retaining the benefits or when the ends of justice require an adherence to the terms of the agreement.²⁵

§ 276. Where incapacity is such as to make contracts voidable.—In the preceding section those instances were mentioned in which contracts may be declared void because of incapacity on the part of one or both of the parties thereto. It must not be understood that it contains a statement of all contracts that are in effect void. An agreement may also be void because of the illegality of the subject-matter, or the law may deny one of the parties a remedy for its enforcement, as in the case of contracts with alien enemies. But contracts void for the causes last mentioned are clearly distinguished from contracts which are void because of incapacity of one of the parties. Consequently, except as mentioned in the preceding sections, all contracts entered into by persons under either a natural or artificial

Prentiss v. Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640; Frazee v. Frazee, 79 Md. 27, 28 Atl. 1105; Tracy v. Keith, 11 Allen (Mass.) 214; Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. 374; Keen v. Hartman, 48 Pa. 497, 86 Am. Dec. 606, 88 Am. Dec. 472; Bank v. Partee, 99 U. S. 325, 25 L. ed. 390; Woodward v. Barnes, 46 Vt. 332, 14 Am. Rep. 626. See also, Earle v. Kingscote (1900), 1 Ch. 203. See also, ante, § 271, Coverture.

²⁴ Central Transportation Co. v. Pullman's Palace-Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478; California Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. 831; De La Vergne & Co. v. German Saving Institution, 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. 20; 3 Thomp. Corp.

(2d ed.), § 2768, and cases cited in note therein.

²⁵ Main v. Casserly, 67 Cal. 127, 7 Pac. 426; Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134; Union Hardware Co. v. Plume & A. Mfg. Co., 58 Conn. 219, 20 Atl. 455; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412; Flint & W. Mfg. Co. v. Kerr-Murray Mfg. Co., 24 Ind. App. 350, 56 N. E. 858; Beach v. Wakefield, 107 Iowa 567, 76 N. W. 688, 107 Iowa 591, 78 N. W. 197; Traer v. Prospecting Co., 124 Iowa 107, 99 N. W. 290; Alexandria & Co. R. Co. v. Johnson, 58 Kans. 175, 48 Pac. 847; Blue Rapids Opera House Co. v. Mercantile Building & Co. Assn., 59 Kans. 778, 53 Pac. 761; Dewey v. Toledo R. Co., 91 Mich. 351,

disability are voidable and not void. As a general rule, the contracts of such persons are voidable and not void.

§ 277. **Ratification.**—A contract voidable at the option of one of the parties because of want of capacity on the part of such party may be ratified after the disability or incapacity has been removed.²⁶ Thus a principal may ratify the unauthorized act of his agent if such principal had the capacity to do the act ratified not merely at the time the act was done but also at the time of ratification.²⁷ Ratification does not amount to the formation of a new contract, consequently no new consideration is necessary.²⁸ When a voidable contract is ratified it becomes binding from the

51 N. W. 1063; *Butterworth v. Kritzer Milling Co.*, 115 Mich. 1, 72 N. W. 990; *Seymour v. Chicago Guaranty Fund Life Co.*, 54 Minn. 147, 55 N. W. 907; *Hunt v. Hauser, Malting Co.*, 90 Minn. 282, 96 N. W. 85; *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79; *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054; *Chapman v. Iron Clad Rheostat Co.*, 62 N. J. L. 497, 41 Atl. 690; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; *Vought v. Eastern Building & Assn.*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. 761; *Boyd v. American Carbon-Black Co.*, 182 Pa. 206, 37 Atl. 937; *Pittsburgh, J. E. & E. R. Co. v. Altoona R. Co.*, 196 Pa. 452, 46 Atl. 431; *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41, 85 N. W. 115; *Wuerfler v. Trustees &c.*, 116 Wis. 19, 92 N. W. 433, 96 Am. St. 940. For an extended discussion of this subject, see 3 *Thomp. Corp.* (2d ed.), § 2787 et seq. and cases there cited.

²⁶ *Conklin v. Ogborn*, 7 Ind. 553; *Losey v. Bond*, 94 Ind. 67; *Mansfield v. Watson*, 2 Iowa 111; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229n; *Thompson v. Lay*, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *Howe v. Howe*, 99 Mass. 88; *Goodnow v. Empire*

Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798; *Ferguson v. Bell*, 17 Mo. 347; *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; *Bigelow v. Grannis*, 2 Hill (N. Y.) 120; *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. ed. 800; *Forsyth v. Hastings*, 27 Vt. 646. Ratification can be made only by one who has power to make the contract in the first instance. *Cushman v. Cloverland &c. Min. Co.*, 170 Ind. 402, 84 N. E. 759, 16 L. R. A. (N. S.) 1078, 127 Am. St. 391.

²⁷ *Kelner v. Baxter*, L. R. 2 C. P. 174, 36 L. J. C. P. 94; *Hardware Co. v. Deere*, 53 Ark. 140, 13 S. W. 1102, 7 L. R. A. 405n; *McCracken v. San Francisco*, 16 Cal. 591; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *National Foundry & Pipe Works v. Oconto Water Co.*, 68 Fed. 1006; *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. 653; *Pollock v. Cohen*, 32 Ohio St. 514; *Bell's Gap R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39; *Milford v. Milford Water Co.*, 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122; *Cook v. Tullis*, 18 Wall. (U. S.) 332, 21 L. ed. 993.

²⁸ *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; *Conklin v. Ogborn*, 7 Ind. 553; *Grant v. Beard*, 50 N. H. 129. See also, § 321 et seq., *Ratification under the title Infants*, etc.

date on which it was made and not merely from the date of ratification.²⁹

²⁹ American Freehold Land Mortgage Co. v. Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; Hall v. Jones, 21 Md. 439; Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521; Minock v. Shortridge, 21 Mich. 304; Tibbets v. Gerish, 25 N. H. 41, 57 Am. Dec. 307; Hoit v. Underhill, 10 N. H. 220, 34 Am. Dec. 148; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Cheshire v. Barrett, 4 McCord (S. Car.) 241, 17 Am. Dec. 735. See further on the subject of Ratification under chapters on Fraud, Duress and Undue Influence, Infants, Married Women, etc.

CHAPTER XI.

INFANTS.

- § 285. Infants—When infants become of age.
- 286. Infants—Contracts may be void, voidable or valid.
- 287. Former rule for determining whether void, voidable, or valid.
- 288. Present rule.
- 289. Effect of emancipation.
- 290. Valid contracts generally.
- 291. Valid contracts generally—Contracts authorized by statute or the common law.
- 292. Contracts authorized by statute—Contracts of enlistment.
- 293. Marriage contracts.
- 294. Contract by infant to do what he is legally bound to do.
- 295. Valid contracts—Necessities.
- 296. What are necessities?
- 297. Necessities—Food, wearing apparel, lodging and the like.
- 298. Necessities—Education.
- 299. Necessities—Services of an attorney.
- 300. Necessities—Miscellaneous.
- 301. What are not necessities.
- 302. Voidable contracts generally.
- 303. Conveyances, transfers and mortgages of property.
- 304. Bills and notes.
- 305. Contracts for service, work and labor.
- 306. Awards and compromise.
- 307. Suretyship.
- 308. Partnership.
- 309. Corporation stock and membership.
- 310. Other illustrative cases—Marriage settlement.
- 311. Other illustrative cases—Mechanic's lien.
- 312. Other illustrative cases—Assignment for benefit of creditors.
- 313. Other illustrative cases—Leases made by guardian extending beyond the term of guardianship.
- § 314. Other illustrative cases—Apprenticeship.
- 315. Effect of concealment or misrepresentation.
- 316. Active concealment, estoppel.
- 317. Active concealment—Action in tort.
- 318. Action to compel a reconveyance.
- 319. Active misrepresentation, liability for false pretense.
- 320. Summary.
- 321. Ratification.
- 322. Ratification—What amounts to.
- 323. Express ratification.
- 324. When ratification must be in writing.
- 325. Ratification by conduct—Retention of property.
- 326. Ratification by conduct—Sale or conversion of property.
- 327. Ratification by conduct—Receiving agreed consideration.
- 328. Ratification by conduct—Miscellaneous.
- 329. Ratification by laches.
- 330. Laches—Statute of limitations.
- 331. Ratification need not be supported by an additional consideration.
- 332. Ratification—Knowledge as to legal liability.
- 333. Ratification—Effect.
- 334. Disaffirmance and avoidance.
- 335. Who may disaffirm or avoid.
- 336. Time and manner of disaffirmance—Personal contracts and contracts concerning personality.
- 337. Time of disaffirmance—Contracts concerning an interest in real estate.
- 338. Time of disaffirmance—Executive contracts.
- 339. Disaffirmance after majority.
- 340. Disaffirmance—Delay greater than that permitted by statute of limitations.
- 341. Disaffirmance—How indicated.

- | | |
|--|---|
| <p>§ 342. What amounts to disaffirmance.
 343. Cannot disaffirm in part and ratify in part.
 344. What amounts to disaffirmance—Illustrations.
 345. Disaffirmance of contract concerning an interest in real estate.
 346. Restoration of consideration.
 347. Restoration of consideration—Cannot use privilege as a sword instead of a shield.
 348. Restoration of consideration—Contract fair and reasonable.</p> | <p>§ 349. Restoration of consideration as a condition precedent.
 350. Restoration of consideration—Statutory modification of common-law rule.
 351. Restoration of consideration—Both parties infants.
 352. Effect and result of disaffirmance.
 353. Disaffirmance—Liability in tort.
 354. Disaffirmance — Effect — Miscellaneous instances.
 355. Finality of disaffirmance.</p> |
|--|---|

§ 285. **Infants—When infants become of age.**—By the common law all persons under the age of twenty-one, whether male or female, were styled infants. By it a person remained an infant until the full age of twenty-one was attained.¹ This rule still obtains except as changed by statute in the various states. The law has drawn no line between an infant six years old and one twenty years old. All infants are, in the eyes of the law, entitled to equal protection.²

It follows that a minor who has nearly attained his majority may be as able to protect his interests in a contract as a person who has passed that period, but the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises; it must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years.³

By the common law and in all jurisdictions where the rule declared by it has not been changed by statute an infant attains his majority at the earliest minute of the day immediately preceding the anniversary of his birth.⁴ It is entirely competent, however,

¹ Coke's Litt. 171; 1 Bl. Com. 463, 466; 2 Bouvier's Law Dict. (Rawle's Ed.) 1209; 2 Pol. & Mait. (2 ed.) 438; Anon., 1 Salk. 44; Banco De Sonora v. Bankers' & Co., 124 Iowa 576, 100 N. W. 532, 104 Am. St. 367.

² Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88. See also, Beekman v. Beekman, 53 Fla. 858, 43 So. 923.

³ McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572.

⁴ Herbert v. Turball, 1 Keb. 589;

Anonymous, 1 Salk. 44; Fitzhugh v. Dennington, 6 Mod. 259; State v. Clarke, 3 Harr. (Del.) 557; Wells v. Wells, 6 Ind. 447; Banco De Sonora v. Bankers' & Co., 124 Iowa 576, 100 N. W. 532, 104 Am. St. 367; Hamlin v. Stevenson, 4 Dana (Ky.) 597; Bardwell v. Purrington, 107 Mass. 419; Benjamin Cases on Contracts 296; Ross v. Morrow, 85 Tex. 172, 19 S. W. 1090, 16 L. R. A. 542; In re Richardson, 2 Story (U. S.) 571.

for the legislature to change the time at which an infant shall attain his or her majority. Thus the legislatures of some of the states have by statutory enactment provided that a minor attains full age at the first minute of his proper birthday;⁵ others, that a female reaches her majority at the age of eighteen.⁶

By the statutes of some states all minors whether male or female are deemed of full age after marriage.⁷ By the statutes of North Dakota an infant over eighteen has the right of election for one year after reaching his majority to affirm or disaffirm his contract.⁸ The statutes of many states provide that the disabilities of infancy may be removed by a specified court proceeding. The various statutes changing the common-law rule in relation to infancy cannot be set out here; reference must be had to the legislative enactment of the separate states.

§ 286. Infants' contracts may be void, voidable or valid.—The contracts of an infant with reference to their validity and his liability may be divided into three classes: first, those agreements that are absolutely void,—a comparatively small number of his contracts fall within this classification; second, contracts that are merely voidable, most of the contracts entered into by an infant are of this description; third, agreements valid and binding upon him.⁹

§ 287. Former rule for determining whether void, voidable, or valid.—The classification of infants' contracts above

⁵ Civil Code Cal., § 26; Civil Code S. Dak., § 10; Ex parte Wood (Cal), 90 Pac. 961.

⁶ See statutes of Arkansas, California, Colorado, Dakota, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri Nebraska, Nevada, Ohio, Oregon, Vermont and Washington. In this connection, see Rowland v. McGuire, 64 Ark. 412, 42 S. W. 1068; Ex parte Wood (Cal.), 90 Pac. 961; Stevenson v. Westfall, 18 Ill. 209; Banco De Sonora v. Bankers' & Co., 124 Iowa 576, 100 N. W. 532, 104 Am. St. 367; Cogel v. Ralph, 24 Minn. 194; Sparhawk v. Buell, 9 Vt. 41. In some jurisdictions the woman becomes of full age on her marriage. Chubb v. Johnson, 11 Tex. 469; White v. Latimer, 12 Tex. 61; Grayson v.

Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121. See also, Statutes of Maryland and Oregon. By the statutes of Nebraska a married woman over sixteen years of age has reached her majority. Ward v. Lavery, 19 Nebr. 429, 27 N. W. 393.

⁷ See statutes of Iowa, Louisiana and also Washington. In the case of Ex parte Hollopeter, 52 Wash. 41, 100 Pac. 159, the court said: "Under the general rule of law Grover H. became of lawful age when the marriage ceremony was performed."

⁸ Luce v. Jestrabe, 12 N. Dak. 548, 97 N. W. 848.

⁹ Reference will be had in the succeeding sections to the various kinds of contracts enumerated.

given is an ancient one, but the test by which to determine to what class a contract belongs has not always remained the same. Under the rule first announced the validity of an infant's contract depended upon whether it was beneficial to such infant. Under this rule when the court could or thought it could pronounce the contract to be to the infant's prejudice it was void; when to his benefit, as for necessities, it was held valid, and when the contract was of an uncertain nature and might in the end prove either beneficial or prejudicial it was voidable at the election of the infant.¹⁰

The foregoing test has, however, in the main been abandoned although it is not altogether obsolete, and is in some jurisdictions still observed and given its original significance.¹¹ In England it is still used as a test whereby to determine the validity of work and labor contracts¹² and perhaps some others.¹³

¹⁰ *Keane v. Boycott*, 2 H. Bl. 511; *Harvey v. Ashley*, 3 Atk. 617; *Zouch v. Parsons*, 3 Burr. 1794; *Philpot v. Bingham*, 55 Ala. 435; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Green v. Wilding*, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696; *Guirot v. Guirot*, 3 Mart. (N. S.) (La.) 400; *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Levering v. Heighe*, 2 Md. Ch. 81; *Ridgeley v. Crandall*, 4 Md. 435; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Cogley v. Cushman*, 16 Minn. 397; *Woolston v. King*, 2 Penn. (3 N. J. L.) 599; *In re Bowman's Estate*, 10 Lanc. Bar. (Pa.) 139; *Radford v. Wescott's Exrx.*, 1 Desaus. (S. Car.) 596; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; *McMinn v. Richmonds*, 6 Yerg. (Tenn.) 9; *McGan v. Marshall*, 7 Humph. (Tenn.) 121; *Cummings v. Powell*, 8 Tex. 80. This classification seems "founded on solid reason." *United States v. Bambridge*, 1 Mason (U. S.) 71.

¹¹ See *Robinson v. Coulter*, 90 Tenn. 705, 18 S. W. 250, 25 Am. St. Rep. 708; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Hatton*

v. Bodan Lumber Co., (Tex. Civ. App.), 123 S. W. 163. See, however, *Gage v. Menczer* (Tex. Civ. App.), 144 S. W. 717. See also, *Grievance Committee v. Ennis*, 84 Conn. 594, 80 Atl. 767; *Benson v. Tucker* (Mass.), 98 N. E. 589; *Aborn v. Janis*, 62 Misc. (N. Y.) 95, 113 N. Y. S. 309. See *Chabot v. Paulhus* (R. I.), 79 Atl. 1103 (holding that the sale of a saloon to a minor was not beneficial to him so as to preclude him from disaffirming his contract of purchase).

¹² *Reg. v. Lord*, 12 Q. B. 757; *Fellows v. Wood*, 59 L. T. (N. S.) 513; *Meakin v. Morris*, 12 Q. B. D. 352; *Evans v. Ware* (1892), 3 Ch. 502; *Corn v. Matthews* (1893), 1 Q. B. 310; *Clements v. L. & N. W. R. Co.* (1894), 2 Q. B. 482. The test applied is, "whether on the true construction of the contract as a whole, it was for his advantage. * * * If it was for his advantage, it was not a voidable contract but one binding on him, which he had no right to repudiate." *Clements v. L. & N. W. R. Co.* (1894), 2 Q. B. D. 482. See, however, *Wald's Pollock on Contracts*, 60, 61, 62, in which the rule is criticized and its validity denied.

¹³ *Clements v. L. & N. W. R. Co.*

§ 288. **Present rule.**—Some cases early recognized that the ancient rule was unsatisfactory.¹⁴ The unsatisfactory character of the old test has led nearly all courts to abandon it, only the classification of void, voidable and valid being retained, in the main at least. They came to understand that infancy is a personal privilege which no one can take advantage of but the infant himself, and therefore that his contract although voidable by him binds the person of full age. A recognition of this principle required that practically all contracts of an infant should be held voidable rather than void and as a result the number of contracts classified as void has been greatly restricted, and the number of agreements so designated seems to approach the vanishing point. The only contracts of an infant that are now void merely because of infancy are those whereby he attempts to execute a power of attorney,¹⁵ and in some jurisdictions the appointment of agents generally is declared void.¹⁶

It is believed, however, that the cases laying down the proposition that the attempted appointment by an infant of agents in general is void, are contrary to the weight of authority.¹⁷ Nor

(1894), 2 Q. B. D. 482, in which it is said: "I will not attempt to say how far the rule extends, but that it does apply to some contracts that are not contracts of labor is clear from many decided cases." For a criticism of the above case see Wald's *Pollock on Contracts*, 75 note M.

¹⁴ See *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134. See also, remarks of Pollock at 60 et seq. of Wald's *Pollock on Contracts*, in which he affirms that the rule announced above and as given by various authorities never was in fact the law.

¹⁵ *Flexner & Lichten v. Dickerson*, 72 Ala. 318; *Philpot v. Bingham*, 55 Ala. 435; *Di Meglio v. Baltimore & O. R. Co.* (Del.), 74 Atl. 558; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481; *Pyle v. Cravens*, 4 Litt. (Ky.) 17; *Lawrence v. McArter*, 10 Ohio 37; *Knox v. Flack*, 22 Pa. St. 337. This rule, however, is not universal. *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697. See also,

Ferguson v. Houston, E. & W. T. R. Co., 73 Tex. 344, 11 S. W. 347. In the case of *Lawder v. Larkin* (Tex. Civ. App.), 94 S. W. 171, it is held that the execution of a deed of trust coupled with the power of sale is not void but voidable.

¹⁶ *Cole v. Pennoyer*, 14 Ill. 158; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. 268; *Semple v. Morrison*, 7 T. B. Mon. (Ky.) 298; *Armitage v. Widoe*, 36 Mich. 124; *Poston v. Williams*, 99 Mo. App. 513, 73 S. W. 1099; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285. In the case of *State v. Field* (Mo. App.), 119 S. W. 499, it was held that a minor could not make a valid appointment of another to act as agent to buy beer for him.

¹⁷ *Towle v. Dresser*, 73 Maine 252; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. 560; *Benson v. Tucker* (Mass.), 98 N. E. 589. See also, ante, *Parties*, § 275, *Void Contracts*.

is there any principle other than that of *stare decisis* upon which the cases holding that the execution of the power of attorney or appointment of an agent is void, can rest.¹⁸ The cases so holding are, perhaps, the survival in a modified form of the old common-law principles that all such gifts, grants, or deeds made by an infant as do not take effect by delivery of his hand are void. But all gifts, grants or deeds made by an infant by matter in deed or in writing which take effect by delivery of his own hand are voidable by himself and his heirs and by those who have his estate.¹⁹ Practically all other contracts except those for necessities are voidable at the infant's option.²⁰

§ 289. Effect of emancipation.—The emancipation of an infant by his father does not enlarge or affect his capacity to make a contract, its only direct effect being to release him from his father's control and to give him a right as against his father to his earnings.²¹ Nor is the rule otherwise when emancipation is brought about by marriage of the minor either with or without

¹⁸ In the case of *Fetrow v. Wiseman*, 40 Ind. 148, it is said that the proposition "may not be founded in solid reason, but is so held by all the authorities."

¹⁹ *Zouch v. Parsons*, 3 Burr. 1794; *Allen v. Allen*, 2 Dr. & War. 307; *Doe v. Roberts*, 16 M. & W. 778; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Dana v. Coombs*, 6 Maine 89, 19 Am. Dec. 194; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105; *Perkins on Conveyancing*, § 12.

²⁰ The English Relief Act provides: 1. All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, ex-

cept such as now by law are voidable: 2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. 3. This act may be cited as The Infant's Relief Act, 1874.

²¹ *Burns v. Smith*, 29 Ind App. 181, 64 N. E. 94, 94 Am. St. 268; *Tandy v. Masterson*, 1 Bibb. (Ky.) 330; *Mason v. Wright*, 13 Metc. (Mass.) 306; *Tyler v. Gallop*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. 336; *Genereux v. Sibby*, 18 R. I. 43, 25 Atl. 345; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630. The latter case holds the above principle applicable to gifts. The fact that a minor has neither parent nor guardian and works for himself and receives his own wages does not operate to confer upon him the power to contract generally. *Wickham v. Torley*, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57 and note. An emancipated infant may sue for his wages and the employer will not be

the consent of the parent.²² But the capacity of an infant to contract for necessities is in one sense enlarged by his marriage, for he is bound for the reasonable value of necessities furnished his family as well as himself;²³ and emancipation by the parent may also be important on the question as to what are necessities in the particular case, and in cases of contracts, express or implied, between parent and child, as well as upon the infant's right to recover from others for his services or the like.²⁴

§ 290. Valid contracts generally.—The valid contracts of an infant may be divided into three classes. They are: first, contracts authorized by law; second, contracts entered into in the performance of a legal duty;²⁵ and third, contracts for necessities.

§ 291. Valid contracts generally—Contracts authorized by statute or the common law.—If a contract is entered into by a minor under the authority or direction of a statute it is binding upon him so far as the question of infancy is concerned and cannot be disaffirmed. The above is expressly provided in statutes of the several states.²⁶ Thus if a minor gives a recognition for his appearance in court he is bound by the same.²⁷ On

permitted to deny the manumission of the infant by the parent. *Webb v. Harris* (Okla.), 121 Pac. 1082.

²² *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. 268. In the above case it is said: "The marriage of an infant with the consent of the father is an emancipation only to the extent as to enable him to make contracts from his own services, and to apply his wages to the support of his family. Otherwise it does not enlarge his power to contract, nor does it remove the disabilities of infancy so that he is bound by his contracts, except for actual necessities." *Hartman v. Kendall*, 4 Ind. 403; *Cummings v. Everett*, 82 Maine 260, 19 Atl. 456; *Taunton v. Inhabitants of Plymouth*, 15 Mass. 203; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Welch v. Young*, 110 Mass. 396.

²³ *Chapman v. Hughes*, 61 Miss. 339.

And if the statutes of the state provide that upon marriage an infant becomes of full age and the disabilities of infancy are removed he then has the capacity to contract.

²⁴ See *Wright v. Dean*, 79 Ind. 407; *Daniel v. Parish*, 4 App. Cas. (D. C.) 213; *Washington v. Washington* (Tex. Civ. App.), 31 S. W. 88.

²⁵ At common law antenuptial debts of the wife are considered as a contract liability for which the infant can not escape except as provided for by statute. See post, § 291.

²⁶ If the statute reads "any person" it will be construed so as to include infants unless it clearly appears that it was intended to exclude them. *Earl of Buckinghamshire v. Drury*, Wilmot 177; *People v. Mullin*, 25 Wend. (N. Y.) 698.

²⁷ *Gavin v. Burton*, 8 Ind. 69; *State v. Weatherwax*, 12 Kans. 463; *Stowers v. Hollis*, 83 Ky. 544, 7 Ky. L. 549; *McCall v. Parker*, 13 Metc. (Mass.) 372, 46 Am. Dec. 735; *Bor-*

the same principle he is bound on a bastardy bond given by him.²⁸ It has been held that he may make a valid assignment for the benefit of creditors under a statute which provides that "any person" may make such assignment.²⁹ By the statutes of New York an infant may make a valid contract by which he insures his life.³⁰ Under the common law a male infant who marries assumes his wife's antenuptial debts.³¹

§ 292. **Contracts authorized by statute—Contracts of enlistment.**—Contracts of enlistment are also upheld, not only on the ground of public policy, but for the added reason that the government has conferred upon minors over sixteen the right to enlist if the consent of the parent or guardian is obtained.³²

The power of congress to authorize the enlistment of minors is undoubted, the only question being whether or not congress has, under the statutes which have been passed from time to time, authorized the enlistment of such persons. It has been usually held that the infant himself is bound and cannot avoid the contract of enlistment, this being a right personal to the parent or guardian.³³

dentown Tp. v. Wallace, 50 N. J. L. 13, 11 Atl. 267; *People v. Moores*, 4 Denio (N. Y.) 518, 47 Am. Dec. 272.

²⁸ *Stowers v. Hollis*, 83 Ky. 544, 7 Ky. L. 549; *People v. Moores*, 4 Denio (N. Y.) 518, 47 Am. Dec. 272.

²⁹ *People v. Mullin*, 25 Wend. (N. Y.) 698.

³⁰ *Hamm v. Prudential Ins. Co.*, 137 App. Div. (N. Y.) 504, 122 N. Y. S. 35.

³¹ *Anderson v. Smith*, 33 Md. 465; *Butler v. Breck*, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258.

³² *Lanahan v. Birge*, 30 Conn. 438; *In re Dowd*, 90 Fed. 718; *Solomon v. Davenport*, 87 Fed. 318; *Ex parte Anderson*, 16 Iowa 595; *In re Graham*, 8 Jones (N. Car.) 416; *Commonwealth v. Gamble*, 11 Serg. & R. (Pa.) 93; *Morrissey v. Perry*, 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. 57; *In re Tarble*, 25 Wis. 390, 3 Am. Rep. 85. "Whenever any disability, enacted by the common law, is removed by the enactment of a statute, the

competency of the infant to do all acts within the purview of such statute is as complete as that of a person of full age." *United States v. Bainbridge*, 1 Mason (U. S.) 71. It is a fundamental principle of national law essential to national life that every citizen whether of an age to make contracts generally or not is under obligation to serve and defend the constituted authorities of the states and nation and for that purpose to bear arms when of sufficient age and capacity to do so and when such service is lawfully required of him. *Lanahan v. Birge*, 30 Conn. 438. See, also, *United States v. Blakeney*, 3 Grat. (Va.) 405.

³³ *In re Dowd*, 90 Fed. 718; *Solomon v. Davenport*, 87 Fed. 318; *In re Kaufman*, 41 Fed. 876; *In re Cosenow*, 37 Fed. 668; *In re Zimmerman*, 30 Fed. 176; *Ex parte Anderson*, 16 Iowa 595; *In re Graham*, 8 Jones L. (N. Car.) 416; *Commonwealth v. Gamble*, 11 Serg. & R. (Pa.) 93; *Morrissey v. Perry*, 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. 57; *United*

It has been held by other authorities, however, that the minor could avoid such contracts either before or after reaching majority.³⁴ On this principle it has been held that the minor may avoid such contracts without being punished for desertion.³⁵

§293. Marriage contracts.—At common law a male fourteen years of age and a female twelve years of age could contract a valid and binding marriage.³⁶ Even if one or both parties were below the ages just mentioned and above the age of seven, a marriage between them was not void but merely voidable, and might be ratified by the female on her reaching the age of twelve and by the male on his attaining fourteen.³⁷ The common-law rule is still in force in the various states except as changed by statutes.³⁸

While the age of consent has been changed in many jurisdictions yet in practically all of them infants may contract valid marriages. The statutory enactments of the various states and their effect cannot be treated here. They may, however, be divided into two classes. They are: statutes which absolutely prohibit the celebration of a valid marriage by a party above the common-law age

States v. Blakeney, 3 Grat. (Va.) 405. See also, *In re McDonald*, 1 Low. (U. S.) 100.

³⁴ *In re Chapman*, 37 Fed. 327, 2 L. R. A. 332. See, however, *United States v. Reeves*, 126 Fed. 127, in which it is said: "In *re Chapman* was overruled by the Supreme Court in *Morrissey's case* and in *Grimley's case* and it is now of no effect. It reads well, but it is not sound."

³⁵ *In re Von Dieselskie*, 5 Mackey (D. C.) 485; *United States v. Hanchett*, 18 Fed. 26; *In re Davison*, 21 Fed. 618; *In re Baker*, 23 Fed. 30; *In re Chapman*, 37 Fed. 327, 2 L. R. A. 332; *Commonwealth v. Fox*, 7 Pa. St. 336. Practically all the foregoing cases have, however, been many times criticized, explained, qualified, or overruled. See cases cited in note 32 and 33 of this section and also *United States v. Reeves*, 126 Fed. 127; *In re Grimley*, 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. 54. As was mentioned above, however, the controversy is not over the principle but over the effect and meaning of the statute actually enacted.

³⁶ Co. Litt. 79b; *Rex v. Gordon*, Russ. & Ry. 48; *Arnold v. Earle*, 2 Lee Ecc. 529; *Beggs v. State*, 55 Ala. 108; *Goodwin v. Thompson*, 2 G. Greene (Iowa) 329; *Parton v. Hervey*, 1 Gray (Mass.) 119; *State v. Lowell*, 78 Minn. 166; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Koonce v. Wallace*, 7 Jones (52 N. Car.) 194; *Shaffer v. State*, 20 Ohio 1; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252; *Fisher v. Bernard*, 65 Vt. 663, 27 Atl. 316; *In re Holloper*, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847n, 132 Am. St. 952.

³⁷ *Bacon Abridgment* 4, 336; *Koonce v. Wallace*, 7 Jones (52 N. Car.) 194; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 792; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659.

³⁸ *State v. Bittick*, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587 and note, 23 Am. St. 869; *Fisher v. Bernard*, 65 Vt. 663, 27 Atl. 316; *In re Holloper*, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847n, 132 Am. St. 952.

and under the statutory age,³⁹ and those which are merely cumulative and do not abrogate the common-law rule.⁴⁰

§ 294. **Contract by infant to do what he is legally bound to do.**—An infant is not excepted from the operation of the rule that a person is bound when he does an act which at law he would have been compelled to do. The doing of an act which an infant is bound at law to do, binds him notwithstanding it was done voluntarily and without legal compulsion.⁴¹ Thus the execution of a trust is binding on the infant, when it is a disposition which equity would have compelled.⁴² Likewise, an infant mortgagee is bound by his release upon the mortgage debt being discharged.⁴³

§ 295. **Valid contracts—Necessities.**—The third class of contracts that are valid and binding on the infant are those for necessities, or “necessaries” as they are usually called in the law. A large majority of the valid contracts of an infant are of this character, consequently, because of the importance of the subject, it will be treated in a separate section.

It is well settled and definitely understood that an infant is liable for the reasonable value of necessities actually furnished him.⁴⁴ It is the policy of the law to protect infants from imposi-

³⁹ *Vernon v. Vernon* (Ohio), 12 Wkly. L. Bull. 237; *Shaffer v. State*, 20 Ohio 1. See also, *Hardy v. State*, 37 Tex. Crim. 55, 38 S. W. 615; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

⁴⁰ *Goodwin v. Thompson*, 2 Green (Iowa) 329; *State v. Bittick*, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587 and note, 23 Am. St. 869; *Fisher v. Bernard*, 65 Vt. 663, 27 Atl. 316; *In re Holloper*, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847, 132 Am. St. 952. Such marriages may be voidable, however. *Willits v. Willits*, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767. A distinction must be drawn between the marriage itself and a promise to marry. The latter is always voidable at the option of the infant party. *Rush v. Wick*, 31 Ohio St. 521; *Benj. on Cont.* p. 135.

⁴¹ *Zouch v. Parsons*, 3 Burr. 1794; *Bavington v. Clarke*, 2 Pen. & W. (Pa.) 115, 21 Am. Dec. 432; *Tucker*

v. Moreland, 10 Pet. (U. S.) 58; *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. ed. 800.

⁴² *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Norholdt v. Norholdt*, 87 Cal. 552, 26 Pac. 599, 22 Am. St. 268; *Prouty v. Edgar*, 6 Iowa, 353; *Bridges v. Bidwell*, 20 Nebr. 18, 29 N. W. 302; *Starr v. Wright*, 20 Ohio St. 97; *Trader v. Jarvis*, 23 W. Va. 100.

⁴³ *Zouch v. Parsons*, 3 Burr. 1794. See also, *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506; *Tucker v. Moreland*, 10 Pet. (U. S.) 58.

⁴⁴ *Ford v. Fothergill*, 1 Esp. 211; *Oliver v. McDuffie*, 28 Ga. 522; *Hunt v. Thompson*, 4 Ill. (3 Scam.) 179, 36 Am. Dec. 538; *Price v. Sanders*, 60 Ind. 310; *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *McCarty v. Murray*, 3 Gray (Mass.) 578; *Squier v. Hydcliff*, 9 Mich. 274; *Epperson v. Nugent*, 57

tion, hence the right to avoid their general contracts. It is apparent, however, that if this rule should be applied so as to include liabilities for necessities furnished it would defeat the very purpose for which it was created. Infants might under such a construction be unable to obtain suitable food, clothing, shelter and education.⁴⁵ Hence, the law imposes an obligation upon the infant to pay for necessities furnished him. This is true regardless of any express agreement on his part to pay therefor. If the goods received are shown to have been necessary for the well-being of the infant and were furnished under such circumstances as to impose a duty to pay therefor, he is liable.⁴⁶ It follows that while infants may make an express promise to compensate one for necessities furnished and while courts are in the habit of enforcing the promise to pay, taking the amount agreed upon as *prima facie* just, it is nevertheless manifest that the obligation enforced is imposed by law on the facts of the case and does not have its origin in the binding force of the infant's agreement.⁴⁷

Miss. 45, 34 Am. Rep. 434; *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; *Shaw v. Bryant*, 65 Hun (N. Y.) 57; *Hyman v. Cain*, 3 Jones (48 N. Car.) 111; *Smith v. Young*, 2 Dev. & Bat. (19 N. Car.) 26; *Scofield v. White*, 29 Vt. 330; *Bent v. Manning*, 10 Vt. 225. "An agreement with an infant to give him board, clothing and schooling in payment for his labor, if reasonable under all circumstances, cannot be repudiated by the infant after it has been executed." *Squier v. Hydcliff*, 9 Mich. 274; *Mountain v. Fisher*, 22 Wis. 93. "Where necessities are furnished with things that are not necessities, there is a remedy for the former, but none for the latter." *Turberville v. Whitehouse*, 12 Price 692; *Maddox v. Miller*, 1 M. & S. 738; *Bent v. Manning*, 10 Vt. 225; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. 777; *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. 721.

⁴⁶ *Ryder v. Wombell*, L. R. 4 Exch. 32; *Wallin v. Highland Park Co.*, 127 Iowa 131, 102 N. W. 839; *Benjamin's Cases on Contracts*, 335; *Beeler v.*

Young, 1 Bibb (Ky.) 519; *Squier v. Hydcliff*, 9 Mich. 274.

⁴⁷ *Duncomb v. Tickridge*, Aleyn 94; *Bliss v. Perryman*, 1 Scam. (Ill.) 484; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759; *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; *Benjamin's Cases on Contracts* 334; *Hyman v. Cain*, 3 Jones L. (48 N. Car.) 111.

⁴⁷ *Walter v. Everard* (1891), 2 Q. B. 369; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Barnes v. Barnes*, 50 Conn. 572; *Burton v. Wilkin*, 6 Hous. (Del.) 522, 22 Am. St. 363; *Hunt v. Thompson*, 4 Ill. (3 Scam.) 179, 36 Am. Dec. 538; *Price v. Sanders*, 60 Ind. 310; *Kilgore v. Rich*, 83 Maine 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. 780; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Earle v. Reed*, 10 Metc. (Mass.) 387; *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; *Welch v. Olmstead*, 90 Mich. 492, 51 N. W. 541; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Locke v. Smith*, 41 N. H. 346; *Pardey v. American-Ship Windlass Co.*, 20 R. I. 147, 37 Atl. 706, 78 Am. St. Rep. 844; *Genereux v. Sibley*, 18 R. I. 43, 25 Atl. 345; *Rainwater v. Durham*, 2 Nott

An infant is not liable on an executory contract for necessities to be furnished in the future.⁴⁸ Not only this, but before any recovery can be had, the reasonable value of the goods furnished must be proved and the fact that they were for necessities actually established.⁴⁹ This brings us to the question, what are necessities? This question will be discussed in the succeeding section.

§ 296. **What are necessities?**—The word “necessities” as used here is a relative term. Its meaning as applied to infants cannot be defined by general rules applicable to all cases. The question is a mixed one of law and fact to be determined in each case from the particular facts and circumstances peculiar thereto,⁵⁰ it being for the court to determine whether the goods furnished may be classified as necessities and for the jury to deter-

& McC. (S. Car.) 524, 10 Am. Dec. 637; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Smith v. Crohm (Tex. Civ. App.), 37 S. W. 469. An infant may make an express written contract for necessities upon which he may be sued, but * * * by showing the price agreed to be paid was unreasonable, he can reduce the recovery to a just compensation for the necessities received by him. Guthrie v. Morris, 22 Ark. 411; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. An infant is liable to pay only what the necessities were reasonably worth and not what he may foolishly have agreed to pay for them. Trainer v. Trumbull, 141 Mass. 527; Locke v. Smith, 41 N. H. 346. The person furnishing the necessities can recover only the fair and reasonable value of such necessities. In re Appeal of Ennis, 84 Conn. 610, 80 Atl. 772. Some cases hold that the infant's express promise is absolutely unenforceable and that no action can be maintained thereon. (See cases cited in the next to last preceding note.) Other cases treat the express promise as the express foundation of the action differing from the ordinary contract only in that the reasonable value of the necessities alone can be recovered. Viewed strictly from a legal standpoint it would seem that the legal principle back of the latter doctrine

is convenience only. For an infant so young as to be utterly incapable of forming or assenting to a contract is nevertheless liable for the necessities furnished him. It is the law that in reality makes the contract and imposes the legal duty.

⁴⁸Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Wallin v. Highland Park Co., 127 Iowa 131, 102 N. W. 839, Benjamin's Cases on Contracts, 335; Pool v. Pratt, 1 Chip. (Vt.) 252; Jones v. Valentine's School of Telegraphy, 122 Wis. 318, 99 N. W. 1043; International Text-Book Co. v. McKone, 133 Wis. 200, 113 N. W. 438 (holding his surety also excused).

⁴⁹Brent v. Williams, 79 Miss. 355, 30 So. 713; Gray v. Sands, 66 App. Div. (N. Y.) 572, 73 N. Y. S. 322; International Text-Book Co. v. Aberton, 30 Ohio C. C. 352.

⁵⁰Englebert v. Troxell, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. 665, per Ragan, C.: “It is therefore a preliminary question to be settled, whether the alleged liability arises from expenditures for what the law deems necessities; and, unless that be shown, it is not competent to introduce the evidence to show that in a pecuniary point of view the expenditure was beneficial to the minor.” See also, Mathes v. Dobschuetz, 72 Ill. 438; Price v. Sanders, 60 Ind. 310. In Decell v. Lowenthal,

mine whether they were in fact necessary.⁵¹ The only general rule that can be formulated is to the effect that those articles are necessities which are necessary to the infant's existence and comfort and enable him to live according to his real position in society.⁵²

§ 297. **Necessities, food, wearing apparel, lodging and the like.**—Lord Coke stated that: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction whereby he may profit himself afterward."⁵³ The modern law on this subject might be stated in practically the same

57 Miss. 331, 34 Am. Rep. 449, it was held that the money furnished an infant to enable him to carry on a plantation was not a necessary. In *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435, it was held that where an infant had no guardian, and the services rendered by an attorney were beneficial to the infant's estate, he was liable for such services. *Bloomer v. Nolan*, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. 690. In *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, it was held that the services rendered by an attorney in defending an infant in a bastardy proceeding were necessities. In *Turner v. Gaither*, 83 N. Car. 357, it was held that money furnished an infant to enable him to acquire a professional education was not a necessary. In *Hull v. Connolly*, 3 McCord (S. Car.) 6, 15 Am. Dec. 612, and in *Kline v. L'Amoreux*, 2 Paige (N. Y.) 419, 22 Am. Dec. 652, it was held that "if an infant was living with his parents or guardian and properly maintained by them, his contract, even for necessities, was not binding."

⁵¹ *Rainsford v. Fenwick*, Cart. 215; *Harris v. Fane*, 1 Scott N. R. 287, 1 Man. & G. 550; *Peters v. Fleming*, 6 M. & W. 42; *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. McKenzie*, 5 Q. B. 606; *Bryant v. Richardson*, L. R. 3 Ex. 93n; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Skrine v. Gordon*, Ir. R. 9 C. L. 479; *Hill v. Arbon*, 34 L. T. 125; *McKanna v. Merry*, 61

Ill. 177; *Henderson v. Fox*, 5 Ind. 489; *Garr v. Haskett*, 86 Ind. 373; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Cobbey v. Buchanan*, 48 Nebr. 391, 67 N. W. 176; *Jordan v. Coffield*, 70 N. Car. 110; *Saunders v. Ott*, 1 McCord (S. Car.) 572; *Smith v. Young*, 2 Dev. & Bat. (19 N. Car.) 26; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; *Bent v. Manning*, 10 Vt. 225.

⁵² *Peters v. Fleming*, 6 M. & W. 42; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Walter v. Everard* (1891), 2 Q. B. 369; *Hands v. Slaney*, 8 T. R. 578; *Strong v. Foote* 42 Conn. 203; *Nicholson v. Spencer*, 11 Ga. 607; *McKanna v. Merry*, 61 Ill. 177, *Benjamin's Cases on Contracts*, 343; *McKanna v. Merry*, 61 Ill. 177; *Sams v. Stockton & Curtis*, 14 B. Mon. (Ky.) 232, *Benjamin's Cases on Contracts*, 346; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Jordan v. Coffield*, 70 N. Car. 110; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274; *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537; *Gayle v. Hayes' Admr.*, 79 Va. 542; *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777.

⁵³ Co. Lit. 172a.

language. The cases decided since Lord Coke's time have in the main merely applied and amplified the rule as announced by that eminent jurist. Consequently, it is well settled that an infant is liable for the reasonable value of necessary food,⁵⁴ medical attention⁵⁵ including nursing during sickness,⁵⁶ wearing apparel,⁵⁷ services rendered by dentists in caring for decayed teeth,⁵⁸ or lodging.⁵⁹

§ 298. **Necessities, education.**—In conformity with Lord Coke's definition a trade education⁶⁰ and common school education⁶¹ are held necessities. It seems from decided cases that a college⁶² or professional education⁶³ is not to be classed as a neces-

⁵⁴*Barnes v. Barnes*, 50 Conn. 572; *Price v. Sanders*, 60 Ind. 310; *Kilgore v. Rich*, 83 Maine 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. 780; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; *McConnell v. McConnell* 75 N. H. 385, 74 Atl. 875. The above case holds the fact that she was under guardianship to be immaterial. *Saunders v. Ott*, 1 McCord (S. Car.) 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274; *Bradley v. Pratt*, 23 Vt. 378.

⁵⁵*Price v. Sanders*, 60 Ind. 310. The infant may be liable for its necessities when the parent fails or refuses to provide them. In this case it was medical attention. *Harris v. Crawley*, 161 Mich. 383, 126 N. W. 421; *Gibbs v. Poplar & Co.*, 142 Mo. App. 19, 125 S. W. 840; *Saunders v. Ott*, 1 McCord (S. Car.) 572.

⁵⁶*In re Werner's Appeal*, 91 Pa. St. 222.

⁵⁷*Price v. Sanders*, 60 Ind. 310; *Stone v. Denison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Atchison v. Bruff*, 50 Barb. (N. Y.) 381; *Saunders v. Ott*, 1 McCord (S. Car.) 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274. See also, *Austin v. Kahn*, 1 White & W. Civ. Cas. (Tex.), § 1049.

⁵⁸*Strong v. Foote*, 42 Conn. 203, *Benjamin's Cases on Contracts*, 338.

⁵⁹*Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Price v. Sanders*, 60 Ind. 310; *Kilgore v. Rich*, 83 Maine 305, 22 Atl. 176, 12

L. R. A. 859, 23 Am. St. 780; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274. See also, *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177.

⁶⁰*Walter v. Everard* (1891), 2 Q. B. 369; *Party v. American-Ship Windlass Co.*, 20 R. I. 147, 37 Atl. 706, 78 Am. St. 844. See *Mauldin v. Southern & C. Business Univ.*, 126 Ga. 681, 55 S. E. 922, where it is held that whether or not a stenographic course for a minor was a necessity depended "entirely upon that particular infant's condition in life, and the particular sphere in society or calling in life which her previous education and attainments had prepared and fitted her to occupy or fill." *International Text-Book Co. v. McKone*, 133 Wis. 200, 113 N. W. 438. In the above case he is held liable only on his executed contract. Nor is his surety liable in case the infant repudiates his executory contract.

⁶¹*Peters v. Fleming*, 6 Mes. & W. 42; *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17; *Saunders v. Ott*, 1 McCord (S. Car.) 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274; *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537.

⁶²*Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537 (especially where the infant's wealth, station in society, or genius or talent do not suggest the fitness and expediency of a college education for him).

⁶³*Turner v. Gaither*, 83 N. Car. 357, 35 Am. Rep. 574 (educated as

sity. It is believed, however, that the foregoing cases denying that a college or professional education may be a necessity are of doubtful propriety, nor can any reason be seen for drawing a distinction between the case in which money is advanced in order to enable an infant to learn a trade or engage in business and the case in which it is advanced to enable him to learn a profession.⁶⁴

§ 299. **Necessities, services of an attorney.**—The services of an attorney may be classed as a necessity if rendered for the protection of his personal rights or for the release of his person.⁶⁵ In conformity with this rule it has been held that an attorney is entitled to the reasonable value of his services for bringing a breach of promise suit on behalf of a destitute female,⁶⁶ bringing suit for indecent assault⁶⁷ or prosecuting an action to recover for personal injury.⁶⁸

It has also been held that an attorney is entitled to recover when he defends a minor in a bastardy⁶⁹ or criminal proceeding,⁷⁰ or any action where his liberty and reputation are at stake.⁷¹ Services rendered in the prosecution or defense of a civil action

physician); *Bouchell v. Clary*, 3 Brev. (S. Car.) 194 (educated as physician). See also, *Smith v. Gibson*, Peake's Add. C. 52, in which it is held that money advanced to place out defendant's infant wife as an apprentice to learn millinery could not be considered as a necessity. *De Moss v. Giltner*, 5 Ky. L. 691, in which it was held that instruction in music and painting given without authority of the person in whose custody the infant was, was not to be classed as a necessity. It has also been held that religious instruction is not such education as is classed as a necessity. *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17.

⁶⁴ See *Peters v. Fleming*, 6 M. & W. 42. Education furnished to an infant may be necessary to him, but only when it is suitable to his wants and condition. *International Text-Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255; *Mauldin v. Southern &c. Business Univ.*, 126 Ga. 681, 55 S. E. 922; *Cory v. Cook*, 24 R. I. 421, 53 Atl. 315.

⁶⁵ *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. 665; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160; *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. 721; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821.

⁶⁶ *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151.

⁶⁷ *Crafts v. Carr*, 2 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. 721.

⁶⁸ *Sutton v. Heinze*, 84 Kans. 756, 115 Pac. 560, 116 Pac. 614, 34 L. R. A. (N. S.) 238; *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821.

⁶⁹ *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160.

⁷⁰ *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

⁷¹ See *McCrillis v. Bartlett*, 8 N. H. 569. See also, *Nagel v. Schilling*, 14 Mo. App. 576.

have been held a necessity when they conserve the infant's property and are highly beneficial to the infant's estate.⁷²

No definite and satisfactory rule can be laid down as to when attorney's fees will be deemed necessities. An action at law may be a necessity for an infant, and whether it is or not is to be determined by the particular circumstances of each case.⁷³

§ 300. **Necessities, miscellaneous.**—There may be special circumstances such as will render necessary certain things that might not under ordinary conditions be so classified. Thus it has been held that regimentals furnished an infant who was a member of a volunteer corps were necessities.⁷⁴ On the same principle a captain in the army has been held liable for a livery furnished his servant, the court saying that they could not hold the servant was not a necessity and if he was necessary a livery for him was also necessary.⁷⁵

An infant widow has been held liable on her contract as for necessities for the funeral expenses of her husband who left no property to be administered.⁷⁶ Mourning goods may also be a necessity.⁷⁷

⁷² *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434. *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. 837. In the case last cited it is said: "Looking to the condition of affairs in our state, it seems to us that to refuse to allow an attorney, who, at the instance of a next friend, has instituted a suit in behalf of a minor and recovered for him money or property, to claim from the infant a reasonable compensation for his services would be to establish a rule which would operate to the prejudice of the class it is designed to protect. In such case where the services have been beneficial to the infant we are of the opinion that reasonable compensation should be allowed." However, it has been held that services rendered in successfully defending a foreclosure suit (*Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. 665), looking up the title and advising an infant as to his rights in certain property (*Cobbey v. Buchanan*, 48 Nebr. 391, 67 N. W. 176), or defending a suit in order to protect

the infant's title at the instance of his guardian (*Phelps v. Worcester*, 11 N. H. 51), were not necessities and that the attorney could not recover for the services rendered. See also, *Dillon v. Bowles*, 77 Mo. 603. While a rule of law (expressly for the infant's benefit) which holds an infant liable for necessities and yet refuses compensation to one who renders services in obtaining possession or conserving, for the infant, his property (the means whereby he may furnish himself with the necessities) would seem a short-sighted policy not expressly for the infant's benefit, yet if the old rule limiting necessities to the person and not the estate of the infant is adhered to cases holding the infant liable for an attorney's services rendered in conserving his estate cannot be upheld on principle.

⁷³ *Thrall v. Wright*, 38 Vt. 494.

⁷⁴ *Coates v. Wilson*, 5 Esp. 152.

⁷⁵ *Hands v. Slaney*, 8 T. R. 578.

⁷⁶ *Chapple v. Cooper*, 13 Mees. & W. 252.

⁷⁷ *De Moss v. Giltner*, 5 Ky. L. 691.

While a horse is not generally considered as a necessity yet it may be considered as such for an infant who has medical advice to take exercise on horseback.⁷⁸ An infant has also been held liable for a wedding outfit proper for the occasion although not suitable for ordinary purposes.⁷⁹ Expensive fruits furnished a sick infant may be classed as necessities.⁸⁰

As has been previously stated the capacity of an infant husband to contract for necessities is enlarged by his marriage and he will be bound for the reasonable value of necessities for his family as well as for himself.⁸¹ Consequently a married infant who leased a house for two years has been held liable for the rental value of the property during the time he actually occupied it but not liable on the executory part of the contract. In this case it appeared that the infant had leased the property for two years; he remained in it ten days, and the court held him liable only for the rental value of the property for ten days.⁸²

The law on this subject may be summarized as follows: necessities concern the person and not the estate. The personal needs of an infant include all such articles, uses and services as are reasonably necessary for one in his circumstances and condition of life.

§ 301. What are not necessities.—The mere fact that an article or articles, such as food, clothing, and the like, may be classed as necessities does not mean that they will under all circumstances be held necessary. The actual need and not the name controls. If it appears that an infant is sufficiently supplied with

⁷⁸ Hart v. Prater, 1 Jur. 623. Also, Clowes v. Brooke, 2 Strange, 1001; Aaron v. Harley, 6 Rich. L. (S. Car.) 26.

⁷⁹ Garr v. Haskett, 86 Ind. 373; Sams v. Stockton, 14 B. Mon. (Ky.) 232; Jordan v. Coffield, 70 N. Car. 110. Expensive jewelry even may be necessary as an engagement present. Jenner v. Walker, 19 L. T. 398.

⁸⁰ Wharton v. Mackenzie, 5 Q. B. 606.

⁸¹ See ante, § 289, Emancipation. See also, Hill and Bunning's Case, 1 Sid. 17; Turner v. Trisby, 1 Strange 168; Turberville v. Whitehouse, 1 Car. & P. 94, affd. in 12 Price 692; Cantine v.

Phillips's admr., 5 Harr. (Del.) 428; Price v. Sanders, 60 Ind. 310; Chapman v. Hughes, 61 Miss. 339; Rivers v. Gregg, 5 Rich. Eq. (S. Car.) 274.

⁸² Peck v. Cain, 27 Tex. Civ. App. 38, 63 S. W. 177. See also, Melton v. Katzenstein, (Tex. Civ. App.) 49 S. W. 173. In the above case it appeared that the infant was married and keeping house. Articles were sold him and it was alleged that they were necessary to enable him to make a crop in order that he might support his family. The court held the question as to whether they were necessities, a mixed question of law and fact, that might be proved by any competent witness.

necessities, whether by his parents, guardian, or friend, or from any source whatever, his contracts for additional articles, in excess of his personal needs, are not binding upon him.⁸³

So long as a minor continues to live with his parents or is under guardianship the law presumes that he is provided with necessities.⁸⁴ This presumption is *prima facie* only, and it is generally held that if parents fail or are unable to supply the wants of their minor children such children may be held liable on their contracts for necessities.⁸⁵

⁸³ *Bainbridge v. Pickering*, 2 W. Black. 1325; *Ford v. Fothergill*, Peake N. P. 229, 1 Esp. 211; *Cook v. Deaton*, 3 Car. & P. 114; *Story v. Pery*, 4 Car. & P. 526; *Burghart v. Angerstein* 6 Car. & P. 690; *Mortara v. Hall*, 6 Sim. 465; *Brayshaw v. Eaton*, 7 Scott 183, 5 Bing. (N. C.) 231; *Steedman v. Rose*, Car. & M. 422; *Foster v. Redgrave*, L. R. 4 Ex. 35n; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Johnstone v. Marks*, L. R. 19 Q. B. D. 509; *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *McKanna v. Merry*, 61 Ill. 177; *Angel v. McLellan*, 16 Mass. 28, 8 Am. Dec. 118; *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. C. 761; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Perrin v. Wilson*, 10 Mo. 451; *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; *Hussey v. Roundtree*, Busb. L. (N. Car.) 110; *Smith v. Young*, 2 Dev. & B. (N. Car.) 26; *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Assignees of Hull v. Connolly*, 3 McCord (S. Car.) 6, 15 Am. Dec. 612; *Edwards v. Higgins*, 2 McCord Eq. (S. Car.) 16; *Kraker v. Byrum*, 13 Rich. (S. Car.) 163; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274; *Elrod v. Myers*, 2 Head (Tenn.) 33; *Nichol v. Steger*, 2 Tenn. Ch. 328, *affd.*, 6 Lea (Tenn.) 393. A trader selling goods to a minor does so at his peril, and before he can recover for their value he must show that the articles furnished were

necessaries, were actually needed, and that they or the money therefor were not supplied by the guardian or others. *Brent v. Williams*, 79 Miss. 355, 30 So. 713. The fact that the trader had no knowledge that the necessities were being furnished by another is immaterial. *Eames v. Sweetser*, 101 Mass. 78. Nor does the mere fact that the trader may or may not have inquired into the infant's circumstances in any way change the question to be decided; whether inquiry was or was not made, the question for the jury would still be the same. *Brayshaw v. Eaton*, 7 Scott 183, 5 Bing. (N. C.) 231. See also, *Dalton v. Gibb*, 7 Scott 117, 5 Bing. (N. C.) 198.

⁸⁴ *Conboy v. Howe*, 59 Conn. 112, 22 Atl. 35; *McKanna v. Merry*, 61 Ill. 177; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Perrin v. Wilson*, 10 Mo. 451; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; *Smith v. Young*, 2 Dev. & B. (N. Car.) 26; *Freeman v. Bridger*, 49 N. Car. 1, 67 Am. Dec. 258; *State v. Cook*, 12 Ired. L. (N. Car.) 67; *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681; *Connolly v. Assignees of Hull*, 3 McCord (S. Car.) 6, 15 Am. Dec. 612; *Parsons v. Keys*, 43 Tex. 557.

⁸⁵ See cases cited in preceding note, and, also, *Mauldin v. Southern & C. Business Univ.*, 126 Ga. 681, 55 S. E. 922. Under the Georgia statute, when a suit is brought against a minor for necessities furnished him, it must affirmatively appear that the parent or guardian of such minor has failed or refused to supply him with sufficient necessities. *McAllister v.*

Closely analogous to the foregoing authorities is the rule that necessities, when furnished, must be in accordance with the needs and circumstances of the individual. If an excess is furnished there can be no recovery for that which is over and above the reasonable amount required by the necessities of the occasion.⁸⁶

The foregoing instances are, in the main, cases in which the articles furnished properly fell within that class designated as necessities, but owing to some circumstance peculiar to each case they were taken out of the general rule. In other words they were necessities in name, but not such in fact. The succeeding cases have to do with articles that are not generally classified as necessities. The word necessity, as here used, has to do with the personal needs of the infant. A ministry to his fancied needs, appetite or passion, under the guise of necessities, is not tolerated ;

Galtin, 3 Ga. App. 731, 60 S. E. 355; Harris v. Crawley, 161 Mich. 383, 126 N. W. 421 (parent); McConnell v. McConnell, 75 N. H. 385, 74 Atl. 875 (guardianship); Goodman v. Alexander, 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781. See Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652, which holds that an infant cannot bind himself for necessities when under the care and control of a parent or guardian able and willing to provide for him. See also, Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118. See, however, Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371, in which it was held that an infant was not liable for medical attention furnished him where his father was poor and unable to provide such attention. In connection with this case see, however, Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761.

⁸⁶ Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Benjamin Cases on Contracts, 339. In the above case it is said: "Their [the plaintiffs'] account mounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessities when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three panta-

loons, in the space of fifteen months and twenty-one days; to say nothing of three bowie knives, sixteen penknives, eight whips, ten whiplashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket money, and to pay for keeping the minor's horses, which no one would be so hardy as to call necessities. How they could reconcile such a verdict to the dictates of conscience, I know not. They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the common law on the subject be strictly enforced." If articles are furnished an infant, some of which articles are necessities and others not, the reasonable value of the necessary articles so furnished may be recovered. Bent v. Manning, 10 Vt. 225; Wallace v. Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. 777.

consequently, except in extraordinary cases, articles of ornament or things conducive to pleasure are not considered necessities.⁸⁷

Thus courts have refused to hold kid gloves, cravats, cologne and walking canes,⁸⁸ velvet and satin suits ornamented with gold lace,⁸⁹ racing jackets supplied to one not a jockey,⁹⁰ liquors, pistols, powder, saddles, bridles, whips, fiddles and fiddle strings,⁹¹ rich and costly betting books,⁹² balls and serenades,⁹³ jewelry,⁹⁴ notwithstanding it is sold to one of high degree,⁹⁵ dinners for friends, confectionery and fruits,⁹⁶ cigars and tobacco,⁹⁷ and pleasure trips,⁹⁸ are not necessities. Horses, whether used for pleasure or business,⁹⁹ bridle and saddle,¹ pony,² buggies,³ bicycles,⁴ and

⁸⁷ Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. *Chappel v. Cooper*, 13 M. & W. 252.

⁸⁸ *Lefils v. Sugg*, 15 Ark. 137.

⁸⁹ *Makarell v. Bachelor*, Cor. Eliz. 583.

⁹⁰ *Burghart v. Angerstein*, 6 Car. & P. 690.

⁹¹ *Saunders v. Ott's Admr.*, 1 McCord (S. Car.) 572.

⁹² *Jenner v. Walker*, 19 L. T. 398.

⁹³ *North and Thompson's Case*, cited Cart. 216.

⁹⁴ *Peters v. Fleming*, 6 M. & W. 42; *Lefils v. Sugg*, 15 Ark. 137; *McKenna v. Merry*, 61 Ill. 177.

⁹⁵ *Ryder v. Wombwell*, L. R. 4 Ex. 32. See, however, *Berrolles v. Ramsay*, Holt N. P. 77, in which it was held that a breast pin and watch and chain might be considered as necessities when purchased by the son of a wealthy nobleman. See also, *Jenner v. Walker*, 19 L. T. 398.

⁹⁶ *Brooker v. Scott*, 11 M. W. 67; *Wharton v. MacKenzie*, 5 Q. B. 606. See, however, *Watson v. Cross*, 2 Duv. (Ky.) 147.

⁹⁷ *Bryant v. Richardson*, 14 L. T. 24.

⁹⁸ *McKanna v. Merry*, 61 Ill. 177. Traveling expenses may, however, be a necessity, [*Breed v. Judd*, 1 Gray (Mass.) 455] as when traveling for the minor's health. *Howard v. Simpkins*, 70 Ga. 322.

⁹⁹ *Skrine v. Gordon*, 9 Ir. R. C. L. 479; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Smithpeters v. Griffin's Admr.*, 10 B. Mon. (Ky.) 259; *Wood v. Losey*, 50

Mich. 475; *Rainwater v. Durham*, 2 Nott. & McC. (S. Car.) 524, 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296. See also, *Mohney v. Evans*, 51 Pa. St. 80. See also, ante, § 300, as to when a horse may be necessary.

¹ *Beeler v. Young*, 1 Bibb (Ky.) 519.

² *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

³ *Howard v. Simpkins*, 70 Ga. 322; *Paul v. Smith*, 41 Mo. App. 275; *Hefington v. Jackson*, 43 Tex. Civ. App. 560, 96 S. W. 108.

⁴ *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775. In the above case it appeared that the infant was employed a considerable distance from home and that he rode the wheel going to and from work. See also, *Rice v. Butler*, 25 App. Div. (N. Y.) 388, 49 N. Y. S. 494, revd. on other grounds, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. 703. In the above case the bicycle was purchased for a domestic living at her employer's house. See, however, the case of *Clyde Cycle Co. v. Hargreaves*, L. T. R. 107 (N. S.) 296, in which it is held not error to find affirmatively that a bicycle was a necessary where it appeared that the use of bicycles was common among persons of the infant's station in life in the surrounding neighborhood. The machine bought was a racing bicycle with which the infant won some prizes; he also used it on the road.

an expensive chronometer, notwithstanding it was bought by a lieutenant in the English royal navy,⁵ are not, except under very exceptional circumstances, necessities.

The law does not contemplate that an infant shall carry on any business which necessitates or involves the making of contracts on his personal responsibility.⁶ Consequently, purchases made by an infant for the purpose of trading, although he thereby gain his living, do not bind him.⁷ Nor is he liable for the value of articles furnished him in carrying on a business, such as running a cigar stand,⁸ barber-shop,⁹ farm¹⁰ or plantation,¹¹ on the ground that such articles were necessities.¹²

Necessities concern the person and not the estate of the infant. In case he has an estate its management and control are the proper business of his guardian.¹³ For these reasons it is held that an infant is not liable, as for necessities, for repairs on his dwelling house or other buildings, although required for the prevention of immediate and serious injury thereto.¹⁴ Nor is the rule affected by the fact that the dwelling is occupied by the in-

⁵ *Berrolles v. Ramsay*, Holt N. P. 77.

⁶ *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. 777.

⁷ *Whittingham v. Hill*, Cro. Jac. 494. See also, *Dilk v. Keighley*, 2 Esp. 480. However, if such articles are consumed as necessities in his own family he is liable therefor. *Turbeville v. Whitehouse*, 1 Car. & P. 94, 12 Price 692. The sale of a saloon to a minor is neither necessary nor beneficial. *Chabot v. Paulhus*, (R. I.) 79 Atl. 1103.

⁸ *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. 777.

⁹ *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109, *Benjamin's Cases on Contracts* 341.

¹⁰ In the following cases the infant was held not liable for a horse purchased by him to be used in farming: *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Wood v. Losey*, 50 Mich. 475, 15 N. W. 557; *Rainwater v. Durham*, 2 Nott. & McC. (S. Car.) 524, 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296. See, however, *Mohney v. Evans*, 51 Pa. St.

80. The board of horses used by an infant hackman has been held not to be a necessary for which the infant was liable. *Merriam v. Cunningham*, 11 Cush. (Mass.) 40. See also, *Paul v. Smith*, 41 Mo. App. 275. In the above case a wagon was bought to be used on a farm.

¹¹ *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *State v. Howard*, 88 N. Car. 650. See, however, *Chapman v. Hughes*, 61 Miss. 339.

¹² As to liability when engaged in business with guardian's consent, see *Rundel v. Keeler*, 7 Watts (Pa.) 237. See also, *Lowe v. Griffiths*, 1 Scott 458, 1 Hodges 30, in which it is held that an infant is chargeable with the use and occupation of a house in which he carries on a business, and which he also occupies as a dwelling.

¹³ *Tupper v. Caldwell*, 12 Metc. (Mass.) 559, 46 Am. Dec. 704.

¹⁴ *Tupper v. Caldwell*, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; *Wallace v. Bardwell*, 126 Mass. 366; *West v. Gregg*, 1 Grant (Pa.) 53; *Phillips v. Lloyd*, 18 R. I. 99, 25 Atl. 909.

fant.¹⁵ On the same principle, work done and material furnished for the erection of a dwelling or other buildings on an infant's premises are not considered as necessities.¹⁶ However, it has been held that equity may in a proper case subrogate the party who makes improvements on an infant's real estate to the increased value of the premises due to such improvements,¹⁷ or the increased rental value of the premises.¹⁸

A contract for insurance on buildings already erected, or other property, while admittedly prudent, is not usually considered a necessary.¹⁹

The common law does not regard money as a necessity; consequently it is well settled that money loaned to an infant and not expended by him for necessities cannot be considered as a necessity.²⁰ In accordance with this principle it is held in law that an infant is not liable for money borrowed by him to pay for necessities. The reason given for so holding is that the cause of action must arise, if at all, when the money is lent, and subsequent matters such as the manner in which the money is spent cannot give rise to a right of recovery. The lender must apply it or actually see that it is applied for necessities before he can recover.²¹

¹⁵ *Horstmeyer v. Conners*, 56 Mo. App. 115.

¹⁶ *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Price v. Jennings*, 62 Ind. 111; *Price v. Sanders*, 60 Ind. 310; *Wornack v. Loar*, 11 Ky. L. 6, 11 S. W. 438; *Allen v. Lardner*, 78 Hun (N. Y.) 603, 60 N. Y. St. 768, 29 N. Y. S. 213; *Freeman v. Bridger*, 49 N. Car. 1, 67 Am. Dec. 258. See also, *Morris v. Mitchell*, 19 Ky. L. 136, 39 S. W. 250, holding that the homestead interest of infants is not chargeable with the cost of improvement made without their authority. See, however, *Chapman v. Hughes*, 61 Miss. 339.

¹⁷ *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805; *McGreal v. Taylor*, 167 U. S. 688, 42 Law. ed. 326, 17 Sup. Ct. 961. See also, *Utermehle v. McGreal*, 1 App. D. C. 359.

¹⁸ *Schumate v. Harbin*, 35 S. Car. 521, 15 S. E. 270.

¹⁹ *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345. See also, *Union & C. Ins. Co. v. Hilliard*, 63

Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462n, 81 Am. St. 644; note to *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569. Such a contract cannot, however, be avoided by the insurer. *Monaghan v. Agriculture Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797. Under the statutes of New York an infant can make a valid contract for life insurance. *Hamm v. Prudential Ins. Co.*, 137 App. Div. (N. Y.) 504, 122 N. Y. S. 35. See also, *Equitable Trust Co. v. Moss*, 134 N. Y. S. 533.

²⁰ *Root v. Stevenson's Admr.*, 24 Ind. 115; *Kennedy v. Doyle*, 10 Allen (Mass.) 161; *Turner v. Gaither*, 83 N. Car. 357, 35 Am. Rep. 574.

²¹ *Darby v. Boucher*, 1 Salk. 279; *Ellis v. Ellis*, 5 Mod. 368; *Earle v. Peale*, 1 Salk. 386, 10 Mod. 66; *Probart v. Knough*, 2 Esp. 472, note; *Price v. Sanders*, 60 Ind. 310; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Randall v. Sweet*, 1 Denio (N. Y.) 460; *Dent v. Manning*, 10 Vt. 225. See

Equity applies a different rule, however, and holds that one who loans money to an infant, who in turn expends it for necessities, is subrogated to the right of the party furnishing the same.²² In conformity with this rule it is held that if an infant gives a note for necessities, signed by a surety, and the surety afterwards pays the note, he is entitled to recover the amount so paid from the infant.²³ In case money is loaned to discharge a prior valid lien on realty owned by a minor, equity subrogates the lender to the rights of the holder of the prior valid lien which has been paid by the money advanced.²⁴

Subject to the general rule hereinbefore discussed an infant is liable both at law and equity to a third person for money expended in order to supply such infant with necessities,²⁵ or for money paid to settle a pre-existing debt for necessities.²⁶ But, as already intimated, notwithstanding the fact that it may be reasonable and prudent for an infant to take out a policy of life

also, *Morton v. Steward*, 5 Ill. App. 533; *Henderson v. Fox*, 5 Ind. 489; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759. *Dorrell v. Hastings*, 28 Ind. 478, in which it is said: "We are not aware of any authority that would justify us in holding that money paid to relieve an infant from a military draft to which the law subjects him comes within the exception of necessities. Upon principles we think it clear that it does not." *McCrillis v. How*, 3 N. H. 348.

²² *Marlow v. Pittfield*, 1 P. Wms. 558; *Price v. Sanders*, 60 Ind. 310; *Hickman v. Hall's Admr.*, 5 Litt. (Ky.) 338. See also, *Kilgore v. Rich*, 83 Maine 305, 22 Atl. 176.

²³ *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Haine's Admr. v. Parant*, 2 Hill (S. Car.) 400. See also, *Dial v. Wood*, 9 Baxt. (Tenn.) 296. *Contra*, *Ayres v. Burns*, 87 Ind. 245, 44 Am. Rep. 759.

²⁴ *Charles v. Hastedt*, 51 N. J. Eq. 171, 26 Atl. 564; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037; *McGreal v. Taylor*, 157 U. S. 688, 42 Law ed. 326, 17 Sup. Ct. 961. See, however, *Burton v. Anthony*, 46 Ore. 47, 79 Pac. 185, 58 L. R. A. 826, 114 Am. St. 847, which holds that a court of equity will not impose a lien on a minor's interest in land to

secure a payment of money advanced at his request to redeem the premises from a sale under decree of foreclosure, the redemption not being a necessity for which the minor is liable. At law money loaned to a minor, by which he discharges a prior valid lien existing against his real estate, is not considered as a necessity. *Magee v. Welsh*, 18 Cal. 155.

²⁵ *Randall v. Sweet*, 1 Denio (N. Y.) 460; *Smith v. Oliphant*, 2 Sands. (N. Y.) 306.

²⁶ *Clarke v. Leslie*, 5 Esp. 38; *Hedgeley v. Holt*, 4 Car. & P. 104; *Kilgore v. Rich*, 83 Maine, 305, 22 Atl. 176, 12 L. R. A. 859n, 23 Am. St. 780; *Benjamin's Cases on Contracts*, 336. In the above case it is said: "The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for a payment while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our exam

insurance such a contract is not considered as one for necessities.²⁷

§ 302. Voidable contracts generally.—A great majority of the contracts of an infant are voidable by him, and, as has been demonstrated by the preceding sections of this chapter, such agreements gain no binding force from the fact that he is engaged in business for himself or is emancipated.²⁸

The exercise of his right to disaffirm his contract may operate injuriously and unjustly against the other party, but the right exists for the protection of the infant against his own improvidence, and may be exercised entirely in his discretion. The fact that the contract has been executed is immaterial. There is no distinction between executed and executory contracts, so far as the right of disaffirmance is concerned.²⁹ In fact all contracts

ination of authorities, noticed any case that opposes the principle." *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Bicknell v. Bicknell*, 111 Mass. 265. In the latter case the money was advanced at the request of the guardian. See also, *Bradley v. Pratt*, 23 Vt. 378. See also, *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519, in which a minor is held liable on a note given in settlement of the claim arising in tort. The decision is based on the analogy existing in the liability of an infant for his necessity and his liability for his tort.

²⁷ *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. 560. An infant's contract of insurance is not void, but is merely voidable. *Union Central Life Ins. Co. v. Hillard*, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. 644. Cases holding that a college or professional education is not a necessity are cited in the preceding section on What are Necessities, in that paragraph relating to trade and common-school education.

²⁸ See ante, § 289, Effect of emancipation, and also, § 301, What are not necessities. Under the statutes of Georgia, which permit an infant to bind himself by a contract in a business carried on with the permission of his parent, guardian, or by permis-

sion of law, a mere single transaction does not constitute the infant one engaged in business. *White v. Sikes*, 129 Ga. 508, 59 S. E. 228, 121 Am. St. 228.

²⁹ *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216. Several cases and some text-books assert that there is a difference between an executory and executed contract of an infant. The difference pointed out is that the executed contract is binding until it is avoided, whereas an executory contract is without binding force until it is affirmed. *Morton v. Steward*, 5 Ill. App. 533; *Minock v. Shortridge*, 21 Mich. 304; *Tyler v. Gallop*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. 336; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349; *State v. Plaisted*, 43 N. H. 413. It is apparent that this is a distinction without any basis in fact. To say that an infant's executory contract is of no binding force until ratified is equivalent to saying that so far as he is concerned the contract is as if it did not exist. If this is true there is no consideration for the adult's promise, and if there is no consideration for his promise he is not bound; yet all authorities agree that an adult is bound by his executory contract with an infant. It

other than those mentioned in the preceding sections of this chapter entered into by an infant are voidable and cannot be considered as either valid or void.⁸⁰ The various contracts of an infant deemed voidable will be considered in the succeeding sections of this chapter.

§ 303. Conveyances, transfers and mortgages of property.

—An infants' conveyance of property is, unless made in accordance with the provision of some statutory enactment peculiar to that state, voidable,⁸¹ and may be disaffirmed on reaching his

therefore appears that the rule above announced amounts to a declaration that an infant's executory contract is void. Not only is neither party bound by a void contract, but there is also the further question as to whether such an agreement can be ratified. An infant's executory contract is in fact valid and binding until disaffirmed. See *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Rush v. Wick*, 31 Ohio St. 521, 27 Am. Rep. 523. "Many text-writers state the proposition that the contract of the infant is void, but, upon a careful examination of the cases cited by them, we are of the opinion that they do not support such a doctrine. * * * To hold the executory contract of a minor void would unsettle the law in many of its branches. It would necessitate the holding that the promise of a minor cannot furnish a consideration for the promise of an adult, and the latter's promise would be void, both for want of consideration and for lack of mutuality, whereas the contrary is the settled law, based upon the proposition that the infant's contract is only voidable." *Brown v. Farmers' &c. Bank*, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359. In an action upon an executory contract it is incumbent upon the minor to plead his infancy. Under the principle announced in the above cases this would be unnecessary.

⁸⁰ *Shropshire v. Burns*, 46 Ala. 108; *Savage v. Lichlyter*, 59 Ark. 1, 26 S. W. 12; *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045; *Cole v. Pennoyer*, 14 Ill. 158; *Alvey v. Reed*, 115 Ind. 148, 17 N. E. 265, 7 Am. St. 418;

Phipps v. Phipps, 39 Kans. 495, 18 Pac. 707; *Breckinridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17; *Dube v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am. St. Rep. 228; *Owen v. Long*, 112 Mass. 403; *Reed v. Batchelder*, 1 Metc. (Mass.) 559; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229n; *Bloomington v. Chittenden*, 74 Mich. 698, 42 N. W. 166; *Tyler v. Gallop*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. 336; *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 43 Am. St. 473; *Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. 665; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133; *Patterson v. Lippincott*, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; *Cambell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; *Fonda v. VanHorne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Rush v. Wick*, 31 Ohio St. 521, 27 Am. Rep. 523; *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. 25; *Curtin v. Pattin*, 11 Serg. & R. (Pa.) 305; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Bonner v. Bryant*, 79 Tex. 540, 15 S. W. 491, 23 Am. St. 361; *Clemmer v. Price* (Tex. Civ. App.), 125 S. W. 604; *Cummings v. Powell*, 8 Tex. 80; *McGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. 961; *Patchin v. Cromach*, 13 Vt. 330; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209.

⁸¹ *McDonald v. Restigouche Salmon Club*, 23 N. B. 472; *Manning v. John-*

majority, or within a reasonable time thereafter.⁸² The same is true of his executory contracts to convey real estate,⁸³ or to purchase it,⁸⁴ or of a lease executed by⁸⁵ or to him.⁸⁶

son, 26 Ala. 446, 62 Am. Dec. 732; *Hastings v. Dollarhide*, 24 Cal. 195; *Walker v. Pope*, 101 Ga. 665, 29 S. E. 8; *Tunison v. Chamblin*, 88 Ill. 378; *Keil v. Healy*, 84 Ill. 104, 25 Am. Rep. 434; *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Green v. Wilding*, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696; *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30; *Hiles v. Hiles*, 26 Ky. L. 324, 82 S. W. 580; *Davis v. Dudley*, 70 Maine 236, 35 Am. Rep. 318; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569; *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115; *Engelbert v. Troxell*, 40 Nebr. 195, 82 N. W. 852, 26 L. R. A. 177, 42 Am. St. 665; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Pedro v. Pedro*, 127 N. Y. S. 997 (holding his deed of trust voidable if disaffirmed within a reasonable time); *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635, affg. 1 Edw. Ch. (N. Y.) 301; *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565; *Drake's Lessee v. Ramsay*, 5 Ohio 251; *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. 25; *Ihley v. Padgett*, 27 S. Car. 300, 3 S. E. 468; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Bullock v. Sprwells*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. 849; *Stone v. Wolfe*, 50 Tex. Civ. App. 231, 109 S. W. 981; *Hatton v. Bodan Lumber Co.*, 57 Tex. Civ. App. 478, 123 S. W. 163 (containing a statement to the effect that "it is only in cases where it is shown that the contract is prejudicial to the infant that it will be treated by the courts as void"); *Tucker v. Moreland*, 10 Pet. (U. S.) 59; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W.

Va. 70, 29 Am. Rep. 445. In the case of *Britt v. Caldwell-Norton Lumber Co.*, 126 La. 155, 52 So. 251, it is said, "A sale of minors' property without any regard whatever to legal formalities is null." In this case it appears that land in which certain minors had an interest was sold without their knowledge or consent, the deed being signed in their name by some one unknown to them. Infants are not only incapable of conveying their real estate, but are incompetent to consent to any of the proceedings provided by law for its disposition. They stand in the position of hostile parties to such proceeding and are treated as objecting to every step taken therein. *Coleman v. Virginia Stove & Co.*, 112 Va. 61, 70 S. E. 545.

⁸² See cases cited, ante, note 31. As to when and how to disaffirm, see post, § 304 et seq., Disaffirmance. The right of disaffirmance is superior to equities of other persons, and may be exercised against a bona fide purchaser from the infant's grantee. *Conn v. Boutwell*, (Miss.) 58 So. 105.

⁸³ *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045; *Johnson v. Rockwell*, 12 Ind. 76; *Yeager v. Knight*, 60 Miss. 730; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640; *Merida v. Cummings*, (Tex. Civ. App.) 115 S. W. 613; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209.

⁸⁴ *Forsee's Admx. v. Forsee*, 144 Ky. 169, 137 S. W. 836; *Lynd v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84.

⁸⁵ *Slator v. Trimble*, 14 Ir. C. L. 342; *Slator v. Brady*, 14 Ir. C. L. 61; *Field v. Herrick*, 101 Ill. 110.

⁸⁶ *Flexner v. Dickerson*, 72 Ala. 318; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429. See also, *McCoon v. Smith*, 3 Hill (N. Y.) 147, 38 Am. Dec. 623, in which it is held that an infant's contract of tenancy does not estop him from denying his landlord's title when sued by the latter in ejectment. The title to the land was confessedly in the infant. The court said: "A con-

An infant's mortgage of his realty is voidable.³⁷ Nor is the mortgage rendered valid and binding because given to obtain necessities,³⁸ or to secure money to erect improvements on the premises.³⁹ It has been held that infancy is no defense to an action to foreclose a mortgage given to secure the purchase-price money.⁴⁰ He may disaffirm the mortgage and relinquish the property,⁴¹ but if he continues to hold the estate and apply it to his own uses after he reaches his majority he is deemed to have affirmed the mortgage.⁴² He cannot enjoy the benefit of the agreement and at the same time avoid the obligations it imposes upon him.⁴³

fession by contract is alleged against him by which the effect of his title and right of possession is to be overcome. This is certainly no more than the confession that a contract was made which he had no right to make and does not come within the rule."

³⁷ *Hubbard v. Cummings*, 1 Maine 11; *Monumental Bldg. Assn. v. Herman*, 33 Md. 128; *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773; *Uecker v. Koehn*, 21 Nebr. 559, 32 N. W. 583, 59 Am. St. 849; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Palmer v. Miller*, 25 Barb. (N. Y.) 399; *Hetterick v. Porter*, 20 Ohio Cir. Ct. 110, 11 Ohio Cir. Dec. 145; *McGan v. Marshall*, 7 Humph. (Tenn.) 121. A minor may call into existence a trust which is valid until avoided. *Eldredge v. Hoefer* (Ore.), 93 Pac. 246, 94 Pac. 563. See *Missouri Central &c. Assn. v. Eveler*, 237 Mo. 679, 141 S. W. 877, in which a father, who was a life tenant, represented that he owned the fee, and borrowed money and gave a mortgage on the premises. It was held that the remainderman, who was an infant at the time the mortgage was given, could not assent to the giving of the mortgage and was not estopped to dispute it.

³⁸ *McGan v. Marshall*, 7 Humph. (Tenn.) 121; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. See, however, *Cooper v. State*, 37 Ark. 421.

³⁹ *New York Building & Loan &c. Co. v. Fisher*, 23 App. Div. (N. Y.) 363, 48 N. Y. S. 152. See, however, *McGreal v. Taylor*, 167 U. S. 688, 42

L. ed. 326, 17 Sup. Ct. 961. Under the holding in the above case he might be subrogated to the increased value of the premises.

⁴⁰ *Robinson v. Bergholz*, 4 Ohio Dec. 103. See, however, *Hook v. Donaldson*, 9 Lea (Tenn.) 56.

⁴¹ *Willis v. Twambly*, 13 Mass. 204.

⁴² *Grace v. Whitehead*, 7 Grant U. C. 591; *Utermehle v. McGreal*, 1 D. C. App. 359; *McClure v. McClure*, 74 Ind. 108; *Hubbard v. Cummings*, 1 Greenl. (Maine) 11; *Dana v. Coombs*, 6 Maine 89, 19 Am. Dec. 194; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805; *Young v. McKee*, 13 Mich. 552; *Betts v. Carroll*, 6 Mo. App. 518; *Uecker v. Koehn*, 21 Nebr. 559, 59 Am. Rep. 849; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Robbins v. Eaton*, 10 N. H. 561; *Heath v. West*, 28 N. H. 101; *Henry v. Root*, 33 N. Y. 526; *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Coutant & Hobby v. Servoss*, 3 Barb. (N. Y.) 128; *Ottman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654; *Kennedy v. Baker*, 159 Pa. St. 146, 28 Atl. 252; *Hook v. Donaldson*, 9 Lea (Tenn.) 56; *Weed v. Beebe*, 21 Vt. 495; *Richardson v. Boring*, 9 Vt. 368; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Callis v. Dav*, 38 Wis. 643.

⁴³ *Dana v. Coombs*, 6 Maine 89, 19 Am. Dec. 194; *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805; *Heath v. West*, 28 N. H. 101. It has been held, however, that where an in-

The same rules governing the transfer or mortgage of real estate by an infant are applicable to his sales of personal property.⁴⁴ An infant's purchase of personal property is voidable at his option,⁴⁵ as are also his mortgages on personalty.⁴⁶ A chattel mortgage made for an infant in the course of a business upon which he depends for support and to enable him to carry it on is not void but merely voidable.⁴⁷ Nor can he be held criminally responsible for selling chattels mortgaged by him since such sale is simply a disaffirmance of the mortgage which it is his right to make.⁴⁸ His contract of warranty of things sold is also voidable.⁴⁹

§ 304. Bills and notes.—After the negotiability of bills of exchange was finally established by the common law and their

infant executes a mortgage which contains a power of sale, such power of sale is invalid and the sale under it absolutely void, and that while the infant might ratify the mortgage he would nevertheless be entitled to redeem if the allegations to the bill sufficiently set forth the invalidity of the power of sale as a ground for release. *Rocks v. Cornell*, 21 R. I. 532, 45 Atl. 552. See ante, § 288, as to void contracts of an infant, the giving of powers of attorney and appointment of agents. See, however, *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

⁴⁴ *Williams v. Brown*, 34 Maine 594; *Kingman v. Perkins*, 105 Mass. 111; *Holmes v. Rice*, 45 Mich. 142; *Roof v. Stafford*, 7 Cow. (N. Y.) 179; *Johnson v. Packer*, 1 Nott. & McC. (S. Car.) 1.

⁴⁵ *Riley v. Mallory*, 33 Conn. 201; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Butler v. Stark*, 25 Ky. L. 1886, 79 S. W. 204; *Robinson v. Weeks*, 56 Maine 102; *McCarthy v. Henderson*, 138 Mass. 310; *Barney v. Rutledge*, 104 Mich. 289, 62 N. W. 369; *Nichols & Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678.

⁴⁶ *Corey v. Burton*, 32 Mich. 30; *Barney v. Rutledge*, 104 Mich. 289, 62 N. W. 369; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407;

Cogley v. Cushman, 16 Minn. 397; *Chapin v. Shafer*, 49 N. Y. 407; *Skinner v. Maxwell*, 66 N. Car. 45. An infant's contract concerning personalty differs from one concerning realty in that it may be disaffirmed before reaching majority. See post, § 334 et seq., Disaffirmance.

⁴⁷ *Hangen v. Hachemeister*, 49 N. Y. Super. Ct. 34.

⁴⁸ *Jones v. State*, 31 Tex. Crim. App. 177, 20 S. W. 354. An eminent writer on the law of contracts has stated that: "If an infant goes upon the streets of a city shopping, he cannot afterwards retrace his steps and get back the money he paid, even though he tenders the goods in return; for to permit it would render shopkeeping impossible." *Bishop on Contracts*, 2 Enlarged Edition, § 921. The above principle would be applicable to necessities purchased but it is believed that it cannot be given any broader application. If the author intended that it should apply generally it is not supported by authority—he cites none—and would seem to be entirely erroneous.

⁴⁹ *Howlett v. Haswell*, 4 Camp. 118; *Green v. Greenbank*, 2 Marsh. (Ky.) 485; *Hewett v. Warren*, 10 Hun (N. Y.) 560; *West v. Moore*, 14 Vt. 447, 39 Am. Dec. 235; *Morrill v. Aden*, 19 Vt. 505.

validity in the hands of an innocent purchaser for value before maturity affirmed, it seemed impossible to designate any instrument negotiable in form as voidable. It must either be void or valid. In conformity with this view the earlier cases hold that an infant's bills and notes are void.⁵⁰ This ruling has, however, been abandoned. Under modern authorities the bill or note of an infant is considered as nonnegotiable in law notwithstanding it is negotiable in form. Consequently minority is a good defense to an action on such an instrument even when in the hands of an innocent purchaser. It follows that they are voidable in character except perhaps when given for necessities.⁵¹

An infant may also avoid his liability to a surety on his note unless it is given for necessities.⁵² It is held, however, by the weight of authority that if such note is given for necessities he must reimburse the surety thereon at least to the amount of the reasonable value of the necessities furnished.⁵³

⁵⁰ *Burgess v. Merrill*, 4 Taunt. 468; *Swasey v. Vanderheyden's Admr.*, 10 John. (N. Y.) 33; *Bouchell v. Cleary*, 3 Brev. (S. Car.) 194; *McMinn v. Richmonds*, 6 Yerg. (Tenn.) 9. See also, *Gibbs v. Merrill*, 3 Taunt. 307; *Williamson v. Watts*, 1 Camp. 522.

⁵¹ *Harris v. Wall*, 1 Exch. 122; *Hunt v. Massey*, 5 B. & Ad. 903; *Fisher v. Jewett*, 2 N. B. 69; *Fant v. Cathcart*, 8 Ala. 725; *Buzzell v. Bennett*, 2 Cal. 101; *Alsop v. Todd*, 2 Root (Conn.) 105; *Strain v. Wright*, 7 Ga. 568; *Gavin v. Burton*, 8 Ind. 69; *LaGrange Collegiate Institute v. Anderson*, 63 Ind. 367, 30 Am. Rep. 224; *Fetrow v. Wiseman*, 40 Ind. 148; *Best v. Givens*, 3 B. Mon. (Ky.) 72; *Keokuk & Co. Bank v. Hall*, 156 Iowa 540, 76 N. W. 832; *Seely v. Seely Howe & Co.*, 128 Iowa 294, 103 N. W. 961; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Tandy v. Masterson*, 1 Bibb (Ky.) 330; *Boody v. McKenney*, 23 Maine 517; *Lawson v. Lovejoy*, 8 Greenl. (Maine) 405, 23 Am. Dec. 526; *Reed v. Batchelder*, 1 Met. (Mass.) 559; *Whitney v. Dutch*, 14 Mass. 462, 7 Am. Dec. 229n; *Earle v. Reed*, 10 Metc. (Mass.) 387; *Mincock v. Shortridge*, 21 Mich. 304; *Nichols & Shepherd Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516; *Baker v. Kennett*, 54 Mo. 82; *Aldrich v.*

Grimes, 10 N. H. 194; *State v. Plaisted*, 43 N. H. 413; *Wright v. Steele*, 2 N. H. 51; *Houston v. Cooper*, 3 N. J. L. 866; *Darlington v. Hamilton Nat. Bank*, 63 Misc. (N. Y.) 289, 116 N. Y. S. 678; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Baldwin v. Van Deusen*, 37 N. Y. 487; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Armfield v. Tate*, 7 Ired. L. (29 N. Car.) 258; *Hesser v. Steiner*, 5 Watt. & S. (Pa.) 476; *Du Bose v. Wheddon*, 4 McCord (S. Car.) 221; *Little v. Duncan*, 9 Rich. L. (S. Car.) 55, 64 Am. Dec. 760; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Heffington v. Jackson & Norton*, 43 Tex. Civ. App. 560, 96 S. W. 108; *Young v. Bell*, 1 Cranch (U. S.) 342; *Baldwin v. Rosier*, 1 McCrary (U. S.) 384, 48 L. ed. 810; *Patchin v. Cromach*, 13 Vt. 330; *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478; *Stokes v. Brown*, 3 Pin. (Wis.) 311; *Brown v. Bank*, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359.

⁵² *Leacox v. Griffith*, 76 Iowa 89, 40 N. W. 109.

⁵³ *Contra*, *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759; *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Haine's Admr. v. Tarrant*, 2 Hill (S. Car.) 400. Ordinarily the surety cannot avoid payment on the ground

An infant's acceptance of a bill of exchange is merely voidable and therefore subject to confirmation.⁵⁴ It has also been determined that if an infant indorses a promissory note or bill of exchange such indorsement is not void but voidable at his election.⁵⁵

§ 305. **Contracts for service, work and labor.**—It is held by the weight of authority that an infant may avoid a contract for service entered into by him after a whole or part performance thereof and recover the reasonable value of his services.⁵⁶ This

that his principal is a minor. *Keokuk &c. Bank v. Hall*, 106 Iowa 540, 76 N. W. 832; *Hesser v. Steiner*, 5 Watts & S. (Pa.) 476. See also, *Brown v. Bank*, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359. However, if the principal, i. e., the infant, disaffirms the contract and returns the consideration received under it the surety is thereby discharged. *Keokuk &c. Bank v. Hall*, 106 Iowa 540, 76 N. W. 832.

⁵⁴*Hyer v. Hyatt*, 3 Cranch D. C. 276, Fed. Cas. No. 6977. The acceptance of a bill of exchange drawn while the acceptor is an infant but accepted after he became of age is not even voidable. *Stevens v. Jackson*, 4 Camp. 164. See also, *Belfast Banking Co. v. Doherty*, 4 L. R. Ir. 124. An infant accepting a bill of exchange may plead his infancy upon an action brought against him. *Williams v. Harrison*, 3 Salk. 197. See also, *Solytkoff, In re* (1891), 1 Q. B. 413.

⁵⁵*Hastings v. Dollarhide*, 24 Cal. 195; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Willis v. Twambly*, 13 Mass. 204. The endorsement by the infant transfers a valid title so far as the maker (*Grey v. Cooper*, 3 Dougl. 65; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Frazier v. Massey*, 14 Ind. 382; *Garner v. Cook*, 30 Ind. 331; *Hardy v. Waters*, 38 Maine 450; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Blake v. Livingston County*, 61 Barb. (N. Y.) 149; *Dulty v. Brownfield*, 1 Pa. St. 497) or acceptor (*Taylor v. Croker*, 4 Esp. 187; *Jones v. Darch*, 4 Price 300) is concerned. This has been held true even though the endorsement was made by an agent. *Hardy*

v. Waters, 58 Maine 450; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229n. *Contra*, *Semple v. Morrison*, 7 T. B. Mon. (Ky.) 298. As to whether or not an infant may endorse a bill of exchange and then after the maker has paid the amount of such bill to the infant's endorsee infant may disaffirm the contract of endorsement and recover payment from the maker of the instrument is a question. See dictum in *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503, to the effect that he can recover and dictum in *Welch v. Welch*, 103 Mass. 562, to the effect that the infant cannot recover.

⁵⁶*Ray v. Haines*, 52 Ill. 485; *Van Pelt v. Corwine*, 6 Ind. 363; *Dallas v. Hollingsworth*, 3 Ind. 537; *Haugh &c. Works v. Duncan*, 2 Ind. App. 264, 28 N. E. 334; *Derocher v. Continental Mills*, 58 Maine 217, 4 Am. Rep. 286; *Benjamin's Cases on Contracts* 332; *Judkins v. Walker*, 17 Maine 38, 35 Am. Dec. 229; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. 263; *Dubé v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am. St. 228; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; *Thompson v. Marshall*, 50 Mo. App. 145; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133; *Haggerty v. Nashua Lock Co.*, 62 N. H. 576; *Voorhees v. Wait*, 15 N. J. L. 343; *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228. Infant seamen may disaffirm their contract of shipment and recover the reasonable value of their services. *Belyea v. Cook*, 162 Fed. 180. A general guardian, as such, is not entitled to the

is true even though he left the service before the expiration of the time for which he hired.⁵⁷ In case an infant agrees to work for a certain wage⁵⁸ or accepts goods instead of money,⁵⁹ he may usually avoid such agreement and recover the quantum meruit.⁶⁰

Some courts have held that the employer is entitled to set off the amount of injury occasioned to him by the infant abandoning the special contract from the value of the services rendered by such infant; in other words the infant is allowed to recover only the difference, if any, in his favor between the amount due him in wages and the damage sustained by the employer by his abandoning the agreement.⁶¹

The better and more general rule is to the effect that the infant has a right to avoid his contract of hiring and still not be liable to any penalty for such act.⁶² Thus it has been held that an infant may avoid his contract to give two weeks notice of his intention to quit or else forfeit two weeks' wages and not be held bound by the clause concerning forfeiture.⁶³

The foregoing must not be confused, however, with the rule

services or society of his ward, and cannot by virtue of his office, bind the ward's person or property, unless expressly authorized by statute. *Aborn v. Janis*, 62 Misc. (N. Y.) 95, 113 N. Y. S. 309.

⁵⁷ *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Winters v. McMahon*, 23 N. Y. Weekly Digest 119. An infant actress may avoid her contract to render services for a theatrical season or seasons (especially when the agreement is not to her benefit) nor will she be enjoined from performing services for another. *Aborn v. Janis*, 62 Misc. (N. Y.) 95, 113 N. Y. S. 309.

⁵⁸ *Lufkin v. Mayall*, 25 N. H. 82.

⁵⁹ *Abell v. Warren*, 4 Vt. 149. See also, *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. 263.

⁶⁰ However, it has been held that if the contract has been fully executed on both sides, that is to say if the infant has performed the work and accepted the compensation agreed upon he cannot recover more. *Murphy v. Johnson*, 45 Iowa 57.

In the above case the decision is based on a statute. *Wilhelm v. Hard-*

man, 13 Md. 140. See, however, *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. 263.

⁶¹ *Judkins v. Walker*, 17 Maine 38, 35 Am. Dec. 229; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Lowe v. Sinklear*, 27 Mo. 308; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206.

⁶² *Derocher v. Continental Mills*, 58 Maine 217, 4 Am. Rep. 286; *Benjamin's Cases on Contracts* 332; *Judkins v. Walker*, 17 Maine 38, 35 Am. Dec. 229; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133; *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640. See also cases cited in note 56 of this section.

⁶³ *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133. A similar holding was made in a similar case, except that in this latter instance the infant was to forfeit all his wages if he failed to give two weeks' notice. *Derocher v. Continental Mills*, 58 Maine 217, 4 Am. Rep. 286; *Benjamin's Cases on Contracts*, 332; *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3.

which permits recovery by the employer of damages arising from the negligence or disobedience of orders on the part of the infant. An infant is entitled to recover only the reasonable value of his services; if by negligence or disobedience of orders he damages his employer's property his services are manifestly worth just so much less.⁶⁴

Contracts whereby an infant renders services in return for necessities furnished are not within the operation of the general rule. After the agreement has been fully executed on both sides the infant cannot repudiate his contract and recover the quantum meruit for the services rendered when it appears that the contract was reasonable and fair. The agreement may be supported on the ground that it is one for necessities or it may be upheld upon the theory that the services have been fully paid for.⁶⁵ The right of an infant to rescind his agreement and recover the quantum meruit of his services is further restricted by the rule that whatever the infant has already received in the way of compensation is to be charged against him as a part payment.⁶⁶

In case a minor assigns his wages he may disaffirm the assignment at any time and his doing so and collecting the money for himself is no crime.⁶⁷ The infant's right to recover the quantum

⁶⁴ *Vehue v. Pinkham*, 60 Maine 142. See, however, in this connection, *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580.

⁶⁵ *Robinson v. Van Fleet*, 91 Ark. 262, 121 S. W. 288; *Harney v. Owen*, 4 Black. (Ind.) 337, 30 Am. Dec. 662; *Wilhelm v. Hardman*, 13 Md. 140; *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; *Squier v. Hydliff*, 9 Mich. 274. See also, *Breed v. Judd*, 1 Gray (Mass.) 455; *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152.

⁶⁶ *Waugh v. Emerson*, 79 Ala. 295; *Belyea v. Cook*, 162 Fed. 180; *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; *Haggerty v. Nashua Lock Co.*, 62 N. H. 576; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228. See also, *Hobbs v. Godlove*, 17 Ind. 359; *Breed v. Judd*, 1 Gray, (Mass.) 455. "He (the infant) can recover no more than is equitably due; and equity considers the whole transaction, including the fact that during the first

four months he received more than he earned. The question of justice is not limited to a month, or to the damages for which the defendants can maintain an action against him. The law of the case is no more inconsistent with moral right than his contractual disability requires." *Haggerty v. Nashua Lock Co.*, 62 N. H. 576; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. 263. See also, *Dube v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am. St. 228, in which it appears that an infant agreed to work for another person with the understanding that his wages were to be applied for paying off a debt owed by his father's estate to his employer, it was held that in case the infant failed to receive anything from his father's estate he could repudiate his agreement and recover the value of his services.

⁶⁷ *People v. Kelly*, 37 Hun (N. Y.) 160, 3 N. Y. Crim. Rep. 414.

meruit of his services may be defeated by the existence of a family relation between the minor and his alleged employer, nor need this relation be one of blood.⁶⁸ The foregoing has to do with affirmative relief. Infancy is a good defense to an action brought against an infant on a claim for work, labor and services.⁶⁹

§ 306. Awards and compromises.—By modern authorities it is held that if an infant submits his rights to arbitration he will not be bound by the award, because of a presumed incompetency to choose suitable arbitrators, and a lack of sufficient judgment to properly care for his own interests, and he is thus protected until he attains his majority. His agreements to arbitrate are therefore voidable.⁷⁰ Consequently the infant may ratify the award on reaching his majority.⁷¹ An infant's submission to arbitration was by an old case declared void,⁷² and this doctrine was adhered to in a comparatively recent case which has been widely cited in text-books,⁷³ but it is interesting to note that on a subsequent

⁶⁸ *Purviance v. Shultz*, 16 Ind. App. 94, 44 N. E. 766, in connection with this case, however, see *Garner's Admr. v. Board*, 27 Ind. 323; *Smith v. Johnson*, 45 Iowa 308. See *Implied and Quasi Contracts, Consideration, etc.* It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interests although the prohibited employment does not involve a direct danger to morals, decency or of life or limb. The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority, how far it shall be exercised is a question of expediency and propriety which is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject unless perhaps its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account. *Starnes v. Albion Mfg. Co.*, 147 N. Car. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602 and note therein contained; *State v. Shorey*, 48 Ore.

396, 86 Pac. 881, 24 L. R. A. (N. S.) 1121, and note therein contained. See also, *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229, 139 Am. St. 389; *People v. Williams*, 189 N. Y. 131, 81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. 854.

⁶⁹ *Bill v. Wolinsky*, 123 N. Y. S. 290.

⁷⁰ *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88. The above case was the arbitration of a claim arising out of tort. The court gave full assent to the proposition that the infant had a right to disaffirm the award but held that if it appeared upon trial that the award was ample only nominal damages should be recovered. *Millsaps v. Estes*, 137 N. Car. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. 496.

⁷¹ *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221; *Jones v. Phoenix Bank*, 8 N. Y. 228.

⁷² *Rudston and Yates' Case*, March 111. See also, *Britton v. Williams*, 6 Munf. (Va.) 453.

⁷³ *Millsaps v. Estes*, 134 N. Car. 486, 46 S. E. 988.

appeal of the same case the agreement to arbitrate was held voidable and not void.⁷⁴

An infant's agreement to compromise a disputed claim is governed by the same principle. His contract to compromise is voidable and not void, regardless of whether the claim arises out of a contract⁷⁵ or tort.⁷⁶ Thus it has been held that an infant has the right to avoid the compromise of a claim for slander and this is true regardless of whether he conducts negotiations in person or through an agent.⁷⁷ The same is true of a compromise of the amount of a legacy due under a will.⁷⁸

It has been held that an infant cannot repudiate the settlement without repaying or tendering the consideration received,⁷⁹ but it is believed that the better rule is to permit a rescission of the compromise agreement and charge whatever he has received under such agreement as a payment upon his claim.⁸⁰ A settlement made by an infant of a claim against himself is also voidable and such infant may recover whatever he has parted

⁷⁴ *Millsaps v. Estes*, 137 N. Car. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. 496. See also, *Jones v. Payne*, 41 Ga. 23. An agreement to arbitrate a dispute as to the interest of a deceased partner in a firm entered into between his widow and surviving partner cannot be repudiated by the latter because it does not bind the deceased's minor children since the minor's contract is avoidable only at the minor's option. In an action on an alleged award made by arbitrator, defendant cannot, under an answer denying the agreement to arbitrate, show that the arbitration was void because of the party interested being a minor. *Chambers v. Ker*, 6 Tex. Civ. App. 373, 24 S. W. 1118.

⁷⁵ *Commonwealth v. Hantz*, 2 Pen. & W. (Pa.) 333.

⁷⁶ *Mattei v. Vautro*, 78 L. T. 682; *St. Louis & C. R. Co. v. Higgins*, 44 Ark. 293; *Di Meglio v. Baltimore & C. Co. (Del.)*, 74 Atl. 558; *Pittsburg, C. C. & St. L. R. Co. v. Healey*, 170 Ill. 610, 48 N. E. 920; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88;

Hollinger v. York Rys. Co., 225 Pa. 419, 74 Atl. 344; *Bonner v. Bryant*, 79 Tex. 540, 15 S. W. 491, 23 Am. St. 361. See, however, *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Langford v. Frey*, 8 Humph. (Tenn.) 443.

⁷⁷ *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489.

⁷⁸ *In re Cumming's Estate*, 120 Iowa 421, 94 N. W. 1117; *Chambers v. Chambers*, 41 La. Ann. 443, 6 So. 659.

⁷⁹ *Lane v. Dayton Coal & C. Co.*, 101 Tenn. 581, 48 S. W. 1094.

⁸⁰ *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Bonner v. Bryant*, 79 Tex. 540, 15 S. W. 491, 23 Am. St. 361. Where an infant has executed a release for value which he subsequently repudiates and brings suit on the original claim the jury should inquire to what extent he has been really benefited by the consideration paid and take that into account in finding a verdict in his favor for damages. *Worthy v. Jonesville Oil Mill (S. Car.)*, 67 S. E. 634, 11 L. R. A. (N. S.) 690.

with under the compromise agreement, the other party having the right to bring an action on the original claim.⁸¹

A next friend or guardian ad litem has no power to compromise or settle a claim of his ward without the express sanction of the court and the ward is not bound by such an agreement.⁸² The above is especially true after the claim has been prosecuted to judgment.⁸³ Not only must there be judicial sanction of the settlement but this sanction must be upon a real and not a perfunctory hearing. The attendant compromise does not become effective by the consent of the next friend but by the judgment of the court acting upon the facts judicially ascertained. The compromise may be set aside if the hearing is merely formal and intended solely to employ the functions and powers of the court to give validity to the prior agreement.⁸⁴

It is of course proper for the legislature to provide a method whereby the infant may enter into a valid compromise or execute a binding release. On this subject the statutes of the various states must be consulted.

§ 307. Suretyship.—Under the ancient rule whereby contracts against the interests of a minor were held void, those for his benefit deemed valid, and those of an uncertain nature considered as voidable, contracts of suretyship entered into by an infant were regarded as prejudicial to his interests and therefore void.⁸⁵ The question as to whether the agreement will benefit the

⁸¹ *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Shaw v. Coffin*, 58 Maine 254, 4 Am. Rep. 290. See, however, *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

⁸² *Isaacs v. Boyd*, 5 Porter (Ala.) 388; *Johnson v. McCann*, 61 Ill. App. 110; *Fort v. Battle*, 13 Sm. & M. (Miss.) 133; *Edsall v. Vandermark*, 39 Barb. (N. Y.) 589; *Millsaps v. Estes*, 137 N. Car. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. 496; *Tucker v. Dabbs*, 12 Heisk. (Tenn.) 18; *Hannum's Heirs v. Wallace*, 28 Tenn. (9 Humph.) 129; *Fletcher v. Parker*, 53 W. Va. 422, 44 S. E. 422, 97 Am. St. 991.

⁸³ *O'Donnell v. Broad*, 2 Pa. Dist. Rep. 84; *Fletcher v. Parker*, 53 W. Va. 422, 44 S. E. 422, 97 Am. St. 991.

⁸⁴ *Missouri Pac. R. Co. v. Lasca*, 79 Kans. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338n. See also, the note to the above case. The next friend or guardian ad litem being intrusted with the rights of the infant so far as they are involved in the cause, and acting under responsibility to the court and to the infant, may negotiate for a fair adjustment of the controversy. *Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162. He may not, however, bind the infant by such settlement. It can become effective only when given due judicial sanction. *Tripp v. Gifford*, 155 Mass. 108, 29 N. E. 208, 31 Am. St. 530.

⁸⁵ *West v. Penny*, 16 Ala. 186; *Hastings v. Dollarhide*, 24 Cal. 195; *Maples v. Wightman*, 4 Conn. 376, 10

promisor is under modern authority not deemed controlling. The old test has disappeared and with it the rule that an infant's contract of suretyship is void. Such an agreement is now considered voidable,⁸⁶ and may be ratified by him after reaching his majority.⁸⁷ Thus it has been held that a recognizance signed by him as surety,⁸⁸ an undertaking as surety for a stay of execution,⁸⁹ or surety on a note⁹⁰ are all voidable.

§ 308. **Partnership.**—A contract of partnership between an infant and an adult is not void⁹¹ but only voidable at the infant's option.⁹² Consequently he may avoid being held liable by the partnership creditors. No individual liability attaches to him upon his plea of infancy,⁹³ nor can he be held liable by the adult member of the firm who settles the partnership liabilities.⁹⁴

The infant may even avoid liability for the partnership debts without disaffirming his contract with the partner.⁹⁵ However,

Am. St. 149; *Robinson v. Weeks*, 56 Maine 102; *Cronise v. Clark*, 4 Md. Ch. 403; *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251.

⁸⁶ *Fetrow v. Wiseman*, 40 Ind. 148; *Wills v. Evans*, 18 Ky. 1067, 38 S. W. 1090; *Owen v. Long*, 112 Mass. 403; *Johnson v. Storie*, 32 Nebr. 610, 49 N. W. 371; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Reed v. Lane*, 61 Vt. 481, 17 Atl. 796.

⁸⁷ *Fetrow v. Wiseman*, 40 Ind. 148; *Owen v. Long*, 112 Mass. 403; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496.

⁸⁸ *State v. Satterthwaite*, 20 S. Car. 536. See also, *Reed v. Lane*, 61 Vt. 481, 17 Atl. 796.

⁸⁹ *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496.

⁹⁰ *Fetrow v. Wiseman*, 40 Ind. 148; *Owen v. Long*, 112 Mass. 403; *Johnson v. Storie*, 32 Nebr. 610, 49 N. W. 371. To same effect, see *Grauman & Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50. The above case lays down the rule that an infant can be estopped only by showing actual discretion, and fraud on his part and a contract beneficial in its nature to him.

⁹¹ *Osborn v. Farr*, 42 Mich. 134, 3 N. W. 299.

⁹² *Latrobe v. Deitrich*, 114 Md. 8, 78 Atl. 983; *Gordon v. Miller*, 111 Mo. App. 342, 85 S. W. 943.

⁹³ *Goode v. Harrison*, 5 B. & Ald. 147; *Murphy v. Yeomans*, 29 U. C. C. P. 421; *Woods v. Woods*, 3 Manitoba 33; *Conklin v. Ogborn*, 7 Ind. 553; *Mehlhop v. Rae*, 90 Iowa 30, 57 N. W. 650; *James v. Alford & Co.*, 15 La. Ann. 506; *Neal v. Berry*, 86 Maine 193, 29 Atl. 987; *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Bush v. Linthicum*, 59 Md. 344; *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27n; *Mason v. Wright*, 13 Metc. (Mass.) 306; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299; *Dunton v. Brown*, 31 Mich. 182; *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201; *Gordon v. Miller*, 111 Mo. App. 342, 85 S. W. 943; *Avery v. Fisher*, 28 Hun (N. Y.) 508.

⁹⁴ *Neal v. Berry*, 86 Maine 193, 29 Atl. 987.

⁹⁵ *Meahlhop v. Rae*, 90 Iowa 30, 57 N. W. 650; *Canary v. Sawyer*, 92 Maine 463, 43 Atl. 27, 69 Am. St. 525; *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27n. See, however, *Miller v. Sims*, 2 Hill (S. Car.) 479; *Salinas v. Bennett*, 33 S. Car. 285, 11 S. E. 968.

courts attempt to prevent the minor from gaining an undue advantage from his disability. Consequently it is held by the weight of authority that he cannot at the same time set up his disability to relieve himself of the firm's debt and retain possession of the firm's assets.⁹⁶ It follows that in the absence of any fraud practiced on the infant in order to induce him to enter into the partnership relation the minor cannot rescind his partnership agreement and recover additions made by him to the assets of the firm. He is entitled to only his pro rata share of the assets remaining after the settlement of the firm's liabilities.⁹⁷

⁹⁶ *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Latrobe v. Deitrich*, 114 Md. 8, 78 Atl. 983; *Bush v. Linthicum*, 59 Md. 344; *Pelletier v. Couture*, 148 Mass. 269, 18 N. E. 400, 1 L. R. A. 863; *Gordon v. Miller*, 111 Mo. App. 342, 85 S. W. 943; *Yates v. Lyon*, 61 N. Y. 344, revg. *Yates v. Lyon*, 61 Barb. (N. Y.) 205. See also, *Richards v. W. H. Hellen & Son* (Iowa), 133 N. W. 393. "The plaintiff, however, contends that inasmuch as he was a minor, and had disaffirmed his personal liability for the debts of the firm, he has an individual interest in such of the partnership property as has been fully paid for at the time when insolvency proceedings were instituted. We do not think that such a contention is maintainable, either on principle or on authority. * * * It will be observed that he did not and does not disaffirm his contract of copartnership, but only his liability for firm debts. He claims title to the goods sued for, as a partner, such goods having been paid for by the firm, and being partnership assets." *Canary v. Sawyer*, 92 Maine 463, 43 Atl. 27, 69 Am. St. 525. In the case of *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. 379, it is said: "The business was not, it is true, a successful one, but this in the absence of fraudulent representations on the part of the appellant cannot affect the question. * * * Where money is paid by a minor in consideration of being admitted as a partner into the business of the appellant (the adult), and he does become and remain a partner for a given time he ought not to be allowed

to recover back the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the appellant." See also, *Wilhelm v. Hardman*, 13 Md. 140, in which it is said: "Where an infant pays money on a voidable contract, and has enjoyed the benefit of it, he cannot avoid it, and recover back his money. The rule which protects infants from liability on contracts, will be allowed to operate reciprocally where it can be so applied. It is not too much to say that if an infant goes into a mercantile venture which proves unsuccessful he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern. If he has been cajoled into any waste of his capital it hardly seems equitable that the creditor of his firm should, either directly or indirectly, be called upon for reimbursement." *Yates v. Lyon*, 61 N. Y. 344.

⁹⁷ *Ex parte Taylor*, 8 DeG. M. & G. 254; *Latrobe v. Deitrich*, 114 Md. 8, 78 Atl. 983; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. 379; *Page v. Morse*, 128 Mass. 99; *Moley v. Brine*, 120 Mass. 324; *Breed v. Judd*, 1 Gray (Mass.) 455. The adult partner has the right to insist upon the assets of the firm being applied to the payment of the firm's debts and the infant's right to rescind is subject to this equity. *Hill v. Bell*, 111 Mo. 35, 19 S. W. 959. In regard to the case so holding it is said in the note to the case of *Craig v. Van Bebber*, 18 Am. St. 604: The broad views expressed to

The partnership agreement of an infant, being voidable only, may of course be ratified by him on reaching his majority and by so doing he becomes liable for the firm obligations incurred during his minority.⁹⁸

§ 309. Corporation stock and membership.—An infant's purchase of capital stock of a corporation is voidable and he may at his election avoid it and recover the purchase-money.⁹⁹ This right to disaffirm has been accorded the infant even though he

the effect "that the assets of a partnership should be appropriated to the satisfaction of firm creditors over the claims of an infant partner, appear to us to be a departure from the general principles governing the liability of infants on their contracts. Why the interest of the infant in the partnership assets should be subjected by implication of law to the claims of creditors of the firm, when it is perfectly well settled that an infant may repudiate any security, as a mortgage, expressly given by him, is not clear. Of course, if an infant would rescind a contract he may be obliged to restore the consideration he may have received, provided he still retains it; but the rule as stated here makes no distinction between such creditors who have disposed of property to the firm, which it still retains, and those creditors who are not in that condition. If it be said that the infant must restore an equivalent, if he have not the original consideration, the rule should not have stopped with the firm assets, but should at least make the infant answerable to the extent of any property which may belong to him. The question cannot be regarded as settled." The decisions holding that an infant cannot recover money or other assets advanced by him to the firm seem erroneous. All the members of the firm whether infants or otherwise have a lien on the firm assets. It would be more nearly correct to hold the infant unable to recover where the rights of creditors have intervened on equitable grounds. The infant has, the same as other members of the partnership, a lien on the firm assets, but the creditors of the firm take precedence over the lien of the partners, even defeating the lien of an

infant partner. See *Conn v. Boutwell* (Miss.), 58 So. 105. See also, *Sparman v. Kiem*, 83 N. Y. 245, in which it is held that an infant partner may recover money which he was induced to invest in business on restoring the benefits received from the partnership.

⁹⁸ *Penn v. Whitehead*, 17 Grat. (Va.) 503, 94 Am. Dec. 478. He even renders himself liable on claims of which he was entirely ignorant at the time. *Miller v. Sims*, 2 Hill (S. Car.) 479. It has already been seen that by some jurisdictions it is held that the act whereby an infant attempts to appoint an agent is void and that he therefore cannot ratify the act of such agent. Consequently it has been contended that an infant could not ratify the acts of his partner since he was incapable of communicating authority to such partner to contract for him and that the attempt to communicate such authority being void it is not subject to a subsequent ratification. This contention was, however, overruled, it being held that the infant might ratify such an agreement. *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229. That one of the general partners is an infant does not affect the liability of a special partner. *Continental Nat. Bank v. Strauss*, 137 N. Y. 148, 32 N. E. 1066.

⁹⁹ *Northwestern R. Co. v. M'Michael*, 5 Exch. 114; *Newry & Co. R. Co. v. Coombe*, 3 Exch. 565; *In re Nassau Phosphate Co.*, L. R. 2 Ch. Div. 610; *Baker's Case*, L. R. 7 Ch. 115; *Lumsden's Case*, L. R. 4 Ch. 31; *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* (1894), 3 Ch. 589; *Wuller v. Chuse Grocery Co.*,

could not place the other party in statu quo.¹ The transfer of shares by a minor is also voidable and not void.²

In Illinois it has been held that, in the absence of statutory restrictions, minors are not ineligible to membership in mutual benefit societies. The objection that an infant could avoid his contract was said not to be important, as in such cases the adult members could do the same without incurring liability.³ On the other hand, if prohibited by a statute, infants are ineligible to membership in a corporation.⁴

It seems to be definitely settled that, unless expressly permitted by statute, an infant cannot become one of the incorporators in the organization of a corporation. It is presumed that the legislature in authorizing persons to form a corporation contemplates that such persons shall be of full age.⁵

241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. 216; Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429; Robinson v. Weeks, 56 Maine 102; Gage v. Menczer (Tex. Civ. App.), 144 S. W. 717.

¹White v. New Bedford Cotton Weight Corporation, 178 Mass. 20, 59 N. E. 642. In an action by an infant to recover money deposited with defendant as margin for operations in stocks, it was conceded by them that he had a right to recover his deposit upon returning all he had received under the contract. As this did not include the stocks but consisted of notices of purchases and sales only and he had received no benefits from the transaction, it was held that he was entitled to rescind and recover without restoration. Mordecai v. Pearl, 63 Hun (N. Y.) 553, 45 N. Y. St. 140, 18 N. Y. S. 543.

²Lumsden's Case, L. R. 4 Ch. 31. In connection with this case see Chicago Mutual Life &c. Assn. v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549, in which it is said: "If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured. If he fails to perform his membership ceases and that is all. We do not assent to the view that as a further consequence of his disability he may recover back the dues and assessments

he may have already paid. If an infant advances money on a voidable contract which he afterwards rescinds he cannot recover his money back, because it is lost to him by his own act and the privilege of infancy does not extend so far as to restore this money unless it was obtained by fraud." Citing 1 Parsons Contracts, 322. It is said of the case just quoted from in Wuller v. Chuse Grocery Co., 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216: "This language of the court used in argument was not essential to the decision and the quotation from Parsons is at variance with authority and the doctrine now accepted. If the fact that the payment of money upon his contract was voluntary precluded its recovery, the right to avoid the contract would be no protection to an infant against his inexperience and the wiles of swindlers and thieves. Such voluntary payment may be recovered upon the avoidance of the contract." Smith v. Nashville &c. R. Co., 91 Tenn. 221, 18 S. W. 546.

³Chicago Mutual &c. Assn. v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 459.

⁴In re Globe Mutual Benefit Assn., 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547, affg. 63 Hun (N. Y.) 263, 43 N. Y. St. 756, 17 N. Y. S. 852.

⁵Hamilton &c. R. Co. v. Townsend, 13 Ont. App. 534, 16 Am. & Eng. Cor.

It has been held in England that the directors of a corporation have power to prevent a minor from becoming a shareholder of a corporation,⁶ but that a transfer of shares to a minor is not void but voidable merely.⁷ After having been made it cannot be ignored by the corporation⁸ and is good until avoided by the infant,⁹ nor is the corporation liable for having made such transfer.¹⁰

§ 310. Other illustrative cases—Marriage settlement.—A marriage settlement entered into by an infant is voidable at his option. However, it is valid until avoided and passes an estate.¹¹ The settlement may be avoided by the infant's privies in blood after his death,¹² but cannot be avoided by the creditors of the infant's son whom the infant left surviving.¹³

Cases 645; In re Globe &c. Assn., 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547, affg. 63 Hun (N. Y.) 263, 43 N. Y. St. 756, 17 N. Y. S. 852. See, however, Chicago &c. Assn. v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549. The above case was, however, decided under a peculiar statute. It has been held, however, that the infant's disability to act as an incorporator cannot be attacked collaterally. In re Nassau Phosphate Co., 2 Ch. Div. 610; In re Laxon & Co. (1892), 3 Ch. Div. 555. His disability, however, is subject to direct attack. Hamilton &c. Co. v. Townsend, 13 Ont. App. 534, 16 Am. & Eng. Cor. Cases 645.

⁶ Asiatic Banking Corporation, L. R. 5 Ch. 298; Symond's Case, L. R. 5 Ch. App. 298.

⁷ Blakeley Ordnance Co., L. R. 4 Ch. 31; Maguire's Case, 3 DeG. & Sm. 31; Lumsden's Case, L. R. 4 Ch. App. Cas. 31; Ebbett's Case, L. R. 5 Ch. App. Cas. 302; Baker's Case, L. R. 7 Ch. App. Cas. 115.

⁸ Hart's Case, L. R. 6 Eq. 512; Wilson's Case, L. R. 8 Ch. 45; Mitchell's Case, L. R. 9 Eq. 363; Creed v. Lancaster Bank, 1 Ohio St. 1.

⁹ In re Nassau Phosphate Co., 2 Ch. Div. 610.

¹⁰ Smith v. Nashville &c. R. Co., 91 Tenn. 221, 18 S. W. 546. For general discussion of infants as incorporators and subscribers to cor-

poration stock see *Thomp. Corp.* (2d. ed.), §§ 175, 642.

¹¹ *Temple v. Hawley*, 1 Sand. Ch. (N. Y.) 153; *Jones v. Butler*, 30 Barb. (N. Y.) 641.

¹² *Levering v. Heighe*, 2 Md. Ch. 81, second appeal, 3 Md. Ch. 365.

¹³ *Lester v. Frazer*, 2 Hill Eq. (S. Car.) 529, Ril. Eq. 76. Under the old rule of law whereby the personal property of the wife became the absolute property of the husband upon marriage it was held that the general personal estate of a female infant is bound by a settlement made on her marriage because such personal estate became by the marriage the absolute property of the husband and the settlement is in effect his settlement and not hers. But as to her real estate and also personal property settled to her separate use, the marriage settlement was not binding because her real estate did not, by the marriage, become the absolute property of her husband. *Simson v. Jones*, 2 Russ. & M. 365; *Durnford v. Lane*, 1 Bro. Ch. 106; *Clough v. Clough*, 5 Ves. 710; *Milner v. Lord Harewood*, 18 Ves. 275; *Simson v. Jones*, 2 Russ. & M. 365; *Johnson v. Johnson*, 1 Keen 648; *Campbell v. Ingilby*, 21 Beav. 567; In re *Waring*, 21 L. J. Ch. 784; *Field v. Moore*, 25 L. J. Ch. 66; *Levering v. Heighe*, 2 Md. Ch. 81, second appeal, 3 Md. Ch. 365; *Temple v. Hawley*, 1 Sand. Ch.

§ 311. **Other illustrative cases—Mechanic's Lien.**—A mechanic's lien predicated merely on a contract entered into with a minor cannot be acquired against the property of such infant. A lien implies a contract, and as an infant cannot make a valid contract, no lien can be obtained against his property.¹⁴ Even if the building contract is entered into with the infant's guardian no lien can be acquired unless such guardian acted under valid legal authority in making the improvements.¹⁵ The infant does not ratify the agreement and subject his property to the lien by

(N. Y.) 153; *Wetmore v. Kissam*, 3 Bosw. (N. Y.) 321; *McIlvaine v. Kadel*, 30 How. Pr. (N. Y.) 193, 26 N. Y. Sup. Ct. 429; *Whichcote v. Lyle's Exrs.*, 28 Pa. St. 73; *Tabb v. Archer*, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657; *Healy v. Rowan*, 5 Grat. (Va.) 414, 52 Am. Dec. 94. The infant's relief act does not apply to a marriage settlement executed by an infant, but such a settlement is, as against the infant, voidable only; that is to say, valid until repudiated within the time and in the manner allowed by law. *Duncan v. Dixon*, 44 Ch. Div. 211, 59 L. J. Ch. 437, 62 L. T. 319, 38 W. R. 700; *Jones Ex parte*, 18 Ch. Div. 122, explained. Marriage articles executed by an adult and an infant, there being no settlement under the infants' settlement act, nor any afterwards executed in pursuance of the articles, although voidable by the infant on his or her attaining twenty-one, are binding on the adult. *Smith's Trusts*, 25 L. R. Ir. 439. A settlement voidable on the ground of the settler's infancy is binding on the settler, unless he repudiates it within a reasonable time after attaining full age. Ignorance of particular provisions of the settlement cannot be set up by the settler as an excuse for delay in repudiating. *Carter v. Silber* (1892), 2 Ch. 278, 61 L. J. Ch. 401, 66 L. T. 473—C. A. Under eighteen and nineteen Vict., Chap. 43, an infant may, with the sanction of the court, make a valid marriage settlement of either his real or personal property. *Seaton v. Seaton*, 13 App. Cases 61; *Moore v. Johnson*, 3 Ch. 48 (1891).

¹⁴ *Alvey v. Reed*, 115 Ind. 148, 17 N. E. 265, 7 Am. St. 418; *Bloomer v. Nolan*, 36 Nebr. 51, 53 N. E. 1039,

38 Am. St. 690; *Hall v. Aken*, 47 N. J. L. 340. And the fact that the infant authorizes another to act for her in drawing up the building contract is immaterial. *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572. The lien cannot be upheld on the theory that the improvement was a necessity. *Price v. Jennings*, 62 Ind. 111.

¹⁵ *Fish v. McCarthy*, 96 Cal. 484, 31 Pac. 529, 31 Am. St. 237. In the above case it was held that the guardian could not subject his ward's property to a mechanic's lien unless he obtained an order from the court authorizing the improvement. *Guy v. Dü Uprey*, 16 Cal. 195, 76 Am. Dec. 518; *Payne v. Stone*, 7 Sm. & M. (Miss.) 367; *Logan Planing Mill Co. v. Aldredge*, 63 W. Va. 660, 60 S. E. 783, 15 L. R. A. (N. S.) 1159, 129 Am. St. 1035. In the above case it was held that the guardian's authority was to be strictly construed. Consequently where the probate court gave the guardian permission "to erect out of the funds of his wards a building upon their lot and of such dimensions and qualities as may suit their interests" the authority does not authorize the guardian to erect a building upon credit and thereby destroy the interests of his ward. The right to a mechanic's lien was therefore denied. If the guardian himself advances the money to erect a building without being authorized so to do by a court of competent jurisdiction, he cannot recover the amount so advanced from his ward. *Hassard v. Rowe*, 11 Barb. (N. Y.) 22. Nor can he create a lien on the premises in favor of the mechanics employed. *Copley v. O'Niel*, 57 Barb. (N. Y.) 299.

the use¹⁶ or retention¹⁷ of the property improved since this would, in effect, nullify his right to rescind.

§ 312. **Other illustrative cases—Assignment for benefit of creditors.**—An infant's assignment for the benefit of creditors is also voidable at the election of such infant. It can, however, be avoided only by the infant or some one entitled to stand upon his rights.¹⁸

§ 313. **Other illustrative cases—Leases made by guardian extending beyond the term of guardianship.**—Under the common law, or a statute simply declaratory thereof, leases made by the guardian to extend beyond the term of the guardianship are voidable.¹⁹ But it has been held under the statutes of Arkansas that a lease made by order of the court may be valid although it is to continue beyond the minority of the infant.²⁰

§ 314. **Other illustrative cases—Apprenticeship.**—According to some early cases an infant's contract of apprenticeship was valid and binding because for his benefit.²¹ Under the modern theory such an agreement has been held valid because for a necessity.²² Contrary to more or less prevalent opinion, such

¹⁶ *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572.

¹⁷ *Bloomer v. Nolan*, 36 Nebr. 51, 53 N. E. 1039, 38 Am. St. 690.

¹⁸ *Soper v. Fry*, 37 Mich. 236; *Yates v. Lyon*, 61 N. Y. 344. The above cases hold that the assignment cannot be avoided by creditors. The latter case holds that an assignment made by co-partners is not fraudulent and void in law because one of the assignors is an infant, and if the infant ratifies the assignment on reaching his majority no fraud can be claimed because of the infancy. See also, *Kingman v. Perkins*, 105 Mass. 111, in which it is held that an infant's assignment of a debt cannot be avoided by his creditors because of his nonage.

¹⁹ *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659.

²⁰ *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659. The above case is an inter-

esting one. Two minors owned a fee to certain property subject to the dower right of their mother. The disabilities of infancy were removed as provided by the statutes of Oklahoma, they being residents of that state. The infants then joined with their mother in a warranty deed for the property to B. After reaching twenty-one they deeded the property to C who then brought suit for possession. The court held that in conveyance of real estate the *lex loci sitae* controlled and by the laws of Arkansas a valid deed cannot be given by persons under twenty-one, consequently the deed to B was voidable, and that the deed to C was a disaffirmance thereof.

²¹ *Rex v. The Inhabitants of Arundel*, 5 M. & S. 257; *Rex v. Inhabitants of Great Wigston*, 3 B. & C. 484; *Woodruff v. Logan*, 6 Ark. 276, 42 Am. St. 695. See also, note in 34 Am. Dec. 538.

²² *Pardey v. American Ship Wind-*

agreements were not generally binding at common law but instead were voidable.²³

It follows that unless considered as a necessity an infant's contract of apprenticeship has no binding force unless authorized by, and executed in conformity with, some statutory enactment.²⁴ Various jurisdictions have at one time or other enacted statutes empowering the infant to bind himself by a contract of apprenticeship.²⁵ The infant is not bound unless the contract is signed by him, unless the statute specifically provides that the agreement may be executed on his behalf by his parents or guardian.²⁶ As a general rule, however, the infant is not liable for damages, for breach of the conditions contained in the agreement, if the plea of infancy is interposed. At most he is merely subject to the control and discipline of the master and to the statutory penalties prescribed, in case he is guilty of misconduct.²⁷

§ 315. Effect of concealment or misrepresentation.—Perhaps no legal question has received so much discussion or given rise to so many diverse holdings as the one relative to the effect of an infant's concealment or misrepresentation of his age on a

lass Co., 20 R. I. 147, 37 Atl. 706, 78 Am. St. 844.

²³ Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777; Harney v. Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662. See also, Tague v. Hayward, 25 Ind. 427; Hunsucker v. Elmore, 54 Ind. 209; Kerwin v. Myers, 71 Ind. 359.

²⁴ Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777; Tague v. Hayward, 25 Ind. 427; Hunsucker v. Elmore, 54 Ind. 209; Kerwin v. Myers, 71 Ind. 359; Frazier v. Rowan, 2 Brev. (S. Car.) 47.

²⁵ See Whitmore v. Whitcomb, 43 Maine 458; Harper v. Gilbert, 5 Cush. (Mass.) 417; Fisher v. Lunger, 33 N. J. L. 100; State v. Reuff, 29 W. Va. 751, 6 Am. St. 676, 2 S. E. 801.

²⁶ Rex v. Inhabitants of Arnesby, 3 B. & Ald. 584; Ivins v. Norcross, 3 N. J. L. 977; Balch v. Smith, 12 N. H. 437; In re McDowle, 8 Johns. (N. Y.) 328; Commonwealth v. Moore, 1 Ashm. (Pa.) 123; Anderson v.

Young, 54 S. Car. 388, 44 L. R. A. 277, 32 S. E. 448; Stringfield v. Heiskell, 2 Yerg. (Tenn.) 545; Pierce v. Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333.

²⁷ Lyly's Case, 7 Mod. 15; Gilbert v. Fletcher, Cro. Car. 179; Brock v. Parker, 5 Ind. 538; McKnight v. Hogg, 1 Const. (S. Car.) 117. Contra, Woodruff v. Logan, 6 Ark. 276, 42 Am. Dec. 695. See also, Walter v. Everard (1891), 2 Q. B. 369. The technical relation of apprentice and master has fallen almost entirely into disuse and is now confined principally to the administration of the poor laws in the care of orphans, indigent and abandoned children. Manifestly this is a matter controlled entirely by statutes of mere local application. These statutes cannot be taken up in detail here, and the enactments of the various states on this subject must therefore be consulted.

contract induced thereby. The net result has not inaptly been termed a "multitude of undistinguishable distinctions."²⁸

The fundamental rule applicable to the subject will first be stated. Generally speaking, passive concealment on the part of the infant does not, either directly or indirectly, defeat the right of the infant to avoid his agreement. The contract of an infant otherwise voidable is not enforceable against him because he dealt or traded as an adult.²⁹ Nor is the operation of the above rule affected by the fact that the infant appears to be of full age and that he was believed by the other party to be an adult.³⁰

§ 316. Active concealment, estoppel.—It is believed that the foregoing rule is practically universal. Many jurisdictions go a step further and hold that active misrepresentation of his age does not estop an infant to set up his minority either affirmatively in an action to rescind and recover the consideration parted with or as a defense to an action brought by the adult on the contract. The reason given for these decisions is that any other rule would enable the infant to enter into a binding agreement by a representation that he was of full age and thus greatly restrict the operation of a rule of law adopted for his protection.³¹

²⁸ See concurring opinion of Calhoun, J., in *Commander v. Brazil*, 88 Miss. 668, 41 So. 497, 9 L. R. A. (N. S.) 1117.

²⁹ *Miller v. Blankley*, 38 L. T. 527; *Confederation Life Assn. v. Kinnear*, 23 Ont. App. 497; *Oliver v. McClellan*, 21 Ala. 675; *Davidson v. Young*, 38 Ill. 145; *Alvey v. Reed*, 115 Ind. 148, 17 N. E. 265, 7 Am. St. 418; *Price v. Jennings*, 62 Ind. 111; *Sewell v. Sewell*, 92 Ky. 500, 18 S. W. 162, 36 Am. St. 606; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350; *Houston v. Cooper*, 3 N. J. L. 866; *Van Winkle v. Ketcham*, 3 Cal. (N. Y.) 323; *Waugh v. Beck*, 114 Pa. St. 422, 6 Atl. 923 60 Am. Rep. 354; *Curtain v. Patton*, 11 Serg. & R. (Pa.) 305; *Bible v. Wisecarver* (Tenn. Ch. App.), 50 S. W. 670;

Harper v. Utsey (Tex. Civ. App.), 97 S. W. 508; *Carpenter v. Prigden*, 40 Tex. 32; *Grauman & Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50.

³⁰ *Buchanan v. Hubbard*, 96 Ind. 1; *Sewell v. Sewell*, 92 Ky. 500; *Ruchizky v. De Haven*, 97 Pa. 202. See, however, *Smith v. Cole*, 148 Ky. 138, 146 S. W. 30. "Positive intentional fraud would bar an infant of years of discretion, but mere silence or acquiescence surely will not." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. 891. By silence is meant entire silence, as distinguished from that sort which merely keeps back part of the truth told or suggested. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. 891. See also, cases above cited in note 2.

³¹ *Bartlett v. Wells*, 1 B. & S. 836; *De Roo v. Foster*, 12 C. B. (N. S.) 272; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Tobin v. Spann*, 85 Ark. 556,

The above rule is harsh in its operation. In many instances it enables the infant to use the protection of the law afforded him as a sword instead of a shield. Courts thought to avoid the hardships entailed by an enforcement of the rule and it is this spirit which has given rise to the confusion mentioned at the beginning of this section. Notwithstanding the tangle which has resulted it is possible to classify the various cases into three or four groups. These groups, while the final result is in all of them practically the same and in that sense they are based on undistinguishable distinctions, are decided on different principles. A knowledge of these principles therefore becomes important. The largest and most important class of cases consists of those in which it is held that when a minor has reached that stage of maturity which indicates that he is of full age, and enters into a contract falsely representing himself to be of age, accepting the benefits of the contract, he will be estopped to deny that he is not

109 S. W. 534, 16 L. R. A. (N. S.) 672n. (In this case action was brought by the infant for affirmative relief.) *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. 510; *Merriam v. Cunningham*, 11 Cush (Mass.) 40; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *Alt v. Groff* (sub nomine *Graff*), 65 Minn. 191, 68 N. W. 9; *Ridgway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464; *Cobbey v. Buchanan*, 48 Nebr. 391, 67 N. W. 176; *Conroe v. Birdsall*, 1 Johns. Cases (N. Y.) 127, 1 Am. Dec. 105; *Studwell v. Shapter*, 54 N. Y. 249. See *Boyd v. Weeks*, 5 Hill (N. Y.) 393; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Keen v. Coleman*, 39 Pa. 299, 80 Am. Dec. 524; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. 931; *Eliot v. Eliot*, 81 Wis. 205, 51 N. W. 81, 15 L. R. A. 250. "By the weight of authority infants are not liable for torts connected with or growing out of contracts, and the doctrine of estoppel in pais does not

apply to them, * * * and a fraudulent representation of capacity cannot be an equivalent for actual capacity." *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869. "A contrary doctrine would overturn the whole law relative to the contracts of infants. From holding that an infant was estopped by a falsehood as to his age, the next step would be to hold him estopped by suppression of the fact that he was under age, when he was silent at that point, while he knew that the party with whom he was contracting supposed him to be of age. There is no difference between the direct and the inferential falsehood; the one is as fraudulent as the other." *Brown v. McCune*, 7 N. Y. Super. Ct. 224. See also, *Carpenter v. Carpenter*, 45 Ind. 142; *Ridgeway v. Herbert*, 150 Mo. 606, 51 So. 1040, 73 Am. St. 464; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *New York Building & Co. v. Fisher*, 20 Misc. (N. Y.) 242, 45 N. Y. S. 795; *Johnson v. Clark*, 23 Misc. (N. Y.) 346, 51 N. Y. S. 238; *Brown v. McCune*, 7 N. Y. Super. Ct. 224; *Carolina Interstate & Assn. v. Black*, 119 N. Car. 323, 25 S. E. 975.

of age when the obligation of the contract is sought to be enforced against him.³²

In accordance with the above rule it has been held that an infant is estopped to bring an action for the rescission of his executed contract or cancelation of his deed of conveyance where he misrepresented his age.³³ Thus an infant who conveys land falsely representing himself to be of age has been denied the right to have the deed set aside on the ground of infancy.³⁴

³² *Commander v. Brazil*, 88 Miss. 668, 41 So. 497, 9 L. R. A. (N. S.) 1117. The language of the text is the language of the case last cited. In that case it is said: "We do not hold that an executory contract may be enforced against an infant who falsely represents himself to be of age, unless some damage has been done to the party with whom he contracts. We do not hold that an infant is estopped by his deed merely. We do not hold that any sort of a contract may be enforced against an infant at any time on account of his false assertion that he is of age, unless the age and appearance indicate such years of maturity as the person whom he deals with may well be deceived by it." In the same case a concurring opinion said: "Recoiling from the multitude of undistinguishable distinctions in the books, I take the law to comport with what is plainly right. Infants are shielded from their own improvidence, and their contracts, as to them, are of no force except for necessities. But when a minor whose appearance justifies belief in such statement induces a contract, which is reasonable, by false assurances that he is of the age of majority, he should be, and is, estopped to repudiate it, and should be compelled to carry it out, or to fully restore the status quo by returning what he got and making compensation if he has wasted it." (The above was termed very unwise dictum in the case of *Lake v. Perry*, 95 Miss. 550, 49 So. 569.) *Ferguson v. Bobo*, 54 Miss. 121; *Ostrander v. Quin*, 84 Miss. 230, 36 So. 257, 105 Am. St. 426; *Har-seim v. Cohen* (Tex. Civ. App.), 25 S. W. 977; *Kilgore v. Jordan*, 17 Tex. 341. See also, U. S. Investment

Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. 326; *Pemberton B. & L. Assn. v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280.

³³ *Schmitheimer v. Eiseman*, 7 Bush (Ky.) 298; *County Board of Education v. Hensley* (Ky.), 144 S. W. 63; *Ryan v. Growney*, 125 Mo. 474, 28 S. W. 189. Compare the foregoing case with *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464; *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511.

³⁴ *Schmitheimer v. Eiseman*, 7 Bush (Ky.) 298 (infant made oath that she was of age); *Damron v. Commonwealth*, 110 Ky. 268, 22 Ky. L. 1717, 61 S. W. 459, 96 Am. St. 453. In the above case an infant son conveyed land to his father in order that he might qualify as surety on a bond. The deed recited the consideration for which it was given and the son testified in open court that he was of age. Later suit was brought against the father on the bond. The son then sought to avoid the deed on the ground of infancy. He was held estopped. *Ingram v. Ison*, 26 Ky. Law 48, 80 S. W. 787. In the above case the infant lacked only about a month of being of age; he was married, had two children; he appeared to be, and the other party supposed him to be, of age. The infant was held estopped to deny the validity of his deed. Where an infant has conveyed land for a reasonable price, representing at the time that he was of age, and thus induced the grantee to part with the consideration, the trade being fairly made and the grantee having no notice that the grantor was under age, the infant is bound by his deed. This principle does not apply when the grantee

No estoppel can arise against the infant because of such misrepresentation when it appears that the other party was not in fact deceived,³⁵ nor where the misrepresentation was made to the agent of the other party, the agent knowing the misrepresentation to be false.³⁶ It must appear that the adult party both knew of and relied on the statement made by the infant that he was of age.³⁷ Nor can the other party successfully set up an estoppel on the part of the infant when such other party does not claim title through or under the instrument executed by the infant.³⁸

§ 317. **Active concealment—Action in tort.**—Cases of another class hold that an infant is not estopped to assert infancy by the fact that he has represented himself to be of full age, but that such misrepresentation or other tort may give rise to an action in deceit for the fraud practiced, this being the only form of relief granted.³⁹ Thus, in case the infant is a bailee for hire, he is

knows or has reason to believe that the grantor is under age. This was a suit to quiet title brought by one to whom the infant had conveyed after majority. *Asher v. Bennett*, 143 Ky. 361, 136 S. W. 879. See, however, *Wilson v. Wilson*, 20 Ky. L. 1971, 50 S. W. 260. In the above case it appears that an infant daughter conveyed to her father her undivided interest in certain real estate, the deed containing recitals to the effect that the daughter was of age. The father then mortgaged the property to the University of Kentucky. It appears that the daughter was a student in such school and that the matriculation record showed her to be only seventeen years of age, and under the circumstances it was held that she was not estopped to disaffirm the deed to her father.

³⁵ *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Putnal v. Walker*, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33 and note; *Bradshaw v. VanWinkle*, 133 Ind. 134, 32 N. E. 877; *Mathers v. Mathers*, 23 Ky. Law 2159, 66 S. W. 832; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464.

³⁶ *Charles v. Hastedt*, 51 N. J. Eq. 171, 26 Atl. 564; *International Text-Book Co. v. Doran*, 80 Conn. 307, 68

Atl. 255. In the above case the infant made the misrepresentation at the direction of the plaintiff's agent.

³⁷ *Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. 877; *Cobbe v. Buchanan*, 48 Nebr. 391, 67 N. W. 176.

³⁸ *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206. The infant will be held to a strict proof of his nonage. *Davis v. Coan*, 14 La. 257.

³⁹ *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly (N. Y.) 334; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *New York Bldg. Loan Banking Co. v. Fisher*, 23 App. Div. (N. Y.) 363, 48 N. Y. S. 152. The major premise of the above cases is, "An infant is liable for his torts." From this it is argued that being liable for his torts he is liable for those torts growing out of a contractual relation when such liability can be enforced without either directly or indirectly enforcing the contract. "The test and only satisfactory test is supplied by the answer to the question, Can the infant be held liable without directly or indirectly enforcing his promise?" *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep.

liable for wilful injury inflicted on the property.⁴⁰ But the infant is not liable for his fraudulent warranty of goods sold by him.⁴¹ Nor is the infant liable for mere negligence in the performance of his contract either on the part of himself⁴² or his agent.⁴³ Before the infant will be liable injury must result from his wilful and deliberate act.⁴⁴ In cases of this character the infant is usually held to have rescinded his contract by some word or act, in which case his subsequent use of the property and the damage resulting therefrom amounts to trover and conversion for which the infant is liable.⁴⁵

53. See in this connection: *Brooks v. Sawyer*, 191 Mass. 151, 76 N. E. 953, 114 Am. St. 594, and *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. 510. These cases hold that, "The fraudulent act, to charge him (the infant), must be wholly tortious; and a matter arising ex contractu, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action."

⁴⁰ *Furnis v. Smith*, *Rolle Abridgment* 530; *Denning v. Nelson*, 1 Ohio Dec. 503; *Peigne v. Sutcliffe*, 4 McCord (S. Car.) 387, 17 Am. Dec. 756; *Vasse v. Smith*, 6 Cranch (U. S.) 226, 3 L. ed. 207.

⁴¹ *Howlett v. Hoswell*, 4 Camp. 118; *Brown v. Dunham*, 1 Root (Conn.) 272; *Green v. Greenbank*, 2 Marsh. (Ky.) 485; *Prescott v. Norris*, 32 N. H. 101; *West v. Moore*, 14 Vt. 447, 39 Am. Dec. 235. See, however, *Morrill v. Adan*, 19 Vt. 505, in which it is held that if the infant ratifies his contract of sale after reaching majority and sues to recover the sale price he thereby ratifies his warranty and infancy is therefore no defense to the defendant's set-off for the breach of warranty. See also, as contrary to the general rule stated *Word v. Vance*, 1 Nott. & McC. (S. Car.) 197, 9 Am. Dec. 683.

⁴² *Jennings v. Rundall*, 8 T. R. 335; *Lowery v. Cate*, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. 744.

⁴³ *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. 268.

⁴⁴ *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189.

⁴⁵ For two celebrated English cases on this subject, see *Burnard v. Haggis*, 14 C. B. (N. S.) 45, 9 Jur. (N. S.) 1325, 11 Weekly Rep. 644. In the above case the infant hired the horse for riding on the road. He was used as a jumper and killed. The infant was held liable. *Walley v. Holt*, 35 L. T. R. (N. S.) 631, in which the court said: "The overdriving and flogging, and all that was done by the defendant, by which the plaintiff's mare was injured, was ultra the contract altogether, and constituted a separate and independent tort on his part, to which * * * the plea of infancy is no defense." *Homer v. Thwing*, 3 Pick. (Mass.) 492. In the above case the court said: "The driving of the horse beyond the place to which the defendant had permission to go was a conversion and trover is the proper remedy." In this case it appears that the infant drove the horse beyond the place he had hired it to drive to. This case is explained in *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 78 Am. St. 510. *Churchill v. White*, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. 64 (drove horse beyond place he hired it to drive); *Campbell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561 (held liable for hard and cruel usage of a horse); *Fish v. Ferris*, 3 E. D. Smith (N. Y.) 567 (case similar to the one just cited); *Moore v. Eastman*, 1 Hun (N. Y.) 578; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85. See also, *Elder v. Woodruff Hardware & Co.*, 9 Ga. App. 484, 71 S. E. 806, holding that where property was sold to an infant under a

While as has already been seen an infant's contract of marriage is voidable⁴⁶ yet if the promise is made the means to accomplish a wrong, such as seduction, the infant is liable for the tort.⁴⁷ On the same principle a vendor who was an old man has been held entitled to recover property sold to an infant when it appears that such infant vendee caused the vendor to become intoxicated and then negotiated the sale, giving his note in payment.⁴⁸

§ 318. **Action to compel a reconveyance.**—The equitable maxim that "he who comes into equity must come in with clear hands," has also been applied to a case in which it appears that the infant misrepresented his age and then sought to compel a reconveyance without a restoration of what had been received by him.⁴⁹ And many of the courts have been less inclined to grant the infant affirmative relief in such cases than they are to permit him to use his infancy as a defense.

§ 319. **Active misrepresentation, liability for false pretense.**—It has been held in at least one jurisdiction that an infant may be subjected to a criminal prosecution for obtaining goods under false pretense, where he represents himself to be over twenty-one years of age, when in fact he is not, if such representation is made for the fraudulent purpose of inducing the person to enter into

contract by which the vendor retained title until a note given in payment therefor was paid and the infant sold the buggy to another an action in trover might be maintained against the infant's vendee and that had the infant been defendant the action would have been maintainable against him. *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519. See, contra, however, on practically the same facts. *Schenk v. Strong*, 4 N. J. L. 97; *Penrose v. Curren*, 3 Rawle (Pa.) 351, 24 Am. Dec. 356; *Wilt v. Welsh*, 6 Watts (Pa.) 9.

⁴⁶ See, ante, § 293 note 40.

⁴⁷ *Hawk v. Harris*, 112 Iowa 543, 84 N. W. 664, 84 Am. St. 352 (in the above case the suit was by the parent); *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361 (suit by woman seduced); *Fry v. Leslie*, 87 Va. 269,

12 S. E. 671 (suit by woman seduced).

⁴⁸ *Walker v. Davis*, 1 Gray (Mass.) 506.

⁴⁹ *International Land Co. v. Marshall*, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056. In the above case it appears that the infant made affidavit that he was twenty-one years of age in order to enable him to sell his land and obtain the purchase-price. On Dec. 26, 1905, part of the purchase-price was paid him. On Dec. 27, 1905, the infant's mother informed defendant that he was under age. On December 28, 1905, a further payment was made him. Held, the infant would not be permitted to invoke the aid of equity to cancel the deed without offering to refund the money so obtained. See, however, *Tobin v. Spann*, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N. S.) 672n.

a contract or engagement that he would not have entered into if he had known that the person was an infant and the person to whom the statement is made is induced to, and does, part with his money or property on the faith of it.⁵⁰

§ 320. **Summary.**—It is believed the law, or the state of the law, on this somewhat confusing subject may be summarized as follows. An infant is not estopped either in law or equity from avoiding his contract from the mere fact that he did not disclose his minority at the time of the formation of the agreement notwithstanding the other party believed him to be an adult and dealt with him on that supposition.⁵¹ Some jurisdictions while permitting the infant to avoid his contract so induced yet hold him liable for the tort⁵² although such cases are in the minority.⁵³ It is held, however, by a growing class of cases that if an infant actively conceals his nonage the other party, believing and relying on the minor's false representation relative thereto, and if his appearance justifies a belief that he has reached his majority, such infant is estopped to plead infancy either as a defense in an action to enforce the terms of the agreement or affirmatively in an action brought by the infant to set it aside.⁵⁴

⁵⁰ *Commonwealth v. Ferguson* (Ky.), 121 S. W. 967, 24 L. R. A. (N. S.) 1101. In the above case the defendant represented himself to be over twenty-one years of age, and thereby induced another party to buy a piece of real estate from him for which they paid \$2,400. For other cases somewhat similar in principle see *Vinson v. State*, 124 Ga. 19, 52 S. E. 79; *Anthony v. State*, 126 Ga. 632, 55 S. E. 479; *People v. Kendall*, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240; *Lively v. State* (Tex. Crim. App.), 74 S. W. 321. See also, *Rex v. Simmonds*, 4 Cox C. C. 277; 1 Hawk. Pleas of the Crown, 345, § 6, note 2.

⁵¹ *Stikeman v. Dawson*, 1 De Gex & S. 90; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420. See also, *Davidson v. Young*, 38 Ill. 145; *Pyle v. Cravens*, 4 Litt. (Ky.) 17; *Price v. Jennings*, 62 Ind. 111; *Alvey v. Reed*, 115 Ind. 148, 17 N.

E. 265, 7 Am. St. 418. See also, cases cited ante, § 316, note 31.

⁵² See ante, § 317.

⁵³ *Johnson v. Pie*, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh (Ky.) 485; *Price v. Hewett*, 8 Exch. 146; *Wright v. Leonard*, 11 C. B. (N. S.) 258; *De Roo v. Foster*, 12 C. B. (N. S.) 272; *Brown v. Dunham*, 1 Root (Conn.) 272; *Geer v. Hovy*, 1 Root (Conn.) 179; *Burns v. Hill*, 19 Ga. 22; *Brooks v. Sawyer*, 191 Mass. 151, 76 N. E. 953, 114 Am. St. 594; *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. 510; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Wilt v. Welsh*, 6 Watts (Pa.) 9; *Kilgore v. Jordan*, 17 Tex. 341; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. 931; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659.

⁵⁴ See ante, § 316.

Equity early evinced a tendency to hold the infant responsible for any contract that he may have induced by his misrepresentation as to his age when the circumstances were such that the other party might reasonably believe such representation.⁵⁵ But notwithstanding this early tendency some jurisdictions still deny that minors may estop themselves from pleading infancy by a misrepresentation of their age or else so limit the rule as to amount to a nullification thereof.⁵⁶ Nevertheless equity will as a general rule regard the circumstances surrounding the transaction, the appearance of the minor, his intelligence, the character of his representation, the advantage he has gained by the fraudulent representation and the disadvantage to which the person deceived has been put by him in determining whether he should be permitted to invoke successfully the plea of infancy.⁵⁷

§ 321. **Ratification.**—The valid contracts of an infant need not be ratified; they cannot be avoided. His void contracts cannot be ratified.⁵⁸ It follows that only an infant's voidable contract need or can be ratified. The term ratification presupposes that the contract was not absolutely binding and on the other hand that it was not entirely void. It is also obvious that such agreement can only be ratified after the infant has reached his majority. An attempted ratification prior to that time would be subject

⁵⁵ See *Clare v. Bedford*, 13 Vin. Abr. 536; *Hanning v. Ferrers*, 1 Eq. Cas. Abr. 356; *Louch v. Parsons*, 3 Burr. 1794.

⁵⁶ *Tobin v. Spann*, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N. S.) 672n; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Lackman v. Wood*, 25 Cal. 147; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Carolina Interstate &c. Loan Assn. v. Black*, 119 N. Car. 323, 25 S. E. 975; *Mills v. Rodgers*, 3 Western Law Monthly (Ohio) 262; *Stoolfoos v. Jenkins*, 12 Serg. & R. (Pa.) 399; *Williams v. Baker*, 71 Pa. 476; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87. See also *Rundle v. Spencer*, 67 Mich. 189, 34 N. W. 548. See ante, § 317.

⁵⁷ *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511. See also, *Commander v. Brazil*, 88 Miss. 668, 41 So. 497, 9

L. R. A. (N. S.) 1117. The case of *Grauman &c. Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50, lays down the rule that an infant is estopped only when the three following elements are present: (1) Actual ability to exercise discretion on the part of the infant; (2) actual fraud practiced by him; (3) a necessity that the transaction be of a beneficial nature to the infant. Applying the above rule the court held that the infant was not estopped to deny his contract as accommodation endorser since it was not for his benefit. "Infants are not estopped, unless their conduct has been intentional and fraudulent." *Harper v. Utsey* (Tex. Civ. App.), 97 S. W. 508.

⁵⁸ *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756.

to the same infirmity as the contract itself and would not prevent a subsequent disaffirmance.⁵⁹

Not only must the infant have reached the age of twenty-one but he must not be otherwise incapacitated. A ratification is valid only when made by one competent to contract and free from restraint. It follows that a ratification after majority by one under guardianship is ineffectual, the statute declaring the contract of the person so situated void.⁶⁰ It is frequently said that the privilege of either disaffirming or ratifying the agreement is personal to the infant and this is of course true. However, his personal representatives may ratify his contract after his death.⁶¹ Not only this, but they may affirm the agreement at a time prior to that at which the infant would have attained his majority had he lived.⁶² Certain cases contain dictum to the effect that privies in estate with an infant may take advantage of the privilege of infancy.⁶³ This, however, is erroneous, but privies in relationship may take advantage of the infant's disaffirmance after he has in fact disaffirmed.⁶⁴

§ 322. Ratification—What amounts to.—Having indicated by whom and at what time ratification may be made, it remains to determine how it may be done. The affirmance may be accomplished in three ways, which are: by voluntary express words

⁵⁹ *Sanger v. Hibbard*, 104 Fed. 455, 43 C. C. A. 635; *Dana v. Coombs*, 6 Greenl. (Maine) 89, 19 Am. Dec. 194; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Corey v. Burton*, 32 Mich. 30; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464; *Bank of Silver Creek v. Browning*, 16 Abb. Pr. (N. Y.) 272; *Cheshire v. Barrett*, 4 McCord (S. Car.) 241, 17 Am. Dec. 735; *O'Dell v. Rogers*, 44 Wis. 136.

⁶⁰ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117. See also, *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87.

⁶¹ *Jefford's Admr. v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108; *Bozeman v. Browning*, 31 Ark. 364.

⁶² *Shronshire v. Burns*, 46 Ala. 108. As to the right of a guardian to

affirm a contract of his infant ward after such ward has reached his majority, see *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

⁶³ *White v. Flora*, 2 Over. (Tenn.) 426; *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Domminck v. Michael*, 6 N. Y. Super. Ct. 374; *Nelson v. Eaton*, 1 Redf. Sur. (N. Y.) 498.

⁶⁴ *Harris v. Cannon*, 6 Ga. 382; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Williams v. Norris*, 2 Litt. (Ky.) 157; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Den v. Stowe*, 2 Dev. & Bat. (N. Car.) 320; *McGill v. Woodward*, 3 Brev. (S. Car.) 401.

of ratification, by acts and conduct which clearly evince an intention to confirm the agreement, and by failure to disaffirm the contract within a reasonable time after reaching full age where such omission is prejudicial to the interests of the other party, or when not prejudicial, failure to disaffirm within the statutory period of limitation.

§ 323. **Express ratification.**—The foregoing methods of ratification will be briefly discussed in the order named. No particular form of words is necessary to make a confirmation of the agreement entered into by a person when an infant after he attains his majority, but they must import an unequivocal recognition and confirmation of the previous engagement though they need not amount to a direct promise to pay. The language used must show a willingness and intention to fulfil the contract.⁶⁵

A mere acknowledgment is not sufficient to constitute a ratification.⁶⁶ Thus it has been held that there was no ratification

⁶⁵ Thrupp v. Fielder, 2 Esp. 628; Catlin v. Haddox, 49 Conn. 492, 44 Am. Rep. 249; Bennett v. Collins, 52 Conn. 1; Wilcox v. Roath, 12 Conn. 550; Benham v. Bishop, 9 Conn. 330, 23 Am. Dec. 358; Martin v. Byrom, Dud. (Ga.) 203; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; Barlow v. Robinson, 174 Ill. 317, 51 N. E. 1045; Conklin v. Ogborn, 7 Ind. 553; Fetrow v. Wiseman, 40 Ind. 148; Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28; Martin v. Mayo, 10 Mass. 137, 6 Am. Dec. 103; Jackson v. Mayo, 11 Mass. 147, 6 Am. Dec. 167; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Ford v. Phillips, 1 Pick. (Mass.) 202; Barnaby v. Barnaby, 1 Pick. (Mass.) 221; Thompson v. Lay, 21 Mass. (4 Pick.) 48, 16 Am. Dec. 325; Peirce v. Tobey, 5 Metc. (Mass.) 168; Smith v. Kelley, 13 Metc. (Mass.) 309; Proctor v. Sears, 4 Allen (Mass.) 95; Lynch v. Johnson, 109 Mich. 640; 67 N. W. 908; Baker v. Kennett, 54 Mo. 82; Wright v. Steele, 2 N. H. 51; Hale v. Gerrish, 8 N. H. 374; Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380, second appeal, 10 N. H. 220, 34 Am. Dec. 148; Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; New Hampshire Mut. F. Ins. Co. v. Noyes, 32 N. H. 345; Alexander v. Hutcheson, 9 N. Car. 535; Dunlap v. Hales, 47 N. Car. 381; Turner v. Gaither, 83 N. Car. 357, 35 Am. Rep. 574; Hinely v. Margaritz, 3 Pa. St. 428; Chambers v. Wherry, 1 Bail. (S. Car.) 28; Reed v. Boshears, 4 Sneed (Tenn.) 118; Hatch v. Hatch's Estate, 60 Vt. 160, 13 Atl. 791; Ward v. Scherer, 96 Va. 318, 31 S. E. 518.

⁶⁶ Thrupp v. Fielder, 2 Esp. 628; Bennett v. Collins, 52 Conn. 1; Catlin v. Haddox, 49 Conn. 492, 44 Am. Rep. 249; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; Conklin v. Ogborn, 7 Ind. 553; Heady v. Boden, 4 Ind. App. 475, 30 N. E. 1119; Barnaby v. Barnaby, 1 Pick. (Mass.) 221; Ford v. Phillips, 1 Pick. (Mass.) 202; Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Mayer v. McLure, 36 Miss. 389, 72 Am. Dec. 190; Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380, second appeal, 10 N. H. 220, 34 Am. Dec. 148; Hale v. Gerrish, 8 N. H. 374; Bank of Silver Creek v. Browning, 16 Abb. Pr. (N. Y.) 272; Bigelow v. Grannis, 2 Hill (N. Y.) 120; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Hine-

where one said of a note he had made during his minority that "if I ever get so that I could (pay) without inconvenience to myself" he would settle but that he would not promise to pay within one year or ten years or at any time.⁶⁷ It has been held also that there was no ratification where it was merely stated that the plaintiff would get his pay, this statement being accompanied with a refusal to give a note.⁶⁸ On the other hand, the words "I do ratify and confirm the debt,"⁶⁹ "all that is justly due shall be paid,"⁷⁰ "or to pay a promissory note" if he signed it,⁷¹ have been held sufficient as a ratification. Moreover, the new promise or confirmation is insufficient if made to a stranger. It must be made to the other party, his agent or attorney.⁷²

The words of ratification need not be express in their character. All that is necessary is that the erstwhile infant expressly agrees to ratify his contract, not by doubtful acts necessarily, but by words or in writing which imports a recognition and a con-

ly v. Magaritz, 3 Pa. St. 428; Chandler v. Glover, 32 Pa. 509; Steele v. Poe, 79 S. Car. 407, 60 S. E. 951.

⁶⁷ Bresse v. Stanly, 119 N. Car. 278, 25 S. E. 870. To same effect, Dunlap v. Hales, 47 N. Car. 381. For similar cases see the following: A statement to the effect that he owed the plaintiff but was unable to pay him; he would, however, endeavor to get his brother to be bound with him has been held not to amount to a renewal of the promise [Ford v. Phillips, 1 Pick. (Mass.) 202], or words to the effect that "that his brother ought to have paid the note; that the writ should not go to court; that it should be settled; and that he would see his brother who ought to pay it," and after the writ was returned, "that he meant to go to jail on it," have been held insufficient. Tappan v. Abbot, 1 Pick. (Mass.) 203.

⁶⁸ Hale v. Gerrish, 8 N. H. 374. The clause in a will whereby the testator provided that all his just debts should be paid has also been held no answer to a plea of infancy. Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28; Martin v. Mayo, 110 Mass. 137, 6 Am. Dec. 103; Jackson v.

Mayo, 11 Mass. 147, 6 Am. Dec. 167; Merchants & Co. v. Grant, 2 Edw. Ch. (N. Y.) 544.

⁶⁹ Thompson v. Lay, 21 Mass. (4 Pick.) 48, 16 Am. Dec. 325.

⁷⁰ Wright v. Steele, 2 N. H. 51.

⁷¹ Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307.

⁷² Heady v. Boden, 4 Ind. App. 475, 30 N. E. 1119; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; Mayer v. McLure, 36 Miss. 389, 72 Am. Dec. 190; Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380, second appeal, 10 N. H. 220, 34 Am. Dec. 148; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Bigelow v. Grannis, 2 Hill (N. Y.) 120; Chandler v. Glover, 32 Pa. 509. A new promise made to the plaintiff's attorney to whom the note had been sent for collection is sufficient as a ratification. Hodges v. Hunt, 22 Barb. (N. Y.) 150. It has also been held, where one left a note with his agent for collection, who in turn gave it to his clerk whom he directed to present it for payment, that such clerk is not a stranger and a promise made to him is binding. Mayer v. McLure, 36 Miss. 389, 72 Am. Dec. 190.

firmation of his promise.⁷³ If the new promise is conditional or is not to be binding until the happening of a contingency, it must be shown that the condition on which the promise was made has been fulfilled. Thus it has been held that where a promise was made to pay when able there could be no recovery thereon without proof of the ability to pay.⁷⁴ A partial promise, that is to say, a promise to pay or perform a part of the original obligation, is binding only to the extent of the new promise.⁷⁵

§ 324. When ratification must be in writing.—In the absence of any statutory provision requiring that the ratification be made in writing the confirmation may be verbal, notwithstanding the contract ratified be a deed of conveyance or an instrument under seal or in fact any contract required to be in writing.⁷⁶ But, if there is a statute that requires the ratification to be in writing and the case falls within the statute the promise, or ratification must, of course, be in writing; a verbal promise will not then suffice.⁷⁷ Thus it has been held by the Supreme Court of Vir-

⁷³ *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229.

⁷⁴ *Cole v. Saxby*, 3 Esp. 159; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Thompson v. Lay*, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; *Proctor v. Sears*, 4 Allen (Mass.) 95; *Peacock v. Binder*, 57 N. J. L. 374, 31 Atl. 215; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Bresee v. Stanley*, 119 N. Car. 278, 25 S. E. 870; *Chandler v. Glover*, 32 Pa. 509. See also, *Martin v. Mayo*, 10 Mass. 137, 6 Am. Dec. 103; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229. In the above case it was held that a promise to pay on his return home was sufficient.

⁷⁵ *Minock v. Shortridge*, 21 Mich. 304; *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541; *Edgerly v. Shaw*, 25 N. H. 514.

⁷⁶ *Jefford's Admr. v. Ringgold*, 6 Ala. 544; *West v. Penny*, 16 Ala. 186; *Vaughan v. Parr*, 20 Ark. 600; *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; *Stokes v. Brown*, 4 Chand. (Wis.) 39, 3 Pinney (Wis.) 311.

⁷⁷ *Hartley v. Wharton*, 11 Ad. &

El. 934; *Stern v. Freeman*, 4 Metc. (Ky.) 309; *Lamkin & Foster v. Ledoux*, 101 Maine 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104n; *Neal v. Berry*, 86 Maine 193, 29 Atl. 987; *Bird v. Swain*, 79 Maine 529, 11 Atl. 421; *Thurlow v. Gilmore*, 40 Maine 378; *Barnes v. American Soda Fountain Co. (Okla.)*, 121 Pac. 250; *Steele v. Poe*, 79 S. Car. 407, 60 S. E. 951; *Ward v. Scherer*, 96 Va. 318, 31 S. E. 518. As to what amounts to a sufficient ratification see the following instances: "Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant, who has attained his majority, amount to a ratification." *Harris v. Wall*, 1 Ex. 122. "A ratification in writing must either in terms or on the fair construction of the instrument refer to the contract which is to be ratified, and treat it as a subsisting contract." *Throwell v. Shenton*, L. R. 8 Ch. D. 318. A promise to pay "as a debt of honor" a debt guaranteed by the promisor during infancy has been held not such a ratification as is re-

ginia that a conditional promise to pay an unidentified open account does not comply with the statutes of that state requiring that one's ratification of a contract during infancy must be in writing and signed.⁷⁸

However, a written promise to pay an obligation contracted during infancy has been held sufficient, notwithstanding it did not contain the name of the creditor, the amount due, or the date, parol evidence being admissible to supply these particulars.⁷⁹ And it must be borne in mind, that contracts may be confirmed by other means than voluntary, spoken or written ratification. They may be affirmed by conduct or laches. Nor do those statutes providing that the affirmation must be in writing prevent a contract from being ratified by these latter methods.⁸⁰

§ 325. Ratification by conduct—Retention of property.—

This brings us to the second method of ratification, namely, affirmation by conduct which evinces an intention to confirm the agreement. Various voluntary acts and conduct have been held

quired by the statute. *Macord v. Osborne*, L. R. 1 C. P. D. 568. The words "particulars of account to the end of 1867, amounting to £162 11s. 6d. I certify to be correct and satisfactory" have been held but an acknowledgment of the debt and not a promise to pay. *Rowe v. Hopwood*, L. R. 4 Q. B. 1. "No action shall be maintained whereby to charge any person upon any debt contracted during infancy, unless such person shall have ratified the same by some other act than a verbal promise to pay the same; and the following acts on the part of such a person after he becomes of full age shall constitute a ratification of such debt: First, an acknowledgment of or promise to pay such debt, made in writing; second, a partial payment upon such debt; third, a disposal of part or all of the property for which such debt was contracted; fourth, a refusal to deliver property in his possession or under his control, for which such debt was contracted, to the person to whom the debt is due, on demand therefor made in writing." *Koerner v. Wil-*

kinson, 96 Mo. App. 510, 70 S. W. 509.

⁷⁸ *Ward v. Scherer*, 96 Va. 318, 31 S. E. 518. It has also been held that when an infant sold a horse with a warranty of soundness and took a note which stipulated that title should remain in the vendor till paid for a written indorsement on the note which read "the within note being paid, I hereby discharge the property thereby secured," could not be construed as a ratification in writing of the warranty on the horse. *Bird v. Swain*, 79 Maine 529, 11 Atl. 421.

⁷⁹ *Hartley v. Wharton*, 11 Ad. & El. 934.

⁸⁰ *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. 312; *Hilton v. Shepherd*, 92 Maine 160, 42 Atl. 387. The case of *Lamkin & Foster v. Ledoux*, 101 Maine 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104n, seems to hold that under the statute then in force no ratification would be sufficient unless in writing. The statute itself made two exceptions to this rule; they are, contracts for necessities or real estate of which he (the infant) has received the title and retains the benefit.

sufficient to amount to a ratification.⁸¹ Thus, should the infant, after he reaches his majority, retain the possession and use of the property beyond a reasonable time, it may amount to a ratification.⁸² Where an infant upon reaching her majority assumed possession of the land, but refused to perform her part of the agreement, it was held that she had ratified the contract and that strict performance would be decreed against her.⁸³ The circumstances may be such, however, as to preclude a ratification by such means; thus a retention of the property by the infant after he has reached his majority cannot be said to amount to a ratification where he has done all in his power to secure a rescission, and has brought suit for that purpose.⁸⁴

⁸¹ As to the necessity of the act being voluntary, see *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Smith v. Kelley*, 13 Metc. (Mass.) 309; *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27n; *Bloomer v. Nolan*, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. 690; *Allen v. Lardner*, 78 Hun (N. Y.) 603, 60 N. Y. St. 768, 29 N. Y. S. 213.

⁸² *Ames Mfg. Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; *Waters v. Lyons*, 141 Ind. 170, 40 N. E. 662; *Boody v. McKenney*, 23 Maine 517; *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *Ellis v. Alford*, 64 Miss. 8, 1 So. 155; *Philpot v. Sandwich Mfg. Co.*, 18 Nebr. 54, 24 N. W. 428; *Aldrich v. Grimes*, 10 N. H. 194; *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; *De-lano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617. See, however, *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654. See also, *Owens v. Phelps*, 95 N. Car. 286, in which it is held that such conduct is admissible in evidence, though it is not of itself a ratification. The Georgia statute on this subject provides that, "if * * * the minor receives property or other valuable consideration, and after arriving at age retains possession of such property or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him. *Wickham v. Torley*, 136 Ga. 594, 71 S. E. 881.

⁸³ *Kincaid v. Kincaid*, 85 Hun (N. Y.) 141, 65 N. Y. St. 661, 32 N. Y. S. 476, *affd.*, 157 N. Y. 715, 53 N. E.

1126. For other cases holding that contracts concerning realty may be affirmed by retaining possession an unreasonable length of time after reaching majority, see *Cecil v. Comes Salisbury*, 2 Vern. 225; *Boody v. McKenney*, 23 Maine 517; *Ellis v. Alford*, 64 Miss. 8, 1 So. 155; *Baker v. Kennett*, 54 Mo. 82; *Roberts v. Wiggint*, 1 N. H. 73, 8 Am. Dec. 38; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654; *Hook v. Donaldson*, 9 Lea (Tenn.) 56; *Callis v. Day*, 38 Wis. 643. And see *Evelyn v. Chichester*, 3 Burr. 1717; *Middleton v. Hoge*, 5 Bush (Ky.) 478; *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805; *Armfield v. Tate*, 29 N. Car. 258; *Ihley v. Padgett*, 27 S. Car. 300, 3 S. E. 488. The principle applies to the settlement of a boundary line of land belonging to an infant during his infancy. *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660; *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612. An infant lessee ratifies the lease by retaining possession an unreasonable time after majority. *Mahon v. O'Farrell*, 10 Ir. L. R. 527; *McClure v. McClure*, 74 Ind. 108; *Boody v. McKenney*, 23 Maine 517, *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429.

⁸⁴ *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189. See also, *Buchanan v. Hubbard*, 96 Ind. 1; *Thing v. Libbey*, 16 Maine 55; *Todd v. Clapp*, 118 Mass. 495; *Smith v. Kelley*, 13 Metc. (Mass.) 309;

It has also been held that an infant, after reaching his majority, must within a reasonable time disaffirm his subscription for capital stock, or he will be held to have ratified it, and will be liable to pay assessments made from the time of making his subscription.⁸⁵

There is no question that the legislature has the right to change the common-law rule relative to ratification by retention of the goods after majority, and under such statute it has been held by the Missouri Court of Appeals that the retention of wearing apparel after majority did not, under the Missouri statute, amount to a ratification.⁸⁶

§ 326. Ratification by conduct—Sale or conversion of property.—A minor may, also, after reaching his majority, ratify his contract by selling or otherwise converting to his own use the property obtained thereby.⁸⁷ Thus, if an infant purchases real estate and after he reaches his majority sells the same, he is deemed to have ratified the original purchase made during infancy.⁸⁸ Nor is there any distinction made under this rule between personal and real property. If an infant purchases personal property and after coming of age sells the same, such an act of

Tobey v. Wood, 123 Mass. 88, 25 Am. Rep. 27n; Baker v. Kennett, 54 Mo. 82; Maupin v. Grady, 71 Mo. 278; Scott v. Scott, 29 S. Car. 414. And see Flexner v. Dickerson, 72 Ala. 318; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Dana v. Stearns, 3 Cush. (Mass.) 372.

⁸⁵ Cork &c. R. Co. v. Cazenove, 10 Ad. & El. (N. S.) 935; Dublin &c. R. Co. v. Black, 8 Exch. 181, 7 Railway & Canal Cases 434; Beardsley v. Hotchkiss, 96 N. Y. 201. As to what amounts to a ratification, see Cork &c. R. Co. v. Cazenove, 10 Ad. & El. (N. S.) 935; Constantinople &c. Hotel Co., L. R. 5 Ch. 302.

⁸⁶ Koerner v. Wilkinson, 96 Mo. App. 510, 70 S. W. 509.

⁸⁷ Curry v. St. John Plow Co., 55 Ill. App. 82; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538; Robinson v. Hoskins, 14 Bush (Ky.) 393; Hilton v. Shepherd, 92 Maine 160, 42 Atl. 387; Boody v. McKenney, 23

Maine 517; Lawson v. Lovejoy, 8 Greenl. (Maine) 405, 23 Am. Dec. 526; Henry v. Root, 33 N. Y. 526; Kincaid v. Kincaid, 85 Hun (N. Y.) 141, 65 N. Y. St. 661, 32 N. Y. S. 476, affd., 157 N. Y. 715, 53 N. E. 1126; Cheshire v. Barrett, 4 McCord (S. Car.) 241, 17 Am. Dec. 735.

⁸⁸ Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538; Leathers v. Ross, 74 Iowa 630, 38 N. W. 516; Middleton v. Hoge, 5 Bush (Ky.) 478; Dana v. Coombs, 6 Greenl. (Maine) 89, 19 Am. Dec. 194; Hubbard v. Cummings, 1 Greenl. (Maine) 11; Thomas v. Pullis, 56 Mo. 211; Uecker v. Koehn, 21 Nebr. 559, 32 N. W. 583, 59 Am. Rep. 849; Williams v. Mabey, 7 N. J. Eq. 500; Lynde v. Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; Henry v. Root, 33 N. Y. 526; Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654; Johnson v. Fournier, 69 Pa. St. 449.

ownership amounts to a ratification.⁸⁹ Thus it has been held that a minor may ratify the purchase of a horse by selling it after he reaches his majority.⁹⁰

§ 327. Ratification by conduct—Receiving agreed consideration.—In case one conveys title or other interest in property during minority, and after he has reached majority he receives⁹¹ or sues for⁹² the agreed consideration, the contract is thereby ratified. Thus it has been held that if he accepts rents,⁹³ receives interest,⁹⁴ receives part of the consideration for a mortgage of his property⁹⁵ or the proceeds of an award,⁹⁶ after reaching full age, he thereby ratifies the contract.⁹⁷ It has also been held that one ratifies a sale of land made during minority by renting the land so sold from the grantee for two consecutive years after reaching his majority.⁹⁸

§ 328. Ratification by conduct—Miscellaneous.—Likewise, a mortgage given by an infant has been declared ratified by her

⁸⁹ *Shropshire v. Burns*, 46 Ala. 108; *Robinson v. Hoskins*, 14 Bush (Ky.) 393; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Williams v. Brown*, 34 Maine 594; *Lawson v. Lovejoy*, 8 Greenl. (Maine) 405, 23 Am. Dec. 526; *Minock v. Shortridge*, 21 Mich. 304; *Chesshire v. Barrett*, 4 McCord (S. Car.) 241, 17 Am. Dec. 735.

⁹⁰ *Robinson v. Hoskins*, 14 Bush (Ky.) 393.

⁹¹ *Walker v. Mulvean*, 76 Ill. 18; *Ward v. Ward*, 143 Ky. 91, 136 S. W. 137; *Clark v. Kidd* (Ky.), 146 S. W. 1097; *Keegan v. Cox*, 116 Mass. 289; *Ferguson v. Bell*, 17 Mo. 347; *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542.

⁹² *Morrill v. Aden*, 19 Vt. 505. See also, *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1054; *Carrell v. Potter*, 23 Mich. 377. In the above case it is held that suit after majority amounts to an affirmation of the agreement, but that suit by an assignee claiming under an assignment made by the infant during his minority does not amount to a ratification.

⁹³ *Ashfield v. Ashfield*, W. Jones 157; *Smith v. Low*, 1 Atk. 489; *Slator v. Trimble*, 14 Ir. C. L. 342.

⁹⁴ *Franklin v. Thornebury*, 1 Vern. 132.

⁹⁵ *Keegan v. Cox*, 116 Mass. 289.

⁹⁶ *Jones v. Phoenix Bank*, 8 N. Y. 228.

⁹⁷ See also, *Hobbs v. Nashville & C. R. Co.*, 122 Ala. 602, 26 So. 139, 82 Am. St. 103, where it is said that if an infant, upon reaching full age and without unfairness, voluntarily receives and retains the money paid her guardian under an invalid condemnation proceeding, with a full knowledge of the facts, the other party being in possession and no question of the statute of frauds arising, such actions constitute an election to treat the transaction as valid. See, however, *Scranton v. Stewart*, 52 Ind. 68, in which it is held that an infant feme covert is not estopped from disaffirming a deed of her lands made jointly with her husband by the fact that after she reached her majority the grantee paid the husband a portion of the purchase-price, unless she knew that such purchase-price was unpaid and the grantee was ignorant of the fact that the grantor was an infant when she executed the deed.

⁹⁸ *Ingram v. Ison*, 20 Ky. L. 48, 80 S. W. 787.

paying the interest coupon note after attaining majority.⁹⁹ The same effect has been accorded a recital in a mortgage executed after reaching majority, that it is subject to a prior mortgage given during infancy to a third person.¹

In case a minor purchases property and gives a mortgage for the purchase-money the deed and mortgage constitute one transaction, and his affirmance of the purchase after his majority by selling the property,² or by other means,³ is a confirmation of the mortgage. A mortgage may also be ratified by a subsequent acknowledgment and redelivery after majority.⁴ Likewise an infant's deed may be rendered valid ab initio by the infant, on reaching full age, taking up the old deed and reconveying by another in affirmance of it.⁵

A deed of assignment has been held to amount to a ratification.⁶ Likewise, it has been held that where a minor voluntarily continues to perform services under a contract made while a minor, and which extended for a period beyond his minority, he ratifies the agreement by continuing the service after coming of age.⁷

§ 329. Ratification by laches.—The third method of ratification mentioned in a preceding section is by an omission under certain circumstances to disaffirm within a reasonable time after reaching full age. It is announced by a large number

⁹⁹ *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 So. 399.

¹ *Losey v. Bond*, 94 Ind. 67; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Allen v. Poole*, 54 Miss. 323; *Heinbockel v. Zugbaum*, 5 Mont. 344, 5 Pac. 897; *Ward v. Anderson*, 111 N. Car. 115, 15 S. E. 933.

² *Hubbard v. Cummings*, 1 Greenl. (Maine) 11; *Dana v. Coombs*, 6 Greenl. (Maine) 89, 19 Am. Dec. 194; *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805; *Uecker v. Koehn*, 21 Nebr. 559, 32 N. W. 583, 59 Am. St. 849; *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; *Walsh v. Powers*, 43 N. Y. 23, 8 Am. Rep. 654. See also, *Curtiss v. McDougal*, 26 Ohio St. 66.

³ *American Mortgage Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; *Ready v. Pinkham*, 181 Mass. 351,

63 N. E. 887; *Young v. McKee*, 13 Mich. 552; *Robbins v. Eaton*, 10 N. H. 561; *Kennedy v. Baker*, 159 Pa. St. 146, 28 Atl. 252; *Richardson v. Boright*, 9 Vt. 368; *Callis v. Day*, 38 Wis. 643.

⁴ *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

⁵ *Cox v. McGowan*, 116 N. Car. 131, 21 N. E. 108. To same effect, *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344. See, however, *Gaskins v. Allen*, 137 N. Car. 426, 49 S. E. 919, in which it is held that a subsequent deed by a married woman never properly executed, and with no probate or privy examination taken, does not amount to a ratification of the deed given during infancy.

⁶ *Keller v. Cooper*, 12 Ky. L. 188.

⁷ *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17; *Spicer v. Earl*, 41

of cases, the statement being in many of them dictum, that an infant grantor who, after reaching full age, stands by for an unreasonable length of time without disaffirming the conveyance, confirms the same. What constitutes a reasonable time within which a person who has executed such a deed shall disaffirm is a question of fact, depending upon the particular circumstances of each case.⁸ It is impossible to fix any more definite limit as to what constitutes a reasonable time than to say that in no case does it extend beyond the period fixed by the statute of limitation.⁹

Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; *State v. Dimock*, 12 N. H. 194, 37 Am. Dec. 197n; *Forsyth v. Hastings*, 27 Vt. 646.

⁸*Hastings v. Dollarhide*, 24 Cal. 195; *Kline v. Beebe*, 6 Conn. 494; *Wallace's Lessee v. Lewis*, 4 Har. (Del.) 75; *Nathans v. Arkwright*, 66 Ga. 179; *Cole v. Penoyer*, 14 Ill. 158; *Blankenship v. Stout*, 25 Ill. 132; *Illinois Land & Co. v. Bonner*, 75 Ill. 315; *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; *Scranton v. Stewart*, 52 Ind. 68; *Long v. Williams*, 74 Ind. 115; *Wiley v. Wilson*, 77 Ind. 596; *Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263n; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798; *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115; *O'Brien v. Gaslin*, 20 Nebr. 347, 30 N. W. 274; *Ward v. Laverty*, 19 Nebr. 429; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Matherson v. Davis*, 2 Cold. (Tenn.) 443; *Solser v. Barron* (Tex. Civ. App.), 146 S. W. 1039; *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801; *Ferguson v. Houston & Co. R.*, 73 Tex. 344, 11 S. W. 347; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Groesbeck v. Bell*, 1 Utah 338; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Richardson v. Boright*, 9 Vt. 368. In the case of *Bentley v. Greer*, 100 Ga. 35, 27 S. E. 974, it is said: "The deed of an infant is not void, but merely voidable; and, unless disaffirmed within a reasonable time after majority, he will be bound by it. Nor is he relieved from the duty of

disaffirming it by the fact that no one is in possession of the land, claiming under the deed. This duty is not dependent on the other party doing anything under the deed. The maker has no right to assume that because the grantee, or some other person holding under him, does not go upon the land, no claim is made under the deed."

⁹*Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263n. See also, *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801. "A reasonable time after majority within which to act is all that is essential to the infant's protection. That ten, fifteen or twenty years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule which is solely protection to the infant. Reason, justice to others, public policy (which is not subserved by cherishing defective titles), and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. * * * Three years and a half, the delay in this case (excluding the period of the plaintiff's minority, after the time within which to act had commenced to run), was

This may mean three¹⁰ or ten or more years,¹¹ dependent upon the number of years designated by the statutes of the various states.¹²

The rule that affirmation results from an unreasonable delay is especially applicable where the grantee has made valuable improvements on the property after the infant has reached the age of twenty-one.¹³ The erection of valuable improvements will not defeat the right to rescind, however, where they were made before the disability of infancy was removed,¹⁴ or when the grantor was absent from the state.¹⁵

§ 330. **Laches—Statute of limitations.**—There is another class of cases, however, that do not give assent to the doctrine that one will be held to have ratified his deed of conveyance un-

prima facie more than a reasonable time, and prima facie the conveyance was ratified." *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798. See, however, *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233, where it is held that mere acquiescence for three years after reaching majority does not amount to a ratification. See also, *Urban v. Grimes*, 2 Grant Cases (Pa.) 96.

¹⁰*Cole v. Pennoyer*, 14 Ill. 158; *Blankenship v. Stout*, 25 Ill. 116; *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480. Prescription or adverse possession is suspended during minority as against the infant. *Jenkins v. Salmen Brick & Lumber Co.*, 120 La. 549, 45 So. 435; *Parker v. Ricks*, 114 La. 942, 38 So. 687; *Pennington v. Earley* (N. J.), 43 Atl. 707; *Winters v. Hainer*, 107 Tenn. 337, 64 S. W. 44.

¹¹*Combs v. Noble*, 22 Ky. L. 736, 58 S. W. 707. "The minor who remains silent for ten years after his minority may be considered as having possibly ratified certain illegal acts of his own. This does not apply to illegal acts of others in his name without the shadow of authority." *Britt v. Caldwell-Norton Lumber Co.*, 126 La. 155, 52 So. 251.

¹²This is not true, however, where the grantor is laboring under some disability other than that of infancy,

the other disability continuing after that of infancy has been removed. Thus where coverture prevents a wife from suing without the consent of her husband a delay of thirty-seven years has been held reasonable. *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263n. See also, *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *McMorris v. Webb*, 17 S. Car. 558, 43 Am. Rep. 629; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709.

¹³*Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 255; *Hartman v. Kendall*, 4 Ind. 403; *Davis v. Dudley*, 70 Maine 236, 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Allen v. Poole*, 54 Miss. 323; *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. 25; *Logan v. Gardner*, 136 Pa. St. 588, 20 Atl. 625, 20 Am. St. 939; *Wheaton v. East*, 5 Yerger (Tenn.) 41, 26 Am. Dec. 251; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. ed. 800. And see *McCullough v. Finley*, 69 Kans. 705, 77 Pac. 696.

¹⁴*Davidson v. Young*, 38 Ill. 145; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897.

¹⁵*Brantley v. Wolf*, 60 Miss. 420; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

less he disaffirms the same within a reasonable time after reaching majority. The preponderance of authority is that in deeds executed by infants mere inertness or silence, continued for a period less than prescribed by the statute of limitation, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed, and those confirmative acts must be voluntary.¹⁶

The cases applying this rule concede that a lapse of time short of the statutory period may, when taken in connection with circumstances other than mere silence, such as standing by and seeing valuable improvements made upon the land, or any act inconsistent with an intention to disaffirm, amount to a ratification or estop the grantor from avoiding the deed.¹⁷

¹⁶ *Eureka Company v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Kountz v. Davis*, 34 Ark. 590; *Stull v. Harris*, 51 Ark. 294, 2 L. R. A. 741; *Wells v. Seixas*, 24 Fed. 82; *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447; *Boody v. McKenney*, 23 Maine 517; *Davis v. Dudley*, 70 Maine 236, 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Wallace v. Latham*, 52 Miss. 291; *Shipp v. McKee*, 80 Miss. 741, 32 So. 281, 92 Am. St. 616; *Allen v. Poole*, 54 Miss. 323; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Huth v. Carondelet, Marine R. & C. Co.*, 56 Mo. 202; *Thomas v. Pullis*, 56 Mo. 211; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Den v. Stowe*, 2 Dev. & B. (19 N. Car.) 320; *Drake's Lessee v. Ramsey*, 5 Ohio 251; *Hughes v. Watson*, 10 Ohio 127; *Cresinger v. Welch's Lessee*, 15 Ohio 156, 45 Am. Dec. 565; *Urban v. Grimes*, 2 Grant Cas. (Pa.) 96; *Tucker v. Moreland*, 10 Pet. (U. S.) 59, 1 Am. Lead. Cas. 224; *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. ed. 800; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 700, 29 Am. Rep. 445. See also,

Barker v. Fuestal (Ark.), 147 S. W. 45. "There is no reason in principle for saying that the right to disaffirm a deed on account of infancy shall be cut off by lapse of time short of the period prescribed in the statute of limitations for bringing an action to recover the property, unless it be on the principle of estoppel, and it must be an exception to the ordinary rule if there can be an estoppel where there has been no change in the position of the parties in respect to the matter in dispute, detrimental to the one who pleads the estoppel." *Stringer v. Northwestern Mutual L. Ins. Co.*, 82 Ind. 100. While it is unnecessary for him to reacknowledge the deed or execute a new one, nevertheless, there must be some positive words or acts from which assent may be inferred. Mere acquiescence for a period less than that prescribed by the statute of limitations is insufficient. *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30.

¹⁷ *Davis v. Dudley*, 70 Maine 236, 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Wallace v. Latham*, 52 Miss. 291; *Allen v. Poole*, 54 Miss. 323; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Thomas v. Pullis*, 56 Mo. 211; *Drake's Lessee v. Ramsey*, 5 Ohio 251; *Cresinger v. Welch's Lessee*, 15 Ohio 156, 45 Am. Dec. 565; *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. ed. 800; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep.

While it gives rise to hardships, something true of practically every case where an infant avoids his agreement, reason, as well as the weight of authority, is, perhaps, with the opinion expressed by the rule stated in this section. An infant's deed, while good until avoided, is, nevertheless, subject to disaffirmance, an infirmity that can be cured only by ratification or estoppel, and it is hard to see how silent acquiescence can amount to either. Ratification or estoppel is usually the result of an affirmative act¹⁸ or at least something more than mere silence under ordinary circumstances. A ratification, as the term is here used, is merely an expression by one of the methods above designated whereby an adult exercises his right to treat as valid and binding a contract voidable at his option, because entered into by him during infancy.¹⁹

§ 331. Ratification need not be supported by an additional consideration.—Since it is in no sense the formation of a new contract, no new or additional consideration is necessary to make the ratified contract valid and binding, the original consideration being sufficient.²⁰ This would seem to be self-evident, and the proposition needs no elaboration.

§ 332. Ratification—Knowledge as to legal liability.—There is some conflict among authorities as to whether or not a ratification must be made with knowledge that there is no legal liability under the contract. Some of the authorities assert that any confirmatory promise or act must be given or done with full knowledge that no legal liability attaches under the contract. In

445. See also, cases cited in preceding note.

¹⁸ This, of course, leaves out of consideration the question of ratification by a retention of the consideration received. If he still has in his possession such consideration at the time he reaches his majority, and continues to retain the same, this may amount to ratification. See ante, § 325. If, after reaching majority, he does not have the consideration received in his possession he cannot be said to ratify because retaining the consideration. See post, § 346. As to the

right of an adult, having specific performance of a contract entered into during minority, being bound by a lapse of time, see *Campbell v. Bartlett*, 122 Tenn. 208, 122 S. W. 250, 25 L. R. A. (N. S.) 639n.

²⁰ *Kay v. Smith*, 21 Beav. 522; *Jefford's Admr. v. Ringgold*, 6 Ala. 544; *American & c. Mortgage Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; *Bell v. Burkhalter* (Ala.), 57 So. 460; *Conklin v. Ogborn*, 7 Ind. 553; *Calhoun v. Anderson*, 78 Kans. 749, 98 Pac. 275; *Grant v. Beard*, 50 N. H. 129.

many of the cases so holding, however, the rule as announced is merely dictum.²¹ However, it is held under the better and more modern theory that an adult's ratification is valid and binding even though made without knowledge of the fact that infancy was a defense.²²

The principle that a ratification cannot be avoided because made without knowledge that infancy was a defense must not be confused with the rule that there is no ratification when made without knowledge of the facts. In the first instance there exists

²¹ *Harmer v. Killing*, 5 Esp. 102; *Flexner v. Dickerson*, 72 Ala. 318; *Eureka Company v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Petrow v. Wiseman*, 40 Ind. 148; *Petty v. Roberts*, 7 Bush (Ky.) 410; *Owen v. Long*, 112 Mass. 403; *Baker v. Kennett*, 54 Mo. 82; *Turner v. Gaither*, 83 N. Car. 357, 35 Am. Rep. 574; *Dunlap v. Hales*, 47 N. Car. 381; *Alexander v. Hutcheson*, 9 N. Car. 535; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Hinely v. Margaritz*, 3 Pa. St. 428; *Norris v. Vance*, 3 Rich. L. (S. Car.) 164; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 58, 1 Am. Lead. Cas. 224; *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791.

²² *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 So. 399; *Morse v. Wheeler*, 4 Allen (Mass.) 570; *Ring v. Jamison*, 66 Mo. 424; *Anderson v. Soward*, 40 Ohio St. 325, 48 Am. St. 687. "The contract of a minor, including the power, on coming of age, without any new consideration, to make the contract binding on him, is a transaction sui generis, and is not strictly analogous to any other known to the law. The nature and validity of the contract depend on the acts of a minor who has the capacity to assent, but not the capacity to bind himself, during minority. The right to enforce the contract depends on the acts of an adult who has no special incapacities nor privileges. When he exercises his option, which results from his contract made while a minor, to bind or not to bind himself by the contract to which he has assented, he stands as every one else stands in the

performance of a voluntary act; he is presumed to know the law. So, in the present case, the defendant knew he had, while a minor, agreed, for a fair consideration, which he had received and enjoyed, to pay the amount in question to the plaintiff, and voluntarily, in specific terms, promised to pay that sum. This promise bound him to make the payment, by force of the same law that exempted him from liability until the promise was made. It is immaterial whether he knew or did not know the law. If such knowledge could affect his act, he is charged with the knowledge, and cannot be permitted to show the contrary." *Bestor v. Hickey*, 71 Conn. 181, 4 Atl. 555. "There was no fact found showing, or tending to show, that any fraud, undue influence, or unfair means of any kind was resorted to or practiced by the appellant, or any other person, to persuade the appellee to ratify the contract; nor was there any fact found showing, or tending to show, that the ignorance of the appellee as to his legal right to disaffirm the contract, or withhold his ratification thereof, was induced by the appellant, or any other person. And yet, in the absence of such facts, and in the presence of the facts that were found showing that the contract so ratified was founded upon an adequate consideration, and was one that ordinary honesty required the ratification of, the master commissioner held that the appellee was not bound by his act ratifying the same, merely because he did not know that he had the legal right to disaffirm it." This was held error. *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774.

merely ignorance of law, which will not excuse the person ratifying. In the latter case there is ignorance of some crucial fact rendering the transaction of no effect. Thus, it has been held that one is not estopped to repudiate a sale made by his tutor or guardian when shortly after emancipation he approves the tutor's account, when he did not know that the sale was invalid because made privately and sold for less than two-thirds of the appraised value.²³ It has, also, been held that an action brought to set aside a deed on the ground of fraud, the plaintiff alleging that he was twenty-one years of age when the deed was executed, does not estop him from bringing suit to have the conveyance set aside on the ground of infancy upon discovering that he was in fact a minor at the time the deed was given, the first action having been dismissed.²⁴

§ 333. Ratification—Effect.—The confirmation of a contract, after reaching majority, relates back and renders the agreement binding from the date on which it was originally entered into, and not merely from the time it was ratified.²⁵ If, after arriving at full age, a contract entered into during infancy is voluntarily ratified, it thereupon becomes the valid subsisting agreement, which cannot subsequently be rescinded. A valid ratification cannot be revoked and the contract so ratified cannot

²³ *Touchy v. Gulf Land Co.*, 120 La. 545, 45 So. 434, 124 Am. St. 440.

²⁴ *Ridgeway v. Herbert*, 150 Mo. 606, 51 So. 1040, 73 Am. St. 464.

²⁵ *American &c. Mortgage Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; *Hall v. Jones*, 21 Md. 439; *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521; *Minock v. Shortridge*, 21 Mich. 304; *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307; *Hoit v. Underhill*, 10 N. H. 220, 34 Am. Dec. 148; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Cheshire v. Barrett*, 4 McCord (S. Car.) 241, 17 Am. Dec. 735. It has been said in many cases that an executory contract cannot be ratified after suit is brought, for the reason "there must be a subsisting right of action at the time of suing out the plaintiff's writ, which right of action no subsequent promise can give." *Hale v. Gerrish*, 8 N. H. 374.

It would seem, on principle, that these decisions are entirely erroneous. Contracts of an infant capable of a ratification are voidable and not void; indeed, both a minor's executed and executory voidable contracts are valid until disaffirmed, for, as has been seen, an infant's marriage settlement, although voidable, is sufficient to pass title if the infant die without having disaffirmed it. It would seem, therefore, that it is immaterial whether the ratification is made prior or subsequent to the bringing of suit. Some authorities even assert "that a promise cannot relate back * * * so as to make the original contract a good foundation for an action from the beginning." *Merriam v. Wilkins*, 6 N. H. 432, 25 Am. Dec. 472. See also, *Freeman v. Nichols*, 138 Mass. 313.

be afterward disaffirmed.²⁶ An offer to compromise is not a ratification, since in so offering one does not acknowledge liability,²⁷ nor does the submission of the question to arbitration prove a ratification.²⁸

§ 334. Disaffirmance and avoidance.—Disaffirmance, also, has to do only with an infant's voidable contract; his void agreement need not, and his valid agreement cannot, be disaffirmed. All voidable agreements entered into by a minor are subject to rescission by him, and this is true of both executed and executory agreements. There is no distinction between executed and executory contracts, so far as the existence of the right of disaffirmance is concerned.²⁹ The right of an infant to avoid his contract is an absolute and paramount right, superior to all equities of other persons. Thus the infant may disaffirm against a bona fide purchaser of real estate from the infant's grantee.³⁰

§ 335. Who may disaffirm or avoid.—It is a well-settled rule that, generally speaking, infancy is a personal privilege of which no one except the infant himself is permitted to take advantage.³¹ The adult party to the agreement cannot avoid be-

²⁶ *Voltz v. Voltz*, 75 Ala. 555; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Hastings v. Dollarhide*, 24 Cal. 195; *Curry v. St. John Plow Co.*, 55 Ill. App. 82; *Youmans v. Forsythe*, 86 Hun (N. Y.) 370; *Luce v. Jestrab*, 12 N. Dak. 548, 97 N. W. 848. The ratification relates back so as to cut off a gratuitous conveyance of the same property made after the giving of the original deed and before the ratification. *Palmer v. Miller*, 25 Barb. (N. Y.) 399. Incidental and collateral circumstances do not amount to a ratification in the face of the party's explicit declaration that he did not intend them as such, nor intend to be bound. *Minock v. Shortridge*, 21 Mich. 304.

²⁷ *Martin v. Byron*, Dud. (Ga.) 203.

²⁸ *Benhan v. Bishop*, 9 Conn. 330, 23 Am. Dec. 358.

²⁹ *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216; *Robinson v. Weeks*, 56 Maine 102; *Hill v. Anderson*, 5 S. & M. (Miss.) 216; *Abell v. Warren*, 4 Vt. 149; *Price v.*

Furman, 27 Vt. 268, 65 Am. Dec. 194; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

³⁰ *Conn v. Boutwell* (Miss.), 58 So. 105; *Brantley v. Wolf*, 60 Miss. 420. See also, *Gage v. Menczer* (Tex. Civ. App.), 144 S. W. 717.

³¹ *Coan v. Bowles*, 1 Show. 165; *Grey v. Cooper*, 3 Doug. 65; *Riley v. Dillon*, 148 Ala. 283, 41 So. 768; *Shropshire v. Burns*, 46 Ala. 108; *Hastings v. Dollarhide*, 24 Cal. 195; *Frazier v. Massey*, 14 Ind. 382; *Schrock v. Crowl*, 83 Ind. 243; *Canon v. Alsbury*, 1 A. K. Marsh (Ky.) 76, 10 Am. Dec. 709; *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280, 3 Am. Dec. 161; *Hardy v. Waters*, 38 Maine 450; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Hill v. Keyes*, 10 Allen (Mass.) 258; *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Voorhees v. Wait*, 15 N. J. L. 343; *Patterson v. Lippincott*, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; *Inhabitants Bordentown v. Wallace*, 50

cause of the other's infancy.³² A stranger to the agreement cannot take advantage of infancy on the part of one of the original parties.³³ Nor is this privilege extended to the infant's assignee or those who stand in privity of relationship,³⁴ notwithstanding the fact that some cases contain statements to the effect that privies in estate may take advantage of the privilege of infancy.³⁵ However, it must be borne in mind that, after the infant has exercised his right to disaffirm, a privy in estate, or any one, may take advantage of such disaffirmance.³⁶ It has also been held that an infant's assignee in insolvency cannot avoid a mortgage

N. J. L. 13, 11 Atl. 267; Van Bramer v. Cooper, 2 Johns. (N. Y.) 279; Hartness v. Thompson, 5 Johns. (N. Y.) 160; Mason v. Denison, 15 Wend. (N. Y.) 64; Parker v. Baker, 1 Clarke Ch. (N. Y.) 136; Beardsley v. Hotchkiss, 96 N. Y. 201; Slocum v. Hooker, 13 Barb. (N. Y.) 536; Jones v. Butler, 30 Barb. (N. Y.) 641, 20 How. Pr. (N. Y.) 189; Hesser v. Steiner, 5 Watts & S. (Pa.) 476; Kuns's Exrs. v. Young, 34 Pa. St. 60; McGill v. Woodward, 3 Brev. (S. Car.) 401; White v. Flora, 2 Over. (Tenn.) 426; Harris v. Musgrove, 59 Tex. 401; Crosby v. Ardoin (Tex. Civ. App.), 145 S. W. 709; Wamsley v. Lindenberger, 2 Rand. (Va.) 478.
³² Seaton v. Cohill, 11 Colo. App. 211, 53 Pac. 170; Gooden v. Rayl, 85 Iowa 592, 52 N. W. 506; Resso v. Lehan, 96 Iowa 45, 64 N. W. 689; Arnous v. Lesassier, 10 La. 592, 29 Am. Dec. 470; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Hicks v. Beam, 112 N. Car. 642, 17 S. E. 490, 34 Am. St. 521; Withers v. Ewing, 40 Ohio St. 400; Webb v. Harris (Okla.), 121 Pac. 1082; Assignees of Hull v. Connolly, 3 McCord (S. Car.) 6, 15 Am. Dec. 612; Warwick v. Cooper, 5 Sneed (Tenn.) 659; Stringfellow v. Early, 15 Tex. Civ. App. 597, 40 S. W. 871; Farr v. Summer, 12 Vt. 28, 36 Am. Dec. 327; Plate v. Durst, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404; Johnson v. Scottish Union &

Nat. Ins. Co., 93 Wis. 223, 67 N. W. 416.

³³ Hooper v. Payne, 94 Ala. 223, 10 So. 431; Elder v. Woodruff Hardware & Co., 9 Ga. App. 484, 71 S. E. 806; La Grange Collegiate Inst. v. Anderson, 63 Ind. 367, 30 Am. Rep. 224; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Beeler v. Bullitt, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161; Thompson v. Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Hill v. Taylor, 125 Mo. 331, 28 S. W. 599; Mott v. Purcell, 98 Mo. 247, 11 S. W. 564; Bordentown v. Wallace, 50 N. J. L. 13, 11 Atl. 267; Grogan v. United States & Co. Ins. Co., 90 Hun (N. Y.) 521, 71 N. Y. St. 707, 36 N. Y. S. 687; Curtiss v. McDougal, 26 Ohio St. 66; Blankenship v. Kanawha & Co. R. Co., 43 W. Va. 135, 27 S. E. 355.

³⁴ In re Whittingham's Case, 8 Coke 42 B; Riley v. Dillon, 148 Ala. 283, 41 So. 768; Bozeman v. Browning, 31 Ark. 364; Harris v. Ross, 112 Ind. 314, 13 N. E. 873; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Curtiss v. McDougal, 26 Ohio St. 66.

³⁵ Beeler v. Bullitt, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161; Dominick v. Michael, 6 N. Y. Super. Ct. 374; Nelson v. Eaton, 1 Redf. Sur. (N. Y.) 498; Jackson v. Burchin, 14 Johns. (N. Y.) 124. See White v. Flora, 2 Over. (Tenn.) 426.

³⁶ Harris v. Cannon, 6 Ga. 382; Wimberly v. Jones, 1 Ga. Dec. 91; Price v. Jennings, 62 Ind. 111; Breck-

given by the infant, that being a right personal to the minor.³⁷ The same has been held true of a guardian appointed during infancy.³⁸

The rule that infancy is a privilege personal to the minor is subject to this exception, however, if the infant dies not having made any binding election, and he was not otherwise estopped to plead infancy, his heirs, devisees³⁹ or personal representatives, such as executor or administrator,⁴⁰ or beneficiary under a life insurance policy taken out by such minor,⁴¹ have the right to exercise the infant's option and either ratify or avoid his agreement. A further exception has been recognized where a guardian is appointed for the infant after he reaches his majority, the appointment being made because the former infant is under some disability other than that of infancy, the guardian then being given the right to avoid his ward's contract entered into during his infancy.⁴²

§ 336. Time and manner of disaffirmance—Personal contracts and contracts concerning personalty.—The time at

enridge's *Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Williams v. Norris*, 2 Litt. (Ky.) 157; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Den v. Stowe*, 2 Dev. & B. (N. Car.) 320; *McGill v. Woodward*, 3 Brev. (S. Car.) 401. The right of avoidance is not assignable. *Austin v. Charleston Female Seminary*, 8 Metc. (Mass.) 196, 41 Am. Dec. 497. See also, *Armitage v. Widoe*, 36 Mich. 124.

³⁷ *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773.

³⁸ *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134.

³⁹ *Bozeman v. Browning*, 31 Ark. 364; *Illinois Land & Co. v. Bonner*, 75 Ill. 315; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Hill v. Keyes*, 10 Allen (Mass.) 258; *Harris v. Ross*, 86 Mo. 89, 56 Am. Rep. 411; *Ihley v. Padgett*, 27 S. Car. 300, 3 S. E. 468; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458. See also, *Bethany Hospital Co. v. Phillippi*, 82

Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194.

⁴⁰ *Shropshire v. Burns*, 46 Ala. 108; *Vaughan v. Parr*, 20 Ark. 600; *Hill v. Keyes*, 10 Allen (Mass.) 258; *Hussey v. Jewett*, 9 Mass. 100; *Parsons v. Hill*, 8 Mo. 135; *Roberts v. Wiggins*, 1 N. H. 73, 8 Am. Dec. 38; *Tillinghast v. Holbrook*, 7 R. I. 230; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

⁴¹ *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. 643. In the above case the beneficiary was permitted to plead infancy in answer to the company's defense of false warranty in the infant's application for insurance.

⁴² *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117. In the above case the guardian was appointed because the ward was a spendthrift. The guardian was permitted to avoid a conveyance made by the ward while an infant. See also, *Ledger Bldg. Assn. v. Cook*, 12 Phila. (Pa.) 434, 34 Leg. Int. (Pa.) 5.

which the infant may exercise the right to disaffirm depends largely upon the subject-matter of the contract. He may disaffirm during minority personal contracts and contracts concerning personal property. He cannot finally and conclusively avoid a conveyance of real estate until he has reached full age. One's first impression of this subject would be that if an infant has not discretion to ratify a contract he would also be incapable of disaffirming the same, but the welfare of the infant is the law's first consideration. It gives the infant the right to disaffirm his contracts concerning personalty during minority because it recognizes that, by reason of the transitory nature of personal property, to withhold this right from an infant until he becomes of age would, in many cases, be to make it utterly valueless.⁴³

Accordingly, it is now well settled that an infant may avoid a sale or exchange of personal property before he reaches his majority.⁴⁴ In accordance with this rule it has been held that an infant's chattel mortgage may be disaffirmed by him during mi-

⁴³ *Towle v. Dresser*, 73 Maine 252. See also, *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Gage v. Menczer* (Tex. Civ. App.), 144 S. W. 717; *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327.

⁴⁴ *Shipman v. Horton*, 17 Conn. 481; *Riley v. Mallory*, 33 Conn. 201; *Carpenter v. Carpenter*, 45 Ind. 142; *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Childs v. Dobbins*, 55 Iowa 205, 7 N. W. 496; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Towle v. Dresser*, 73 Maine 252; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *McCarthy v. Henderson*, 138 Mass. 310; *Bradford v. French*, 110 Mass. 365; *Bloomingtondale v. Chittenden*, 74 Mich. 698, 42 N. W. 166; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Chapin v. Shafer*, 49 N. Y. 407; *Hoyt v. Wilkinson*, 57 Vt. 404; *Salter v. Krueger*, 65 Wis. 217, 26 N. W. 544. Some of the earlier cases on this subject apparently limited the above

rule to instances in which the property had been delivered. Thus in *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345, it is said: "If the subject of the sale be personal property, and a delivery to and possession by the vendee follows, and there are no legal means to regain the property till the minor arrives at full age, so as to decide whether he will ratify the contract or not, the property may all be wasted and gone, beyond recovery, and in many cases for a very inadequate consideration." See also, *Stafford v. Roof*, 9 Cow. (N. Y.) 626, in which it is said: "It then stands before us, at best, as the case of an infant contracting to sell; and the vendee taking possession in virtue of the contract, without its being followed up by any act of delivery. Such a taking would be tortious, and a conversion in itself." These cases seem to go on the mistaken assumption that the infant's contract is void until there has been a delivery; nor does it seem that the law would require the infant to make a delivery in order that he might be able to disaffirm. The distinction herein mentioned is no longer recognized.

nority.⁴⁵ The same is true of his purchase of personal property.⁴⁶ This includes subscriptions for shares of stock in a corporation.⁴⁷ Personal contracts of the infant may also be avoided during infancy. Thus it has been held that an infant may avoid a partnership agreement,⁴⁸ a power of attorney,⁴⁹ or a contract of service,⁵⁰ before reaching his majority.⁵¹

§ 337. Time of disaffirmance—Contracts concerning an interest in real estate.—As has already been pointed out a conveyance of real estate made during infancy cannot be avoided until after full age is reached.⁵² There are perhaps two reasons

⁴⁵ *Miller v. Smith*, 26 Minn. 248, 2 N. E. 942, 37 Am. Rep. 407; *Cogley v. Cushman*, 16 Minn. 397; *State v. Plaisted*, 43 N. H. 413; *Chapin v. Shafer*, 49 N. Y. 407. He cannot be held criminally responsible for selling chattels mortgaged by him, since such sale is simply a disaffirmance of the mortgage which it is his right to make. In this case the minor sold the crop after having mortgaged it. *Jones v. State*, 31 Tex. Crim. App. 177, 20 S. W. 578.

⁴⁶ *Riley v. Mallory*, 33 Conn. 201; *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Childs v. Dobbin*, 55 Iowa 205, 7 N. W. 496; *Leacox v. Griffith*, 76 Iowa 89, 40 N. W. 109; *Cogley v. Cushman*, 16 Minn. 397. In the two preceding cases it is held that this rule is not changed by a statute which provided "a minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirm them within a reasonable time after he attains his majority," the statute only fixing a time within which contracts must be disaffirmed.

⁴⁷ *Newry & Co. v. Coombe*, 3 Ex. 565; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216. See also, *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

⁴⁸ *Adams v. Beall* 67 Md. 53, 8 Atl. 664, 1 Am. St. 379. *Contra*, *Dunton v. Brown*, 31 Mich. 182.

⁴⁹ *Pickler v. State*, 18 Ind. 266. If the power of attorney is void it

would seem that it need not be disaffirmed.

⁵⁰ *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777.

⁵¹ See, however, *Lansing v. Michigan Cent. R. Co.*, 126 Mich. 663, 86 N. W. 147, 86 Am. St. 567, in which it is held that an infant cannot avoid his settlement of the claim for personal injuries during minority. This decision is based on the authority of *Dunton v. Brown*, 31 Mich. 182. *Armitage v. Widoe*, 36 Mich. 124; *Osborn v. Farr*, 42 Mich. 134, 3 N. W. 299.

⁵² *Zouch v. Parsons*, 3 Burr. 1794; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Hastings v. Dollarhide*, 24 Cal. 195; *Welch v. Bunce*, 83 Ind. 382; *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475; *Chapman v. Chapman*, 13 Ind. 396; *Irvine v. Irvine*, 5 Gill (Minn.) 44; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Baker v. Kennett*, 54 Mo. 82; *Shipley v. Bunn*, 125 So. 445; *Emmons v. Murry*, 16 N. H. 385; *Staford v. Roof*, 9 Cow. (N. Y.) 626; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Matthewson v. Johnson*, 1 Hoff. Ch. (N. Y.) 560; *Doe v. Leggett*, 8 Jones L. (N. Car.) 425; *Cummings v. Powell*, 8 Tex. 80; *Kilgore v. Jordan*, 17 Tex. 341. The rule has been thus stated: "Matters in fait (i. e., not of record) he shall avoid either within age or at full age," but matters of record only on reaching his majority. 2 Cokes Littleton 380b. See also, *Newry & Co. v. Coombe*, 3 Ex. 565; *North*

why an infant is denied the privilege of rescinding a conveyance of realty until after majority. They are, first, that real estate is permanent and may be recovered at any time;⁵³ second, that the infant, while he may not avoid the transfer, may, nevertheless, enter and take profits, thus protecting himself during the period of infancy.⁵⁴

The last reason given is not applicable universally, however. The Supreme Court of Missouri has held that "the distinction that, although he (the infant) cannot avoid his conveyance during his minority, he can yet enter upon the land, and enjoy the profits, does not obtain in this state."⁵⁵ It would seem, however, that an infant lessor could avoid his lease during infancy for two reasons: the first one being that, in some jurisdictions, a lease of realty for years is considered as personal property, and for that reason may be rescinded before majority;⁵⁶ the second reason is, that if the infant has a right to enter in and take profit during his minority this would, in effect, avoid the lease. It has also been held that an infant lessee may avoid his lease during minority.⁵⁷ If an infant mortgages his real estate he may avoid it during minority, at least to the extent of pleading infancy to an action to foreclose.⁵⁸

§ 338. Time of disaffirmance—Executory contracts.—It would seem on principle that all executory contracts, whether

Western R. Co. v. M'Michael, 5 Ex. 114. See, however, *International Land Co. v. Marshall*, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056, which says: "We are inclined to the doctrine, that where the deed is absolutely void, and there is no question of affirmance or disaffirmance, suit may be maintained during infancy to have it declared void," citing *Swafford v. Ferguson*, 3 Lea (Tenn.) 292, 31 Am. Rep. 639.

⁵³ *Scott v. Buchanan*, 11 Humph. (Tenn.) 468.

⁵⁴ *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Cummings v. Powell*, 8 Tex. 80. See also, *Matthewson v. Johnson*, 1 Hoff. Ch. (N. Y.) 560, from which it would seem that a court of chancery may

appoint a receiver to take charge of the property as equivalent to entry by the infant.

⁵⁵ *Shipley v. Bunn*, 125 Mo. 445, 28 S. W. 754.

⁵⁶ *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803. See also, *Field v. Herrick*, 101 Ill. 110.

⁵⁷ *Riley v. Mallory*, 33 Conn. 201; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618.

⁵⁸ *Gilchrist v. Ramsay*, 27 U. C. Q. D. 500; *Schneider v. Staihr*, 20 Mo. 269. See, however, *Robinson v. Bergholz*, 4 Ohio Dec. 103, in which it is held that where an infant buys real estate and executes a mortgage to secure the purchase-money the infancy of the mortgagor is no defense to a foreclosure proceeding.

they relate to real or personal property, may be avoided by the infant either before or after majority; for would not the minor be given the privilege of interposing a plea of infancy, regardless of his then age, in an action brought by the other party to enforce the agreement?⁵⁹ We have shown, however, the distinctions made by the courts and the reasons for them.

§ 339. Disaffirmance after majority.—While an infant may disaffirm his contract concerning personalty during minority his failure so to do does not defeat his right to rescind after majority; to hold otherwise would, in effect, enable the infant to ratify during minority, and this power would enable him to bind himself by contract. This he cannot do except in those instances already mentioned.⁶⁰

As has already been seen there is a variance among authorities as to the time within which disaffirmance must be made after majority is reached.⁶¹ The doctrine quite generally announced is that an infant must rescind within a reasonable time after majority.⁶² However, the doctrine as announced is in many in-

⁵⁹ See *Riley v. Mallory*, 33 Conn. 201; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216; *Childs v. Dobbins*, 55 Iowa 205, 7 N. W. 496; *Robinson v. Weeks*, 56 Maine 102; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. 379; *Johnson v. Northwestern &c. Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. 473; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Miller v. Smith*, 26 Minn. 248, 2 N. E. 942, 37 Am. Rep. 407; *Chapin v. Shafer*, 49 N. Y. 407; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Petrie v. Williams*, 68 Hun (N. Y.) 589, 52 N. Y. St. 587, 23 N. Y. S. 237. See, however, *Dunton v. Brown*, 31 Mich. 182; *Armitage v. Wideo*, 36 Mich. 124; *Stafford v. Roof*, 9 Cow. (N. Y.) 626.

⁶⁰ See ante, § 321 et seq., Ratification.

⁶¹ See ante, § 321 et seq., Ratification.

⁶² *Edwards v. Carter* (1893), A. C. 360; *Viditz v. O'Hagan* (1899), 2 Ch. 569, 68 L. J. Ch. (N. S.) 553; *McDonald v. Restigouche Salmon Club*, 33 N. B. 472; *Watson v. Bil-*

lings, 38 Ark. 278, 42 Am. Rep. 1; *Hastings v. Dollarhide*, 24 Cal. 195; *Kline v. Beebe*, 6 Conn. 494; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Tunison v. Chamblin*, 88 Ill. 378; *Buchanan v. Hubbard*, 96 Ind. 1; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Petty v. Roberts*, 7 Bush (Ky.) 410; *Boody v. McKenney*, 23 Maine 517; *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798; *Dolph v. Hand*, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. 25; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. 837; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801; *Simkins v. Searcy*, 10 Tex. Civ. App. 406, 32 S. W. 849; *Richardson v. Boright*, 9 Vt. 368; *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089. This rule has been declared especially applicable to contracts concerning personal property. See Page on Contracts 1378, citing *McKamy v.*

stances purely dicta, and not only this, but in others unreasonable delay was coupled with a continual use and possession of the property, or a refusal to deliver the same and an assertion of ownership. Again, in many of them property was purchased instead of being sold by the infant; and it is much more easy to ratify a contract of purchase by lapse of time because of other elements entering in, such as continued possession and the like, than it is to ratify a conveyance of real estate.⁶³

In some states it is provided by a statute that a minor must rescind within a reasonable time after reaching his majority, but notwithstanding these statutes and the cases that announce a similar doctrine it is believed that where a conveyance is made by an infant mere acquiescence, unaccompanied with any other element for a period of time shorter than prescribed by statutes of limitation, does not defeat the right to disaffirm.⁶⁴

§ 340. Disaffirmance—Delay greater than that permitted by statute of limitations.—There are, however, circum-

Cooper, 81 Ga. 679, 8 S. E. 312; Deason v. Boyd, 1 Dana (Ky.) 45; Robinson v. Hoskins, 14 Bush (Ky.) 393; Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617. But it is believed that these cases furnish very little authority for the statement.

⁶³ See, generally, on this subject, Shropshire v. Burns, 46 Ala. 108; Thomasson v. Boyd, 13 Ala. 419; McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312; Robinson v. Hoskins, 14 Bush (Ky.) 393; Deason v. Boyd, 1 Dana (Ky.) 45; Lawson v. Lovejoy, 8 Greenl. (Maine) 405, 23 Am. Dec. 526; Williams v. Brown, 34 Maine 594; Boody v. McKenny, 23 Maine 517; Hubbard v. Cummings, 1 Greenl. (Maine) 11; Boyden v. Boyden, 9 Metc. (Mass.) 519; Minock v. Shortridge, 21 Mich. 304; Robbins v. Eaton, 10 N. H. 561; Aldrich v. Grimes, 10 N. H. 194; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; Alexander v. Heriot, Bail. Eq. (S. Car.) 223; Cheshire v. Barrett, 4 McCord (S. Car.) 241, 17 Am. Dec. 735; Eubanks v. Peak, 2 Bailey (S. Car.) 407. Thus if a minor purchases and takes a conveyance of real estate and enters

into possession [Cecil v. Comes Salisbury, 2 Vern. 225; Boody v. McKenny, 23 Maine 517; Ellis v. Alford, 64 Miss. 8, 1 So. 155; Baker v. Kennett, 54 Mo. 82; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Henry v. Root, 33 N. Y. 526; Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654; Hook v. Donaldson, 9 Lea (Tenn.) 56; Callis v. Day, 38 Wis. 643. And see Evelyn v. Chichester, 3 Burr. 1717; Middleton v. Hoge, 5 Bush (Ky.) 478; Armfield v. Tate, 29 N. Car. 258], or settles a boundary dispute [Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660; George v. Thomas, 16 Tex. 74, 67 Am. Dec. 612], or takes a lease [McClure v. McClure, 74 Ind. 108; Boody v. McKenny, 23 Maine 517; Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429], he must rescind within a reasonable time after majority, since he still continues to enjoy the benefits of the contract. But as has already been pointed out the circumstances may be such that continued possession does not show a ratification. See, ante, § 321 et seq., Ratification.

⁶⁴ See, ante, § 321, et seq., Ratification.

stances which will excuse a delay even greater than that permitted by the statute of limitation. Thus, wherever coverture is a disability at the time the cause of action accrues, so that the feme covert is not required to sue, although she may be permitted so to do, the statute of limitations will not run against her and she will not be precluded from disaffirming a deed made during infancy by her mere omission so to do for any length of time after she attains majority and while coverture continues. Thus it has been held that a delay of thirty-seven years,⁶⁵ thirty-two years,⁶⁶ twenty-three years,⁶⁷ or twenty-eight,⁶⁸ if due to coverture, would not defeat her right to disaffirm. It follows that she is not barred of her right to disaffirm by lapse of time during coverture if the husband, who united in the deed, acquired by virtue of the marriage, such an interest in the land conveyed as would not be defeated by the wife's disaffirmance, since in such case the rescission would be a vain act.⁶⁹ However, if a woman not yet of age conveys her property and becomes of age before her marriage her subsequent marriage will not protect her. After the statute of limitation has commenced to run, subsequent disabilities will not ordinarily obstruct its course. One disability cannot be tacked to another to defeat the statute.⁷⁰

A marriage settlement of realty, so far as the woman is concerned, is governed by the same rules controlling conveyances of real estate. Consequently, when an infant feme, upon the eve

⁶⁵ *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263n.

⁶⁶ *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709.

⁶⁷ *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

⁶⁸ *McMorris v. Webb*, 17 S. Car. 558, 43 Am. Rep. 629.

⁶⁹ See *Stull v. Harris*, 51 Ark. 294, 2 L. R. A. 741; *Miles v. Lingerman*, 24 Ind. 385; *Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263n; *Youse v. Norcoms*, 12 Mo. 549, 51 Am. Dec. 175; *Temple v. Hawley*, 1 Sand. Ch. (N. Y.) 153; *McIlvaine v. Kadel*, 30 How. Pr. (N. Y.) 193, 26 N. Y. Sup. Ct. 429; *Epps v. Flowers*, 101 N. Car. 158, 7 S. E. 680; *Scott v. Buchanan*, 11 Humph.

(Tenn.) 468; *Matherson v. Davis*, 2 Cold. (Tenn.) 443; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857. And see *Vaughan v. Parr*, 20 Ark. 600 (sale of an interest in remainder in a slave); *Magee v. Welsh*, 18 Cal. 155 (execution of a note and mortgage). See, however, *Louisiana &c. Lumber Co. v. Lovell* (Tex. Civ. App.), 147 S. W. 366.

⁷⁰ *Priddy v. Boice*, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718n, 119 Am. St. 762. See, however, *Tilton v. Tilton*, 130 Ky. 281, 113 S. W. 134, 132 Am. St. Rep. 359.

of her marriage, unites with her husband in settling her real estate upon herself and the contemplated issue of such marriage the act is voidable and can be disaffirmed by her when the disability of infancy and coverture has been removed, when she has in the meantime done no act to ratify or affirm such settlement.⁷¹

§ 341. Disaffirmance—How indicated.—It is unnecessary for an infant to disaffirm his agreement in a definite and prescribed manner. It may be done by any act clearly demonstrating a renunciation of the contract.⁷² The specific acts that have been held to amount to a disaffirmance will be mentioned in a succeeding section.

§ 342. What amounts to disaffirmance.—While there is no particular manner by which the disaffirmance may be made yet it is obvious that there can be no disaffirmance of a contract unless there is an intention to disaffirm on the part of the infant and this intention must be indicated by some positive act inconsistent with the validity of the contract.⁷³

⁷¹ *Smith v. Smith*, 107 Va. 112, 57 S. E. 577, 12 L. R. A. (N. S.) 1184, 122 Am. St. 831. See also, *Lancaster v. Lancaster*, 13 Lea (Tenn.) 126, in which it is said that a wife may in equity affirm or disaffirm an antenuptial settlement of land or personal property, or of both, voidable by reason of her infancy. *Tilton v. Tilton*, 130 Ky. 281, 113 S. W. 134, 132 Am. St. 359, holding that a woman may disaffirm an unconscionable antenuptial agreement after the death of her husband. In the above case it appears that the marriage settlement was drawn up two months before the marriage. The parties lived together for thirty years after marriage. The court held that her failure to disaffirm during the two months intervening between the signing of the contract and the consummation of the marriage did not amount to a confirmation of the agreement, since the same influence which induced her to sign it operated to lull her into silence and acquiescence not only during the two succeeding months, but during the thirty-two years which followed. *Levering v.*

Heighe, 3 Md. Ch. 365; *Temple v. Hawley*, 1 Sand. Ch. (N. Y.) 153; *Shaw v. Boyd*, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368. See, however, *Wetmore v. Kissam*, 3 Bosw. (N. Y.) 321. Failure to disaffirm a conveyance after reaching majority may be excused on account of the grantor being under duress after reaching majority. *Salser v. Barron* (Tex. Civ. App.), 146 S. W. 1039.

⁷² *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475 (conveyance of real estate); *Cogley v. Cushman*, 16 Minn. 397; *Heath v. West*, 6 Foster (N. H.) 191; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38 (conveyance of real estate); *State v. Plaisted*, 43 N. H. 413; *Skinner v. Maxwell*, 66 N. Car. 45; *Groesbeck v. Bell*, 1 Utah 338. In case a conveyance of real estate is disaffirmed the act of disaffirmance need not be as solemn as the original deed. *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475; *Allen v. Poole*, 54 Miss. 323.

⁷³ *Illinois Land & Loan Co. v. Beem*, 2 Ill. App. 390; *Dixon v. Merritt*, 21 Minn. 196; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Hatton v.*

§ 343. **Cannot disaffirm in part and ratify in part.**—There is one limitation placed on an infant's right to disaffirm that should be noticed at this point. It is to the effect that he cannot ratify a portion of a single transaction and disaffirm as to the rest. He either disaffirms or ratifies in toto. The entire transaction is considered as a unit.⁷⁴ Thus an infant cannot claim the benefits resulting from a conditional contract and not be bound by the conditions.⁷⁵ Nor is he permitted to retain property whether real,⁷⁶ or personal⁷⁷ purchased by him and avoid a purchase-money mortgage or a vendor's lien given to secure payment therefor⁷⁸ or avoid payment on the ground of infancy⁷⁹ and this is true even though the money with which to purchase the property was advanced by a third person to whom the mortgage was given.⁸⁰

The purchase of the property and the mortgage given to se-

Bodan Lumber Co., 57 Tex. Civ. App. 478, 123 S. W. 163. See also, Dominick v. Michael, 6 N. Y. Super. Ct. 374; Voorhies v. Voorhies, 24 Barb. (N. Y.) 150; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209. A disaffirmance "necessarily implies the action of a free mind exempt from all constraint or disability." Sims v. Everhardt, 102 U. S. 300, 26 L. ed. 87.

⁷⁴ Peers v. McLaughlin, 88 Cal. 294, 26 Pac. 119, 22 Am. St. 306; Howard v. Cassels, 105 Ga. 412, 31 S. E. 562, 70 Am. St. 44; Biederman v. O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; Carpenter v. Carpenter, 45 Ind. 142; Robinson v. Berry, 93 Maine 320, 45 Atl. 34; White v. Mount Pleasant & Co. Corp., 172 Mass. 462, 52 N. E. 632; Strong v. Ehle, 86 Mich. 42, 48 N. W. 868; Henry v. Root, 33 N. Y. 526; Overbach v. Heermance, 1 Hopk. Ch. (N. Y.) 337, 14 Am. Dec. 546; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Kincaid v. Kincaid, 85 Hun (N. Y.) 141, 65 N. Y. St. 661, 32 N. Y. S. 476; Curtiss v. McDougal, 26 Ohio St. 66; Tennessee & Co. v. James, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211n, 30 Am. St. 865. This statement must not be taken too literally. It merely means that where the benefits and obligations of

a contract are indivisible, the infant cannot continue to enjoy the benefits and avoid the obligations. On the other hand if he is under no obligation to return or relinquish what was received under the contract he may ratify as to part and avoid as to part. Thus he may ratify part of a debt contracted during infancy and repudiate the rest. Peacock v. Binder, 57 N. J. L. 374, 31 Atl. 215.

⁷⁵ Biederman v. O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; Lowry v. Drake, 1 Dana (Ky.) 46. He cannot purchase goods on a conditional sale and after the condition is broken plead infancy as a defense. Robinson v. Berry, 93 Maine 320, 45 Atl. 34.

⁷⁶ Strong v. Ehle, 86 Mich. 42, 48 N. W. 868; Uecker v. Koehn, 21 Nebr. 559, 32 N. W. 583, 59 Am. Rep. 849; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589.

⁷⁷ Heath v. West, 28 N. H. 101; Curtiss v. McDougal, 26 Ohio St. 66; Knaggs v. Green, 48 Wis. 601, 4 N. W. 760, 33 Am. Rep. 838.

⁷⁸ Smith v. Henkel, 81 Va. 524.

⁷⁹ Thomason v. Phillips, 73 Ga. 140.
⁸⁰ Thurston v. Nottingham & Co. Bldg. Society (1902), 1 Ch. 1; Ready v. Pinkham, 181 Mass. 351, 63 N. E. 887.

cure payment constitute one transaction and the mortgage cannot be avoided without also avoiding the conveyance or transfer, nor can one be ratified and the other disaffirmed.⁸¹ Nor can he retain the property after he reaches his majority and repudiate his note given for the purchase-price or other agreements entered into by him in consideration of the property being surrendered to him.⁸² Likewise he cannot disaffirm his conveyance and at the same time sue for the unpaid purchase-price.⁸³

The foregoing must not be confused with the principle that if an infant enters into distinct and separate contracts he may disaffirm one or more of them and not the others. Thus he may disaffirm one of several deeds made by him.⁸⁴

§ 344. What amounts to disaffirmance—Illustrations.—Subject to the foregoing limitations the following methods by which disaffirmance may be made known will be mentioned. If an infant sells personal property previously mortgaged by him it amounts to a disaffirmance of such chattel mortgage.⁸⁵ The agreement may also be disaffirmed by pleading infancy to an action brought to enforce the contract provided it has not been ratified or the minor is not otherwise estopped to enter such plea.⁸⁶ He may disaffirm his contract for the performance of work and labor by leaving his employment and bringing an ac-

⁸¹ *Dana v. Coombs*, 6 Maine 89, 19 Am. Dec. 194; *Hubbard v. Cummings*, 1 Maine 11; *Young v. McKee*, 13 Mich. 552; *Betts v. Carroll*, 6 Mo. App. 518; *Uecker v. Koehn*, 21 Nebr. 559, 32 N. W. 583, 59 Am. Rep. 852; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Heath v. West*, 28 N. H. 101; *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; *Ottman v. Moak*, 3 Sand. Ch. (N. Y.) 431; *Curtiss v. McDougal*, 26 Ohio St. 66; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Richardson v. Boright*, 9 Vt. 368; *Callis v. Day*, 38 Wis. 643.
⁸² *Bennett v. McLaughlin*, 13 Ill. App. 349, *Benj. Cas. on Contracts* 326; *Philpot v. Sandwich Mfg. Co.*, 18 Nebr. 54, 24 N. W. 428; *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Henry v. Root*, 53 N. Y. 526; *Armfield v. Tate*, 29 N. Car. 258; *Weed v. Beebe*, 21 Vt. 495.

⁸³ *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

⁸⁴ *Tunison v. Chamblin*, 88 Ill. 378.

⁸⁵ *State v. Plaisted*, 43 N. H. 413; *Chapin v. Shafer*, 49 N. Y. 407; *State v. Howard*, 88 N. Car. 650.

⁸⁶ *Sparr v. Florida Southern R. Co.*, 25 Fla. 185; *Strain v. Wright*, 7 Ga. 568; *Shrock v. Crowl*, 83 Ind. 243; *Freeman v. Nichols*, 138 Mass. 313. It is obvious, however, that this plea can only be entered where the agreement is executory on the part of the infant or where the question is presented in such form as to afford opportunity to plead infancy. See *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285. The plea of infancy has been said to be merely an initiatory step and does not ipso facto avoid the agree-

tion for the quantum meruit of his services.⁸⁷ Likewise he disaffirms his release of a claim for a personal injury by bringing suit upon the original claim.⁸⁸ A suit to avoid the contract operates as a disaffirmance.⁸⁹ An offer to restore the property and a demand for the consideration paid therefor amounts to a rescission.⁹⁰ The same is true of a suit to recover the consideration paid therefor.⁹¹

§ 345. Disaffirmance of contract concerning an interest in real estate.—Peculiar feudal principles rendered necessary the rule that an infant's feoffment with livery of seisen could be avoided only by an act of equal notoriety or solemnity.⁹² Consequently it was held by a few early cases that an infant's deed of conveyance could only be disaffirmed by an entry or by some act of equal notoriety or solemnity with the original conveyance.⁹³ While there is no question that such act is a sufficient disaffirmance,⁹⁴ the ancient rule which declared it the necessary and only way no longer obtains. It is now held that the disaffirming act need take no particular form or expression. The deed of a minor may be avoided by acts and declarations disclosing an unequivocal intent to repudiate the binding force and effect of it as a valid instrument.⁹⁵

There are certain well-recognized methods by which this unequivocal intent may be given expression. A minor's deed of

ment for it may be sufficiently answered by the reply or defeated by the trial or be withdrawn by the pleader. *Best v. Givens & Wood*, 3 B. Mon. (Ky.) 72.

⁸⁷ *Harney v. Owens*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; *Moses v. Stevens*, 2 Pick. (Mass.) 332.

⁸⁸ *St. Louis &c. R. Co. v. Higgins*, 44 Ark. 293.

⁸⁹ *Gage v. Menczer* (Tex. Civ. App.), 144 S. W. 717.

⁹⁰ *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775.

⁹¹ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775. In the above case suit was brought by the infant's father to recover the money paid, with the infant's consent. On the witness

stand the infant testified that he was then willing to stand by the contract. The court held that this did not show that he had not avoided the contract or that there was not a good cause of action.

⁹² *Drake's Lessee v. Ramsay*, 5 Ohio 251.

⁹³ *Vallandigham v. Johnson*, 85 Ky. 288; *Jackson v. Burchim*, 14 Johns. (N. Y.) 124; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Domnick v. Michael*, 6 N. Y. Super. Ct. 374; *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150.

⁹⁴ *Vallandigham v. Johnson*, 85 Ky. 288; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209. See also, *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

⁹⁵ *McCarthy v. Nicrosi*, 72 Ala. 332,

conveyance may be disaffirmed, after he has reached his majority, by bringing suit to recover possession of the premises conveyed,⁹⁶ or by a suit for the cancellation of the deed,⁹⁷ or by an absolute sale and conveyance of the same land to a third person⁹⁸ who is not in privity of relation with the first grantee.⁹⁹ The execution of a quit-claim deed after majority to one not in privity of relationship with the person to whom the same property was granted by warranty deed during minority, may operate as a

47 Am. Rep. 418; *Bagley v. Fletcher*, 44 Ark. 153; *Long v. Williams*, 74 Ind. 115; *Cogley v. Cushman*, 16 Minn. 397; *Allen v. Poole*, 54 Miss. 323; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *State v. Plaisted*, 43 N. H. 413; *Chapin v. Shafer*, 49 N. Y. 407; *Drake's Lessee v. Ramsay*, 5 Ohio 251; *White v. Flora*, 2 Over. (Tenn.) 426. See also, *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475; *Roberts v. Wiggins*, 1 N. H. 73, 8 Am. Dec. 38.

⁹⁶ *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Cole v. Pennoyer*, 14 Ill. 158; *Dunn v. Wheeler*, 86 Maine 238, 29 Atl. 985; *Walsh v. Young*, 110 Mass. 396; *Craig v. Van Bebbler*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Drake's Lessee v. Ramsay*, 5 Ohio 251; *Hughes v. Watson*, 10 Ohio 127; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

⁹⁷ *Slator v. Rudderforth*, 25 App. D. C. 497; *Schaffer v. Lavretta*, 57 Ala. 14; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Tunison v. Chamblin*, 88 Ill. 378; *Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177n, 42 Am. St. 665; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Bedinger v. Wharton*, 27 Grat. (Va.) 857.

⁹⁸ *Beauchamp v. Bertig*, 90 Ark. 351, 19 S. W. 75, 23 L. R. A. (N. S.) 659; *Bagley v. Fletcher*, 44 Ark. 153; *Black v. Hills*, 36 Ill. 376, 87 Am. Dec. 224; *Losey v. Bond*, 94 Ind. 67; *Pitcher v. Laycock*, 7 Ind. 398; *Riggs v. Fisk*, 64 Ind. 100; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 9 L. ed. 345; *Combs v. Hall*, 22 Ky. L. 1418, 60 S. W. 647. In the above case the infant had given a title bond for land, while yet a minor. On reaching his

majority he conveyed the land to another. *Moore v. Baker*, 92 Ky. 518, 13 Ky. Law 724, 18 S. W. 363; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. 385; *Craig v. Van Bebbler*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Cresinger v. Welch's Lessee*, 15 Ohio 156, 45 Am. Dec. 565; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. 837; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209.

⁹⁹ *Beauchamp v. Bertig*, 90 Ark. 351, 19 S. W. 75, 23 L. R. A. (N. S.) 659; *Bagley v. Fletcher*, 44 Ark. 153; *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635. Whether a deed executed after majority constitutes a disaffirmance of a prior deed executed by the grantor during infancy is a question of law for the court. *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441. In the absence of any other element entering in the following test is usually applied: Is the instrument executed after majority so inconsistent with the one executed during minority that the former of necessity destroys the force and effect of the latter, if so it amounts to a disaffirmance of such latter instrument; on the other hand if it is possible for the two to stand together and both be given effect the conveyance executed after majority does not of necessity amount to a disaffirmance. See the following cases bearing on the subject. *Scott v. Brown*, 106 Ala. 604, 17 So. 731; *Hastings v. Dollard*, 24 Cal. 195; *Losey v. Bond*, 94 Ind. 67; *Long v. Williams*, 74 Ind. 115; *Estep*

disaffirmance of the latter conveyance.¹ Re-entry upon the land,² or notice of disaffirmance,³ especially if coupled with re-entry,⁴ may amount to a rescission.

§ 346. **Restoration of consideration.**—This branch of the subject is an excellent illustration of the principle that hard cases make bad law. Courts have tried to make laws that would operate fairly between infants who disaffirm and the adversary party to the contract,—an impossible task if the infant's right to dis-

v. Estep, 24 Ky. L. 2198, 73 S. W. 777; Moore v. Baker, 92 Ky. 518, 13 Ky. Law. 724, 18 S. W. 363; Vallandingham v. Johnson, 85 Ky. 288, 3 S. W. 173; Corbett v. Spencer, 63 Mich. 731, 30 N. W. 385; Haynes v. Bennett, 53 Mich. 15, 18 N. W. 539; Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Roberts v. Wiggins, 1 N. H. 73, 8 Am. Dec. 38; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565; Tucker v. Moreland, 10 Pet. (U. S.) 58, 9 L. ed. 345. Thus the execution of a mortgage after arriving at full age on land conveyed during infancy amounts to a disaffirmance of such conveyance since it shows that he considers himself the owner, but it is otherwise if he joins with the grantee in executing the mortgage to secure a debt of the grantee. Watkins v. Wassell, 15 Ark. 73. It has also been held that the execution of a warranty deed after majority is reached of land mortgaged during infancy is a disaffirmance of the mortgage. Dixon v. Merritt, 21 Minn. 196; Allen v. Poole, 54 Miss. 323. See also, Scott v. Brown, 106 Ala. 604, 17 So. 731, in which case the minor gave a mortgage on certain real property; after majority she gave notice by her attorney on the day of the foreclosure sale that her interest could not be sold. Prior to that time she had executed a deed with conveyance of general warranty to her brother. These acts were held to be a disaffirmance. On the execution of the warranty deed the court said that it was an act utterly inconsistent with

the affirmance of the mortgage. These cases seem to be erroneous on principle, since the mortgage and deed are not consistent with each other. Both may stand and neither destroy the effect of the other. Singer Mfg. Co. v. Lamb, 81 Mo. 221; Palmer v. Miller, 25 Barb. (N. Y.) 399. But if the deed recites that the conveyance is subject to the mortgage the mortgage is thereby confirmed. Losey v. Bond, 94 Ind. 67; President & Co. of Boston Bank v. Chamberlin, 15 Mass. 220.

¹ Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; Bagley v. Fletcher, 44 Ark. 153. A quitclaim deed not coextensive with the previous deed does not amount to a disaffirmance. Leitensdorfer v. Hempstead, 18 Mo. 269; Eagle Fire Co. v. Lent, 6 Paige (N. Y.) 635; Stuart v. Baker, 17 Tex. 417.

² Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475; Long v. Williams, 74 Ind. 115; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; White v. Flora, 2 Over. (Tenn.) 426; Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155; Dominick v. Michael, 6 N. Y. Super. Ct. 374. The two cases last cited lay down the rule that re-entry is a requisite of a valid disaffirmance, a principle now obsolete.

³ McCarty v. Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136; McCarthy v. Nicrosi, 72 Ala. 322, 47 Am. Rep. 418; Long v. Williams, 74 Ind. 115; Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475; Roberts v. Wiggins, 1 N. H. 73, 8 Am. Dec. 38.

⁴ Green v. Green, 69 N. Y. 553, 25 Am. Rep. 232.

affirm is to afford him any protection. As a result, much confusion exists among the cases on this branch of the subject making it difficult to form any rule of general application. It may be stated generally, however, subject to many important exceptions, that the infant is not required to place the other party in statu quo in order to make his disaffirmance effectual.⁵

If during his minority the infant has lost, wasted or squandered the property or other consideration received or any part thereof under the contract before reaching his majority he may nevertheless repudiate the contract, nor is he obliged to make restitution in order to give effect to his disaffirmance.⁶ The

⁵ *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417, 12 L. R. A. 136; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. New Bedford Cotton-Waste Corp.*, 178 Mass. 20; *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Cresinger v. Welch's Lessee*, 15 Ohio 156, 45 Am. Dec. 565; *McGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. ed. 326.

⁶ *American Mfg. Co. v. Dykes*, 111 Ala. 187, 18 So. 292, 56 Am. St. 38; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Bell v. Burkhalter*, (Ala.) 57 So. 460; *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533; *St. Louis & C. R. Co. v. Higgins*, 44 Ark. 293; *Barker v. Fuestal* (Ark.), 147 S. W. 45; *Gonackey v. General Accident & Corp.*, 6 Ga. App. 381, 65 S. E. 356; *Reynolds v. McCurry*, 100 Ill. 356; *Featherstone v. Betlejewski*, 75 Ill. App. 59; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216; *United States & C. Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; *Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803; *White v. Branch*, 51 Ind. 210; *Leacox v. Griffith*, 76 Iowa 89, 40 N. W. 109; *White v. Cotton-Waste Corporation*, 178 Mass. 20, 59 N. E. 642; *Walsh v. Young*, 110 Mass. 396; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Corey v. Burton*, 32 Mich. 30; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Harvey v.*

Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; *Brantley v. Wolf*, 60 Miss. 420; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. 464; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177n, 42 Am. St. 665; *Bloomer v. Nolan*, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. 690; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Kane v. Kane*, 13 App. Div. (N. Y.) 544, 43 N. Y. S. 662; *Petrie v. Williams*, 68 Hun (N. Y.) 589, 52 N. Y. St. 587, 23 N. Y. S. 237; *Kincaid v. Kincaid*, 85 Hun (N. Y.) 141, 65 N. Y. St. 661, 32 N. Y. S. 476; *Youmans v. Forsythe*, 86 Hun (N. Y.) 370; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *Ruchisky v. DeHaven*, 97 Pa. 202; *Lane v. Dayton & C. Co.*, 101 Tenn. 581, 48 S. W. 1094; *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. 849; *McGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. ed. 326; *Wiser v. Lockwood*, 42 Vt. 720; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Thormachlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089. The above rule is of course applicable to those cases in which an infant disaffirms during his minority a contract concerning personal property, the consideration received having been squandered before disaffirmance. Consequently if the property has depreciated in value (*Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678) either

above being true it naturally follows that if the infant has never in fact received any consideration, either because never paid over by the other party, or because paid to some third person such as the infant's husband,⁷ father,⁸ or agent,⁹ such infant is not bound to restore or offer to restore the consideration.¹⁰

§ 347. Restoration of consideration—Cannot use privilege as a sword instead of a shield.—However, the infant is not permitted to use his privilege as a sword instead of a shield. Consequently he is bound to return the consideration or so much thereof as remains in his possession at the time of disaffirmance, if made before majority, or if disaffirmance is made after majority, so much thereof as remained in his possession at the time he became of full age.¹¹

Some early cases laid down the rule that in actions at law brought by infants to recover money or property based on their right to avoid their contracts there must be a restoration or offer to restore the consideration received. These cases have in the

on account of misuse (*White v. Branch*, 51 Ind. 210) or consumption (*Nichol v. Steger*, 6 Lea (Tenn.) 393) by the infant he need not account for the loss or depreciation. See also, *Beickler v. Guenther*, 121 Iowa 419, 96 N. W. 895, in which case the plaintiff bought a team of horses that he sold before reaching his majority. At majority he disaffirmed the purchase. The court said: "He is only required by the statute to restore the money or property received by virtue of the contract 'remaining within his control at any time after attaining his majority.' As stated he ceased to be the owner of the team before coming of age, and thereafter was not in control of anything received from defendant. There was nothing in his keeping to restore."

⁷ *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533; *Stull v. Harris*, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

⁸ *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Griffis v. Younger*, 41 N. Car. 520, 51 Am. Dec. 438; *Salser v. Brown* (Tex. Civ. App.), 146 S. W. 1039.

⁹ *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. 451.

¹⁰ See also, *Shroyer v. Pettenger*, 31 Ind. App. 158, 67 N. E. 475; *Law v. Long*, 41 Ind. 586; *Robinson v. Weeks*, 56 Maine 102; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857.

¹¹ *Bell v. Burkhalter* (Ala.), 57 So. 460; *American & Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. 38; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, 132 Am. St. 216; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Sanger v. Hibbard*, 2 Ind. Ter. 547, 53 S. W. 330; *Jenkins v. Jenkins*, 12 Iowa 195; *Burgett v. Barrick*, 25 Kans. 526; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; *Dube v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am. St. 228; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Brantley v. Wolf*,

main been overruled or limited by subsequent decisions.¹² If the rule announced by these early cases should be adhered to, it would, in effect, result in the nullification of the infant's right

60 Miss. 420; *Harvey v. Briggs*, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569; *Betts v. Carroll*, 6 Mo. App. 518; *Bloomer v. Nolan*, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. 690; *Hamblett v. Hamblett*, 6 N. H. 333; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *McGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. ed. 326; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 9 L. ed. 345; *Lane v. Dayton & Coal Co.*, 101 Tenn. 581, 48 S. W. 1094; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. 849; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857; *Young v. Ry. Co.*, 42 W. Va. 112, 24 S. E. 615; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445. The consideration received must, however, be disposed of prior to majority otherwise he might be held to have ratified the agreement by disposing of it after he reaches majority. For a good résumé of the law on this subject see, *White v. Sikes*, 129 Ga. 508, 59 S. E. 228, 121 Am. St. 228, in which it is said: "But it is said that the law declares that if an infant receives property, or other valuable consideration, and after arrival at age retains possession of such property or enjoys the proceeds of such valuable consideration, this is such a ratification of the contract as will bind him; Civ. Code, § 3648. If an infant makes a contract, either executory or executed, and receives the consideration in whole or in part during his minority and disposes of the same before his majority, either by losing, expending or squandering it, this is nothing more than the law anticipates of him, and he will not be required to make any tender of the amount so disposed of before repudiating the contract which he made during infancy. *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E.

788. But if, upon arrival at majority, he has in his possession either the exact consideration that he received during infancy or any substantial part of the same, or property which is purchased with such consideration—that is, if he has then anything of a substantial nature into which can be traced the proceeds of the contract made during his infancy—then neither law, equity nor good conscience will permit him to repudiate his contract and retain that which is the fruits of the contract. But it must appear that the infant, after attaining majority, retains possession and control of something which is tangible, which has become his property as a result of his having used the consideration paid to him under the contract made while he was an infant. If he expends the amount in the purchase of food and the food is consumed, the principle alluded to would have no application; and so, if he used the land in the purchase of an education, which is a thing of value in a sense, but is intangible, the principle would have no application."

¹²*Bozeman v. Browning*, 31 Ark. 364, overruled by *St. Louis & C. R. Co. v. Higgins*, 44 Ark. 293; *Bartlett v. Cowles*, 15 Gray (Mass.) 445. Compare, however, with *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428. Compare, however, with *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228; *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327. Compare with these cases, however, *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678. See also, *Craig v. VanBebber*, 100 Mo. 584, 15 S. W. 906, 18 Am. St. 569, limiting various Missouri cases; *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. 849, limiting a number of Texas cases in this respect.

to disaffirm, except as to executory contracts, and thus permit to be done by indirection that which can be done directly.¹³

§ 348. Restoration of consideration—Contract fair and reasonable.—There is a line of cases, however, which hold that if the personal contract of an infant is fair and reasonable and free from any fraud or undue influence by the other party and has been wholly or partly executed on both sides so that the infant has enjoyed the benefits of it but has parted with what he has received, or the benefits received are of such a nature that he cannot restore them, he cannot recover that which he has paid unless he places the other party substantially in statu quo.¹⁴

The effect of the foregoing rule is to place the fair and reasonable contracts of an infant, so far as executed, upon much the same footing as his contracts for necessities. It is perhaps a survival in a modified form of the ancient doctrine to the effect that an infant's beneficial contracts are binding. The burden is on the other party to show that the contract was fair to the infant and reasonable and free from any fraud or imposition.¹⁵

§ 349. Restoration of consideration as a condition precedent.—In case the infant is bound to return the considera-

¹³ See *Corey v. Burton*, 32 Mich. 30; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233. In *Parsons on Contracts*, vol. 1, page 322, it is said: "If an infant advances money on a voidable contract which he afterwards rescinds he cannot recover his money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." The case of *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128n, declares the above statement to be at variance with authority and the doctrine now accepted and also criticizes an Illinois case which cites it with approval and cites as contrary thereto: *Robinson v. Weeks*, 56 Maine 102; *Ruchizky v. De Haven*, 97 Pa. 202; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640.

¹⁴ *Valentini v. Canali*, L. R. 24 Q. B. D. 166; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. 379; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. 473; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Heath v. Stevens*, 48 N. H. 251; *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. 703; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. 837. See also, *Smith v. Cole*, 148 Ky. 138, 146 S. W. 30.

¹⁵ *Johnson v. Northwestern & Co. Ins. Co.*, 56 Minn. 365, 59 N. W. 992, 57 N. W. 934, 26 L. R. A. 187, 45 Am. St. 473; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417.

tion received by him there is a conflict of authority as to whether a tender of such consideration is a condition precedent to a valid rescission. Some authorities hold that it is;¹⁶ others hold that the infant may rescind without making a tender or offering to restore the consideration received, but that the rescission revests the title thereto in the other party who may thereupon recover the property,¹⁷ or its value, should the infant, subsequent to such disaffirmance, convert the consideration to his own use.¹⁸

It will be found upon a review of the preceding cases that the tendency is not to require a tender when the action is at law, but if the action is in equity there is a disposition to require a tender or offer by the infant as a condition precedent to a valid rescission, on the ground that he who seeks equity must do equity.¹⁹ By other cases the following test is applied: if the contract is executory on the part of the infant no tender prior to rescission is necessary, on the other hand if executed on the part of both parties a tender is required.²⁰ But this rule has been declared

¹⁶ *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Riley v. Mallory*, 33 Conn. 201; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 582, 26 L. R. A. 177n, 42 Am. St. 665; *International Land Co. v. Marshall*, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056; *Smith v. Evans*, 5 Humph. (Tenn.) 70. This same rule applies with greater force to an adult, especially if he seeks to take property by legal process from an infant. In this case a piano had been sold conditionally to an infant. Action by vendor to replevin the same. *Ross P. Curtis Co. v. Kent* (Nebr.), 131 N. W. 944.

¹⁷ *Carpenter v. Carpenter*, 45 Ind. 142; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *Shirk v. Shultz*, 113 Ind. 571; *Robinson v. Berry*, 93 Maine 320, 45 Atl. 34; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755; *McCarthy v. Henderson*, 138 Mass. 310; *Fitts v. Hall*, 9 N. H. 441; *Mustard v.*

Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209. See also, *Strain v. Wright*, 7 Ga. 568. See, however, post, § 352, Effect and Result of Disaffirmance.

¹⁸ *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755; *Fitts v. Hall*, 9 N. H. 441. See also, ante, Ch. 4, Fraud and Misrepresentation.

¹⁹ See *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Englebert v. Troxell*, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177n, 42 Am. St. 665; *International Land Co. v. Marshall*, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056. This is true where the consideration is still in the hands of the infant. If it is no longer in his power to make restitution this fact should be alleged.

²⁰ *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Craighead v. Wells*, 21 Mo. 404; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209.

applicable only in equity.²¹ While the above test may reconcile many cases it does not completely do so, for it has been held in law and equity that a return of the consideration was a condition precedent to a plea of infancy as a defense to a suit on a promissory note at law.²²

§ 350. Restoration of consideration—Statutory modification of common-law rule.—The common-law rule with reference to rescission by an infant has been modified in some states by statutory enactment. Thus it is provided by the statutes of Iowa that, "all money or property received by him by virtue of the contract and remaining within his control at any time after he has attained his majority" must be restored.²³

It is provided by the civil code of California that the contract of a minor "if made while he is under the age of eighteen may be disaffirmed," etc., but "if the contract be made by the minor while he is over the age of eighteen it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received or pay its equivalent."²⁴ It has been held by the Supreme Court of that state that the words "or pay its equivalent" clearly imply that if the infant cannot restore the identical consideration received he must pay its equivalent.²⁵ This would necessitate the infant's making good that part of the consideration which he had wasted before he could make a valid rescission. It is provided by the statutes of Indiana that "in all sales of an infant feme covert of lands belonging to her and in which sale and conveyance her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale until she shall have first restored to the person owning said real estate the consideration she received for said lands."²⁶

²¹ *Smith v. Evans*, 5 *Humph.* (Tenn.) 70.

²² *Philpot v. Sandwich Mfg. Co.*, 18 *Nebr.* 54, 24 *N. W.* 428 (law); *Pemberton Bldg. & Loan Assn. v. Adams*, 53 *N. J. Eq.* 258, 31 *Atl.* 280 (equity).

²³ See *Stout v. Merrill*, 35 *Iowa* 47; *Beickler v. Guenther*, 121 *Iowa* 419, 96 *N. W.* 895. This seems to be but little if anything more than a declaration of the common-law rule. By the latter if the infant has all or part

of the consideration received at the time he rescinds he must restore it and if he disposes of the consideration after reaching his majority this is held to be a ratification. See *ante*, §§ 326, 347.

²⁴ *Civil Code* § 35.

²⁵ *White v. Rosencrantz*, 123 *Cal.* 634, 56 *Pac.* 436, 69 *Am. St.* 90.

²⁶ *Sec. 3979 Burns' Annotated Statutes 1908.*

And again in Illinois, "in all sales of real estate by an infant he or she shall not be permitted to disaffirm said sale without first restoring to the person owning the property sold the consideration received in said sale, if the infant falsely represented himself or herself to be over the age of twenty-one years and the purchaser acted in good faith."²⁷

§ 351. Restoration of consideration—Both parties infants.—In case both the contracting parties were infants the one who seeks to disaffirm the contract is not, under the common-law rule, liable for what he has spent before disaffirmance, nor can he recover from the other that which the latter has squandered, or wasted.²⁸

§ 352. Effect and result of disaffirmance.—Cases on this subject state generally that the valid disaffirmance of a contract entered into during infancy annuls and renders it void on both sides *ab initio*.²⁹ It logically follows that the rights of the parties, as a general rule, are determined without reference to the provisions of the contract.³⁰ Thus the mere disaffirmance of a conveyance made during infancy revests the legal title in the former infant so as to allow him to sue in ejectment.³¹ On the same principle after an infant has rescinded his contract for the sale of personal property the title is thereby revested in him and an action in trespass cannot be sustained against him for taking the

²⁷ Sec. 3980 Burns' Annotated Statutes 1908. For construction of the statute see *Ackerman v. Hawkins*, 45 Ind. App. 483, 88 N. E. 616. See also, *Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. 1041. The sales and conveyances mentioned in the first section above quoted include mortgages. Consequently a feme covert cannot disaffirm a mortgage executed during infancy in which her husband, he being of full age, joined, cannot rescind the same without returning the consideration received. *United States & Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451.

²⁸ *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

²⁹ *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Shrock v.*

Crowl, 83 Ind. 243; *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *French v. McAndrew*, 61 Miss. 187; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Hoyt v. Wilkinson*, 57 Vt. 404.

³⁰ *Meyers v. Rehkopf*, 30 Ill. App. 209; *Ross P. Curtice Co. v. Kent*, 89 Nebr. 496, 131 N. W. 944; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133.

³¹ *Cole v. Pennoyer*, 14 Ill. 158; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539; *Craig v. VanBebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569; *Harris v. Ross*, 86 Mo. 89, 56 Am. Rep. 411; *Drake's Lessee v. Ramsey*, 5 Ohio 252; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381. See also, *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461n, 123

property into his possession.³² In conformity with the foregoing principles it has been said that if chattels are sold to an infant, the title reverts in the vendor on disaffirmance by the infant, and he may recover the specific goods if in the infant's possession. In practically all of the cases that contain a statement to this effect, however, the holding is obiter or the rule stated obscurely or indefinitely.³³

On the other hand a recent case decided by the Maine Supreme Court flatly contradicts the general rule above stated. It holds that where property is unconditionally sold and delivered to an infant his repudiation of the agreement after majority does not revert title in the vendor.³⁴

§ 353. Disaffirmance—Liability in tort.—The infant may also render himself liable for the value of the goods in case he disaffirms and then before they have been reclaimed by the vendor and subsequently to such disaffirmance disposes of or destroys the same.³⁵ This is on the principle that while the infant cannot be held liable in damages for breach of his contract he is sometimes held liable for torts arising out of contracts, the reasoning of the court being that since an infant is liable for his torts he is

Am. St. 609. It is the disaffirmance which avoids the deed and not the suit. *Long v. Williams*, 74 Ind. 115; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263n. See, however, *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

³² *Shipman v. Horton*, 17 Conn. 481.

³³ *Thomason v. Phillips*, 73 Ga. 140; *Strain v. Wright*, 7 Ga. 568; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Fitts v. Hall*, 9 N. H. 441; *Heath v. West*, 28 N. H. 101; *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101. See also, *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417, 12 L. R. A. 136; *Bennett v. McLaughlin*, 13 Ill. App. 349, *Benj. Cas. on Contracts* 326 (title retained in vendor until purchase price paid); *Robinson v. Berry*, 93 Maine 320, 45 Atl. 34 (title

retained by the vendor until purchase price paid).

³⁴ *Lamkin & Foster v. Le Doux*, 101 Maine 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104n. The decision in the above case is controlled largely by a statute concerning ratification, the court deciding there had been no ratification. There is nothing in the opinion to show that the statute in any way changes the effect of a valid disaffirmance.

³⁵ *Carpenter v. Carpenter*, 45 Ind. 142. See also, generally on this subject, *Jefford v. Ringgold & Co.*, 6 Ala. 544; *Shuford v. Alexander*, 74 Ga. 293; *Strain v. Wright*, 7 Ga. 568; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Walker v. Davis*, 1 Gray (Mass.) 506; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209.

liable for those torts growing out of contracts, in case he can be held liable therefor without giving effect to his agreement.³⁶

Disaffirmance by an infant is not a fraudulent act. It does not render him liable at law as for fraud nor will a court of equity grant relief against the disaffirmance on that ground.³⁷ Consequently the infant cannot be held liable in damages for breach of contract.³⁸ Nor is he criminally responsible because of his disaffirmance.³⁹

§ 354. Disaffirmance—Effect—Miscellaneous instances.—

Nor, as in the case of building contracts, can the infant be held liable by enforcing a lien on his premises.⁴⁰ An infant has been held liable, however, for the rent and profits during his occupancy.⁴¹ He has also been held liable for the value of improvements made by the purchaser,⁴² although this liability has been limited to the increased rental value of the premises.⁴³ On the other hand the infant has been held entitled to a lien on the premises as security for the return of purchase-money paid in by him.⁴⁴ But this does not entitle the infant to recover money paid in to a third person under the contract.⁴⁵

§ 355. Finality of disaffirmance.—A valid disaffirmance cannot be retracted without the assent of the other party. It

³⁶ See ante, § 315, Effect of Concealment or Misrepresentation.

³⁷ *Burns v. Hill*, 19 Ga. 22; *Brantley v. Wolf*, 60 Miss. 420; *Clamorgan v. Lane*, 9 Mo. 446; *Huth v. Carondelet & Co. R. Co.*, 56 Mo. 202; *Seabrook v. Gregg*, 2 S. Car. 68; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 9 L. ed. 345.

³⁸ *Harrison v. Burnes*, 84 Iowa 446, 51 N. W. 165; *Derocher v. Continental Mills*, 58 Maine 217, 4 Am. Rep. 286; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Widridge v. Taggart*, 51 Mich. 103, 16 N. W. 251; *Stotts v. Leonhard*, 40 Mo. App. 336; *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375. See, however, *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Lowe v. Sinklear*, 27 Mo. 308.

³⁹ *Jones v. State*, 31 Tex. Crim. App. 177, 20 S. W. 578. See also, *State v. Plaisted*, 43 N. H. 413; *State*

v. Howard, 88 N. Car. 650. In this connection see, however, *Commonwealth v. Ferguson*, 135 Ky. 32, 121 S. W. 967, 24 L. R. A. (N. S.) 1101n, in which it was held that the infant may be criminally liable if he falsely represents his age and thereby obtains property under a contract. See also, ante, § 315 et seq., Concealment or Misrepresentation.

⁴⁰ See ante, § 311, Mechanic's Lien.

⁴¹ *Scott v. Scott*, 29 S. Car. 414, 7 S. E. 811.

⁴² *Rundle v. Spencer*, 67 Mich. 189, 34 N. W. 548.

⁴³ *Sewell v. Sewell*, 92 Ky. 500, 18 S. W. 162, 36 Am. St. 606.

⁴⁴ *Scott v. Scott*, 29 S. Car. 414, 7 S. E. 811; *Morris v. Holland*, 10 Tex. Civ. App. 474, 31 S. W. 690.

⁴⁵ *Jennings v. Hare*, 47 S. Car. 279, 25 S. E. 198, distinguishing *Scott v. Scott*, 29 S. Car. 414, 7 S. E. 811.

follows that if the contract concerns personalty a disaffirmance made during minority is final and cannot afterward be avoided except by mutual assent.⁴⁶ A fortiori a rescission after majority is a final election.⁴⁷

⁴⁶ *Edgerton v. Wolf*, 6 Gray (Mass.) 453. In the above case an infant bought a horse. During minority he rescinded the purchase. This action was held to be final, the infant defendant ceasing to have any right over the property. *Pippen v. Mutual Benefit &c. Co.*, 130 N. Car. 23, 40 S. E. 822, 57 L. R. A. 505n. In the above case an infant avoided his contract of insurance. His administrator attempted to avoid his disaffirmance and hold the company liable on the policy. It was held this could not be done.

⁴⁷ *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 8 So. 417, 12 L. R. A. 136. In the above case a deed was disaffirmed after majority. The court said: "The disaffirmance destroyed all defendant's equitable claim or title to the land but did not affect the legal. Defendant having once disaffirmed, could not repudiate it, and then confirm; the contract having been made void cannot be revived, except by mutual consent." It must be borne in mind that an infant cannot disaffirm his contract concerning real estate during minority. See ante, § 337.

CHAPTER XII.

INSANE PERSONS.

- | | |
|---|--|
| <p>§ 365. When one person is of such unsound mind as to be incapable of contracting.</p> <p>366. Insanity must bear directly on the agreement.</p> <p>367. Contracts of insane persons generally voidable.</p> <p>368. Contracts of insane persons—When void.</p> <p>369. Proceeding to commit to an asylum and to appoint guardian—Distinction between.</p> <p>370. Rule holding contract of insane persons void strictly construed.</p> <p>371. Voidable contracts of an insane person.</p> <p>372. Valid contracts of insane persons.</p> <p>373. Contracts for necessities.</p> | <p>§ 374. What are necessities.</p> <p>375. Effect of inquisition and adjudication of insanity.</p> <p>376. Adjudication covering period of time prior to finding.</p> <p>377. Adjudication—Collateral attack.</p> <p>378. Contracts after office found.</p> <p>379. Effect of knowledge of the other party.</p> <p>380. Effect of want of knowledge.</p> <p>381. Ratification and avoidance.</p> <p>382. Who may affirm or avoid.</p> <p>383. Acts showing a disaffirmance.</p> <p>384. Restoration of consideration.</p> <p>385. Illustrations of the rule.</p> <p>386. Restoration as a condition precedent.</p> <p>387. Liability for benefits received—Subrogation—Insanity a question of fact.</p> |
|---|--|

§ 365. When one is of such unsound mind as to be incapable of contracting.—Mental weakness, whether resulting from sickness, age or any other cause, which does not totally destroy the ability to comprehend the nature and effect of the transaction, furnishes no ground for the avoidance of a contract entered into by such person in the absence of evidence showing fraud, duress or undue influence.¹ One may bind himself even though his mental capacity does not equal that of the average man.² More than this, when a contract is sought to be set aside on the sole ground of mental incapacity, a person's mind may be clouded to a greater or less degree without rendering him inca-

¹ See ante, chapter 10, Parties. See also, *Seawel v. Dirst*, 70 Ark. 166, 66 S. W. 1058; *Nance v. Stockburger*, 111 Ga. 821, 36 S. E. 100; *Saffer v. Mast*, 223 Ill. 108, 79 N. E. 32; *Richardson v. Traveler's Life Ins. Co.* (Maine), 82 Atl. 1006; *Mulloy v. Ingalls*, 4 Nebr. 115; *Blanchard v.*

Nestle, 3 Denio (N. Y.) 37; *Stewart's Exr. v. Lispenard*, 26 Wend. (N. Y.) 303; *Williams v. Sapieha*, 94 Tex. 430, 61 S. W. 115.

² *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. 1000; *Hale v. Hills*, 8 Conn. 39.

pable of forming a valid agreement. The law simply requires him, in general, to know what he is about.³

Before one's capacity to contract will be destroyed by unsoundness of mind, his reasoning faculties must be so impaired by age, disease, or other cause as to render him incapable of comprehending and acting rationally in the transaction in which he is engaged. If he can understand the nature of his business and appreciate the effect of what he is doing and can exercise his will with reference thereto, his acts will be valid so far as this question is concerned.⁴

³ *Moore v. Gilbert*, 175 Fed. 1, 99 C. C. A. 141; *Hovey v. Chase*, 52 Maine 304, 83 Am. Dec. 514; *Allen's Admrs. v. Allen's Admrs.* 79 Vt. 173, 64 Atl. 1110. The case of *Green v. Maxwell*, 251 Ill. 335, 96 N. E. 227, 36 L. R. A. (N. S.) 418, holds that a higher degree of intellect is required to make a valid contract than a valid will. It lays down the rule that to sustain a deed the grantor must have ability to transact ordinary business, and that mental strength to compete with an antagonist and understanding to protect his own interest, are essential in the transaction of ordinary business.

⁴ *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481; *Moore v. Gilbert*, 175 Fed. 1, 99 C. C. A. 141; *Barlow v. Strange*, 120 Ga. 1015, 48 S. E. 344; *Martin v. Hart*, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; *Snyder v. Snyder*, 142 Ill. 60, 31 N. E. 303, per *Craig, J.*: "In Indiana, under a statute quite similar to ours, in *Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 633, where the jury had been instructed if they believed that, from the evidence, that 'in Nancy Fiscus there is an essential privation of her reasoning faculties, or if she is incapable of understanding and acting with discretion in the ordinary affairs of life, then she is a person of unsound mind, and incapable of managing her estate, and you should so find. This instruction having been challenged, in passing upon it the court said: 'We think counsel is mistaken in his contention that the instruction does not fix any standard by which the jury is to be governed. The jury were told, in substance, that if Nancy Fis-

cus, the appellant, was so far deprived of reason that she was no longer capable of understanding and acting with discretion in the ordinary affairs of life, that she was insane, within the meaning of the law. This, we think, was a correct definition of insanity, and one that was easily understood by the jury.'" *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282, 56 Am. St. 253; *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815; *Elwood v. O'Brien*, 105 Iowa 239, 74 N. W. 740; *Richardson v. Traveler's Ins. Co. (Maine)*, 82 Atl. 1005; *Milks v. Milks*, 129 Mich. 164, 88 N. W. 402. See also, *Wilson v. Jackson*, 167 Mo. 135, 66 S. W. 972; *State v. Grand Lodge &c.*, 78 Mo. App. 546; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. 228; *Sprinkle v. Wellborn*, 140 N. Car. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174n, 111 Am. St. 827; *Whittaker v. Hamilton*, 126 N. Car. 465, 35 S. E. 815; *Carnegie v. Diven*, 31 Ore. 366, 49 Pac. 891; *Miller v. Rutledge's Committee*, 82 Va. 863, 1 S. E. 202; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383. However, where the consideration is inadequate or where there is no consideration whatever, the degree of mental weakness required is much less than when the contract is made upon a fair consideration and is reasonable and just. *Weeks v. Wortmann*, 84 Nebr. 217, 120 N. W. 933. To same effect, *Allen's Admrs. v. Allen's Admrs.*, 79 Vt. 173, 64 Atl. 1110 (aged and infirm grantor of property made the conveyance without consideration while subjected to undue influence). Mere physical

§ 366. **Insanity must bear directly on the agreement.**—Moreover, the insanity alleged must have a direct bearing on the agreement. A monomania or delusion unconnected with the subject-matter of the contract or which does not prompt the agreement does not destroy its binding force.⁵ On the other hand, if the insane delusion is so connected with the subject-matter of the agreement as to render one of the parties thereto incapable of understanding the nature or effect of the contract, it is thereby rendered voidable at the option of the party so afflicted.⁶

Lunacy may be intermittent in character; if so, a valid contract may be entered into during a lucid interval.⁷ However, where one is shown to have been mentally deranged at a recent period anterior to the execution of the contract, that condition is presumed to continue and the burden is on the other party to show that the agreement was entered into during a lucid interval or

weakness not taken advantage of through fraud or undue influence is not usually sufficient if it does not produce a state of unconsciousness to invalidate a contract. *Nason v. Chicago, R. I. & P. R. Co.* (Iowa), 128 N. W. 854.

⁵ *Searle v. Galbraith*, 73 Ill. 269; *Burgess v. Pollock*, 53 Iowa 273, 5 N. W. 179, 36 Am. Rep. 218; *Lewis v. Arbuckle*, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; *Staples v. Wellington*, 58 Maine 453; *Meigs v. Dexter*, 172 Mass. 217, 62 N. E. 75; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Boyce v. Smith*, 9 Grat. (Va.) 704, 60 Am. Dec. 313. See also, *Wetter v. Habersham*, 60 Ga. 193; *Cutler v. Zollinger*, 117 Mo. 92, 22 S. W. 895; *Benoist v. Murrin*, 58 Mo. 307; *Pidcock v. Potter*, 68 Pa. St. 348, 8 Am. Rep. 181.

⁶ *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481; *Lemon v. Jenkins*, 48 Ga. 313; *Mathews v. Nash*, 151 Iowa 125, 130 N. W. 796 (suit to set aside an executory land contract induced by an insane delusion by the promisor relative to her husband); *Hovey v. Hobson*, 55 Maine 256; *Bond v. Bond*, 7 Allen (Mass.) 1; *Dewey v. Algire*, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. 468; *Riggs v. American Tract Society*, 95 N. Y. 503.

⁷ *Hall v. Warren*, 9 Ves. 610, 7 R. R. 306; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Lilly v. Waggoner*, 27 Ill. 395; *Jones' Admr. v. Perkins*, 5 B. Mon. (Ky.) 222; *In re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554; *Tozer v. Saturlee*, 3 Grant (Pa.) 162; *Lee's Heirs v. Lee's Exr.*, 4 McCord (S. Car.) 183, 17 Am. Dec. 722; *Wright v. Market Bank* (Tenn.), 60 S. W. 623; *Reed v. Reed*, 108 Va. 790, 62 S. E. 792. See also, *Baldrick v. Garvey*, 66 Iowa 14, 23 N. W. 156; *King v. Robinson*, 33 Maine 114, 54 Am. Dec. 614; *Williams v. Hayes*, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153n, 42 Am. St. 743n. Where insanity is shown to exist both before and after the transaction and so near the event as to leave but a very short time for a lucid interval to have intervened, the agreement may be held invalid when the nature of the mania is taken into consideration. *Ellars v. Mossbarger*, 9 Ill. App. 122. The promisor's mental condition at the time the contract was executed is the important question. *Moore v. Gilbert*, 175 Fed. 1, 99 C. C. A. 141; *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 123 S. W. 271.

after recovery,⁸ provided the derangement is not caused by a temporary or transient ailment, such as fever, fits or the like.⁹

§ 367. Contracts of insane persons generally voidable.—

There are authorities to the effect that all contracts or conveyances of an insane person are absolutely void.¹⁰ The foregoing cases are, however, clearly contrary to the weight of authority. It is well settled that the contract or conveyance of a lunatic before office found is generally voidable only and not void.¹¹ Nor is it necessary that resort be had to equity in order to avoid the

⁸ *Rawdon v. Rawdon*, 28 Ala. 565; *Pike v. Pike*, 104 Ala. 642, 16 So. 689; *Hoge v. Fisher*, Fed. Cas. No. 6585, Pet. C. C. 163; *Emery v. Hoyt*, 46 Ill. 258; *Physio-Med. College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357; *Wright v. Wright*, 139 Mass. 177, 29 N. E. 380; *Ricketts v. Jolliff*, 62 Miss. 440; *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354n; *Rogers v. Walker*, 6 Pa. 371, 47 Am. Dec. 470; *Pittsburg Nat. Bank v. Palmer*, 22 *Pittsburg Legal Journal* 189; *Elston v. Jasper*, 45 Tex. 409; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Wright v. Jackson*, 59 Wis. 569, 18 N. W. 486; *Ripley v. Babcock*, 13 Wis. 425; *Wright v. Jackson*, 59 Wis. 569, 18 N. W. 486. The rule is sometimes stated in this manner "permanent and confirmed insanity shown to exist at any time prior to the execution of the contract is presumed to continue until a return of sanity is established." See cases above cited. *Kellogg v. United States*, 103 Fed. 200, 43 C. C. A. 179.

⁹ *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Corbit v. Smith*, 7 Iowa 60, 71 Am. Dec. 431; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Thornton v. Appleton*, 29 Maine 298; *Staples v. Wellington*, 58 Maine 453; *Turner v. Rusk*, 53 Md. 65; *Hix v. Whittemore*, 4 Metc. (Mass.) 545; *Richardson v. Smart*, 152 Mo. 623, 54 S. W. 542, 75 Am. St. 488; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529. See also, *Hall v. Unger*, Fed. Cas. No. 5949, 4 Sawyer (U. S.) 672, 2 Abb. (U. S.) 507; *Pike v. Pike*, 104 Ala. 642, 16 So. 689; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Stewart v. Redditt*,

3 Md. 67; *Reed v. Reed*, 108 Va. 790, 62 S. E. 792. For a discussion of insanity as an act of God, see *Central of Georgia R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. 170n.

¹⁰ *Walker v. Winn*, 142 Ala. 560, 39 So. 12, 110 Am. St. 50; *Daugherty v. Powe*, 127 Ala. 577, 30 So. 524; *Wilkinson v. Wilkinson*, 129 Ala. 279, 30 So. 578; *Galloway v. McLain*, 131 Ala. 280, 31 So. 603; *Edwards v. Davenport*, 20 Fed. 756, 4 McCrary 34; *Corbit v. Smith*, 7 Iowa 60, 71 Am. Dec. 431; *Owing's Case*, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311. For an explanation of this case see, however, *Riley v. Carter*, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. 443; *Hanley v. National Loan & Co.*, 44 W. Va. 450, 29 S. E. 1002. See also, *Lee's Heirs v. Lee's Executors*, 4 McCord (S. Car.) 183, 17 Am. Dec. 722. By other authorities only conveyances of real estate are declared void. *Elder v. Schumaker*, 18 Colo. 433, 33 Pac. 175; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *Wager v. Wagoner*, 53 Nebr. 511, 73 N. W. 937; *Van Deusen v. Sweet*, 51 N. Y. 378. In connection with this latter case see *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. 806, in which it is explained. *Farley v. Parker*, 6 Ore. 105, 25 Am. Rep. 504. See also, *Bowman v. Wade*, 54 Ore. 347, 103 Pac. 72.

¹¹ *Castro v. Geil*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. 84; *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. 1000; *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. 22; *Ratliff v. Baltzer's Admr.*, 13

conveyance of an insane person. It may be set aside or held invalid in an action in ejectment.¹²

§ 368. **Contracts of insane persons—When void.**—There are certain contracts of an insane person that are said to be void. The instances in which this is true correspond to the void contracts of an infant. A power of attorney executed by a person of unsound mind whereby he attempts to authorize another to sell land is absolutely void and not merely voidable.¹³ Contracts made with a person of unsound mind after inquisition and adjudication of insanity and the appointment of a guardian or

Idaho 152, 89 Pac. 71; Mead v. Stegall, 77 Ill. App. 679; Burnham v. Kidwell, 113 Ill. 425; Studebaker v. Faylor, 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Aetna Life Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. 481; Downham v. Holloway, 158 Ind. 626, 64 N. E. 82, 92 Am. St. 330; Allen v. Berryhill, 27 Iowa 534, 1 Am. Rep. 309; Willis v. Mason, 140 Ky. 88, 130 S. W. 964; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Blakeley v. Blakeley, 33 N. J. Eq. 502; Ipock v. Atlantic & C. R. Co. (N. Car.), 74 S. E. 352; Luhrs v. Hancock, 181 U. S. 567, 45 L. ed. 1005, 21 Sup. Ct. 726. The right to disaffirm is superior to the rights of an innocent purchaser for value. Hovey v. Hobson, 53 Maine 451, 89 Am. Dec. 705; Flach v. Gottschalt Co., 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. 418 and note; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. 443; Howe v. Howe, 99 Mass. 88; Wolcott v. Ins. Co., 137 Mich. 309, 100 N. W. 569; Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1; McAnaw v. Tiffin, 143 Mo. 667, 45 S. W. 656; Gingrich v. Rogers, 69 Nebr. 527, 96 N. W. 156; Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461n, 123 Am. St. 609; Blinn v. Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. 806; Sprinkle v. Wellborne, 140 N. Car. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. 827; Creek-

more v. Baxter, 121 N. Car. 31, 27 S. E. 994; Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766; Newman v. Taylor (Tex. Civ. App.), 122 S. W. 425; Pearson v. Cox, 71 Tex. 246, 9 S. W. 124, 10 Am. St. 740; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. 856.

¹²Brown v. Freed, 43 Ind. 253; Hovey v. Hobson, 53 Maine 451, 89 Am. Dec. 705; Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. 609 and note. In the above case the proposition was discussed at length. The following cases were also cases in ejectment: Fitzgerald v. Shelton, 95 N. Car. 519; Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766. See also, Bail v. Mannin, 1 Dow. & C. 380; Moran v. Moran, 106 Mich. 8, 63 N. W. 989, 58 Am. St. 462. The case of Jacobs v. Richards, 18 Beav. 300, contains an obiter statement to the effect that relief must be had in equity. See also, McAnaw v. Clark, 167 Mo. 443, 67 S. W. 249.

¹³Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25; McClun v. McClun, 176 Ill. 376, 52 N. E. 928; Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. 146; Dexter v. Hall, 15 Wal. (U. S.) 9, 21 L. ed. 73. And see Wolcott v. Ins. Co., 137 Mich. 309, 100 N. W. 569; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716. Contra, Williams v. Sapiaha, 94 Tex. 430, 61 S. W. 115.

conservator for such person and during the time such adjudication and appointment remain in force, are void.¹⁴ So it has been held that the guardian cannot maintain an action on his ward's contract for the sale of his real estate.¹⁵

§ 369. Proceeding to commit to an asylum and to appoint guardian—Distinction between.—It should be borne in mind, however, that there is a distinction between proceedings whereby it is sought to commit one to an insane asylum for safekeeping and treatment and a proceeding which has for its object the appointment of a guardian on the ground that such person is incompetent to deal with his property or manage his affairs. One may properly be committed to an insane asylum in order to prevent injury to himself or others and yet be competent to manage his estate.¹⁶

¹⁴ *Church v. Rosenstein* (Conn.), 82 Atl. 568 (also holding that the conservator cannot, without an order of the probate court, borrow money on the credit of the ward's estate); *American Trust & Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. 167; *Burnham v. Kidwell*, 113 Ill. 425; *Lilly v. Waggoner*, 27 Ill. 395; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; *Hovey v. Hobson*, 53 Maine 453, 89 Am. Dec. 705; *Wait v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Lynch v. Dodge*, 130 Mass. 458; *Payne v. Burdette*, 84 Mo. App. 332; *Rannells v. Gerner*, 80 Mo. 474. By the above case it is held that an insane person under guardianship cannot bind himself by contracts during a lucid interval. *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 582; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. 386; *Hanley v. National Loan & Co.*, 44 W. Va. 450, 29 S. E. 1002. It is immaterial that the other party had no knowledge of the adjudication. *American Trust & Co.*

v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. 167; *Bradbury v. Place* (Maine), 10 Atl. 461; *Mohr v. Tulip*, 40 Wis. 66.

¹⁵ *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235.

¹⁶ *Wagener v. Harriott* (N. Y.), 20 Abb. N. Cas. 283, per McAdam, Ch. J.: "Wedmark had committed no offense, and the money taken from his person was not the proceeds of crime. The defendant became possessed of it for safekeeping only, and was bound to return it upon demand. The fact that Wedmark was committed to the asylum did not incapacitate him for making a legal transfer of the right of action. No committee of the person and estate of the lunatic had been appointed, and until inquisition and office found, the acts of the lunatic are voidable only—not void. (*Ingraham v. Baldwin*, 9 N. Y. 45, affg. 12 Barb. (N. Y.) 9; *Matter of Beckwith*, 3 Hun (N. Y.) 443, T. & C. (N. Y.) 13; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *Wait v. Maxwell*, 5 Pick. (Mass.) 217.) Thus, a marriage between a lunatic and a sane woman, followed by cohabitation, is not void, but voidable only; it cannot be impeached in an action against the committee for necessities furnished to the wife (*Stuckey v*

§ 370. **Rule holding contracts of insane persons void strictly construed.**—The rule that contracts of an insane person under guardianship are void is given a strict construction. It has been held that even though one has been judicially found insane a contract entered into subsequently to such finding and prior to the appointment of a guardian or conservator, is not conclusively void.¹⁷ The same is true where the guardian has resigned, been removed or the guardianship has been practically abandoned.¹⁸ Certain authorities declare that if the insanity of a party to a contract is known by the other party thereto, the agreement is absolutely void.¹⁹ It would seem unnecessary to so hold, however, for the insane person would thereby lose the benefit of any advantageous contract he might make. If the contract is void neither party is bound. It could be as freely abrogated by the sane as by the insane party. An insane person is amply protected by the rule holding his contracts voidable, es-

Mathes, 24 Hun (N. Y.) 461). A deed executed by a lunatic before office found is not void, but voidable only; therefore, one not in privity with the lunatic cannot allege the lunacy as a matter of defense (*Merritt v. Gumaer*, 2 Cow. (N. Y.) 552). *Van Deusen v. Sweet*, 51 N. Y. 378, does not conflict with the view stated. In that case, the plaintiff brought ejectment, claiming title under the will of Sylvester Sweet made in 1849. The defendant claimed title under a deed executed by Sylvester Sweet in 1864. The question of Sweet's competency to make the deed in 1864 was submitted to the jury, who found for the plaintiff and the judgment was affirmed. The case presented a direct conflict between the legal representatives of the lunatic on the one hand, and a person claiming under a grant made by the lunatic on the other, and the question whether the grant was void or voidable only, became of no consequence, as the legal representatives had the right in either event to avoid it." See also, *Treadwell v. Torbert*, 122 Ala. 297, 25 So. 216; *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; *Aldrich v. Superior Court*, 120 Cal. 140, 52 Pac.

148; *Leggate v. Clark*, 111 Mass. 308; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Dewey v. Algire*, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. 468; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Imhoff v. Witmer*, 31 Pa. St. 243.

¹⁷ *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Topeka & Co. v. Root*, 56 Kans. 187, 42 Pac. 715; *Lower v. Schumacher*, 61 Kans. 625, 60 Pac. 538; *Black's Estate*, 132 Pa. 134, 19 Atl. 31. *Contra*, *Kiehne v. Wessell*, 53 Mo. App. 667.

¹⁸ *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299; *Thorp v. Hanscom*, 64 Minn. 201, 66 N. W. 1; *Elston v. Jasper*, 45 Tex. 409. See, however, *Redden v. Baker*, 86 Ind. 191.

¹⁹ *Henry v. Fine*, 23 Ark. 417; *Bethany Hospital Co. v. Philippi*, 82 Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194; *Matthiessen & Weicher's Refining Co. v. McMahon's Admr.*, 38 N. J. L. 536; *Lincoln v. Buckmaster*, 32 Vt. 652. Persons who deal with such persons are regarded as having perpetrated a fraud on them. *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. 339; *Fecel v. Guinault*, 32 La. Ann. 91.

pecially when it is remembered that it is unnecessary for the person non compos mentis to place the other party in statu quo when it appears that such other person has knowledge of his insanity. It follows that, by the better rule, contracts between parties, one of whom is non compos mentis and known so to be by the other party, are not void but voidable, the fact that the party dealing with the non compos mentis person had knowledge of his mental incapacity being material merely upon the question as to whether he is entitled to be placed in statu quo before there can be an avoidance of the deed in question.²⁰

§ 371. **Voidable contracts of an insane person.**—All other contracts of an insane person are either valid or voidable. His chattel mortgage is valid until disaffirmed.²¹ The bill or note of an insane person is voidable.²² The same is true of his deed,²³

²⁰ *Studebaker v. Faylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. St. 766. See, however, *Odom v. Reddick*, 104 N. Car. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. 686.

²¹ *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142. See also, *Creekmore v. Baxter*, 121 N. Car. 31, 27 S. E. 994.

²² *Voris v. Harshbarger*, 11 Ind. App. 555, 39 N. E. 521; *Reinskopf v. Rogge*, 37 Ind. 207; *Wilder v. Weakley*, 34 Ind. 181; *Musselman v. Cravens*, 47 Ind. 1; *Taylor v. Dudley*, 35 Ky. 308; *Burke v. Allen*, 29 N. H. (9 Foster) 106, 61 Am. Dec. 642. In the above case it was the payee and endorser that was insane. *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. 720. But if an insane person's note is accepted without knowledge of his insanity and no advantage is taken of him, but, instead, the transaction is for his benefit, he may be held liable thereon, at least to the amount of the loan expended for necessities. *Davis v. Tarver*, 65 Ala. 98; *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *First National Bank v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495. As

to the right of the maker of a bill or note to interpose the defense that the payee and endorser thereof was insane at the time of the endorsement, when sued by the endorsee, see *Carrier v. Sears*, 4 Allen (Mass.) 336, 81 Am. Dec. 707, which holds that the maker cannot when neither the payee or his personal representatives has disaffirmed the endorsement. See, however, *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642, and *Hannahs v. Sheldon*, 20 Mich. 278. In case the maker is insane the purchaser takes with notice of the maker's insanity. *Jeneson v. Jeneson*, 66 Ill. 259.

²³ *Greene v. Maxwell*, 251 Ill. 335, 96 N. E. 227, 36 L. R. A. (N. S.) 418; *Studebaker v. Faylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; *Kent v. LaRue*, 136 Iowa 113, 113 N. W. 547; *Dowell v. Dowell's Admr.* (Ky.), 125 S. W. 283; *Campbell v. Kerrick*, 142 Ky. 279, 134 S. W. 186; *King v. Siple*, 166 Mich. 258, 131 N. W. 572; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. 806; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. 609; *Shea v. Campbell*, 71 Misc. (N. Y.) 222, 128 N. Y. S. 508; *Sprinkle v. Wellborne*, 140 N. Car. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174n, 111 Am. St. 827; *Vogel v. Zuercher* (Tex. Civ. App.),

mortgage,²⁴ or sale of realty thereunder,²⁵ or release.²⁶ His contract for services may be voidable at the option of himself or his personal representatives but not at the option of the servant.²⁷ But he may be liable for services rendered either to the extent of the benefit received²⁸ or on the ground that the services rendered were necessities.²⁹ His bill of sale has been held voidable.³⁰ Contracts that are voidable at the option of a party thereto who is non compos mentis are also voidable as against a purchaser (although without notice and for full value) from the other contracting party.³¹

§ 372. Valid contracts of insane persons.—Under certain circumstances the contracts of an insane person may be valid and binding upon him. Contracts of a monomaniac which are unaffected by the monomania are of this character.³² The same is true of contracts entered into in a lucid interval. They, too, may be valid and binding.³³ A voluntary performance by an

135 S. W. 737. A deed given by an insane member of a partnership in the name of the firm is voidable. *Riley v. Carter*, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. 443. See ante, § 367. His deed absolute may be shown to be in fact a mortgage. *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. 339.

²⁴ *Ingraham v. Baldwin*, 12 Barb. (N. Y.) 9; *Cook v. Parker*, 4 Phila. (Pa.) 265; *Mohr v. Tulip*, 40 Wis. 66.

²⁵ *Encking v. Simmons*, 28 Wis. 272.

²⁶ *Ætna Life Ins. Co. v. Sellers*, 154 Ind. 370, 56 N. E. 97, 77 Am. St. 481.

²⁷ *Mead v. Stegall*, 77 Ill. App. 679. See also, *McGuirl v. McGuirl*, 12 Ill. App. 624.

²⁸ *Ballard v. McKenna*, 4 Rich. Eq. (S. Car.) 358.

²⁹ *McKee's Admr. v. Ward*, 18 Ky. L. 987, 38 S. W. 704; *Key v. Harris*, 116 Tenn. 161, 92 S. W. 235; *Schrammek v. Shepeck*, 120 Wis. 643, 98 N. W. 213.

³⁰ *Wilkins v. Wilkins*, 35 Nebr. 212, 52 N. W. 1109. For other cases illustrating the voidability of an insane person's contract, see *Flach v.*

Gottschalk Co., 88 Md. 368, 71 Am. St. 418. In the above case two barrels of whiskey were bought, suit being brought for the purchase-price. See also, *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707; *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Ætna Life Ins. Co. v. Sellers*, 154 Ind. 370, 56 N. E. 97, 77 Am. St. 481; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413; *Garland v. Rice*, 4 Ky. L. 254; *Morris v. Great Northern R. Co.*, 67 Minn. 74, 69 N. W. 628; *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; *Luhrs v. Hancock*, 181 U. S. 567, 45 L. ed. 1005, 21 Sup. Ct. 726.

³¹ *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; *Hovey v. Hobson*, 53 Maine 451, 89 Am. Dec. 705; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *McKenzie v. Donnell*, 151 Mo. 461, 52 S. W. 222; *Dewey v. Algire*, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. 468; *Gingrich v. Rogers*, 69 Nebr. 527, 96 N. W. 156; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. 720; *Wirebach's Exr. v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821.

³² See ante, § 366.

³³ See ante, § 366.

insane person or his representative of an act which the law might compel him to do is valid and binding upon him.³⁴ The validity of a sale under a deed of trust is not affected by the insanity of one who purchased the premises subject to the lien of such deed and who assumes the payment of the debt secured by it as a part of the purchase-price, and it is immaterial that the purchaser at the trustee sale had actual knowledge of such insanity.³⁵

Likewise if an executory contract, complete in its terms, is entered into by one of the parties while sane and is not executed until after such party has become insane, it is nevertheless a valid and binding agreement and may be enforced against such insane party. Thus when a lessor executed a lease while sane, the lessee having the option to extend the term thereof, his election to enlarge the term was valid and binding, notwithstanding the lessor had in the meantime become insane.³⁶ A mortgage has been held valid where its terms were discussed and fully agreed upon at a time when there was no question as to the mortgagor's sanity, notwithstanding it was not signed until after he had become incompetent to transact business.³⁷ The renewal of an accommodation indorsement made while such indorser was insane has been held binding, since the indorsement of the original note was executed while the indorser was in full possession of his faculties.³⁸ A payor's promissory notes have been held valid,

³⁴ *In re Hirst's Estate*, 147 Pa. St. 319, 23 Atl. 455. In the above case ground rents inherited from an ancestor were released upon the happening of the conditions which were to terminate it.

³⁵ *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. 422. In the above case a suit in ejectment was brought against the insane party and his wife. A guardian ad litem was appointed for the insane person. It was held that after such appointment the judgment rendered was binding upon the lunatic and his property to the extent that a similar judgment would be on a sane person.

³⁶ *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962n.

³⁷ *Parker v. Marco*, 76 Fed. 510. In the above case the mortgage was held valid while a separate transaction proposed at the time of the execution

of the mortgage was held void. To same effect, *Bevin v. Powell*, 11 Mo. App. 216, affd. 83 Mo. 365. See also, *Brown v. Miles*, 61 Hun (N. Y.) 453, 41 N. Y. St. 67, 16 N. Y. S. 251. In the above case a warranty deed was executed at a time when the grantor was insane. The deed was executed pursuant to the terms of a written contract entered into while the grantor was sane. This deed was said to be absolutely void in law but it was held that the court, as a court of equity, might grant such equitable relief as the evidence disclosed the transferee was entitled to, including a deed from the other party.

³⁸ *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. 788. The ground upon which the above decision is based is that the accommodation indorser was liable on the original note and that

notwithstanding he became insane before they were due.³⁹ In case a person enters into a contract while sane he is liable for the breach thereof committed while insane.⁴⁰

§ 373. Contracts for necessities.—By far the largest and most important class of valid contracts that may be executed by an insane person are those for necessities. A person non compos mentis is liable on his contract for necessities the same as a minor.⁴¹ Nor is the rule changed by the fact that such person has been adjudged a person of unsound mind and been placed under a conservator or guardian, if the goods furnished were in fact necessities, the guardian having failed to provide them.⁴²

§ 374. What are necessities.—The term “necessities” includes not only the individual wants of the insane party, but ne-

this valid antecedent liability was not defeated by a renewal of the same. To same effect, *Snyder v. Laubach*, 7 Wkly. Notes Cas. 464.

³⁹ *School District &c. v. Sheidley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. 576. In the above case the notes were given as a voluntary subscription. The notes were held valid on the ground that the school board had expended money and incurred a liability on the strength of the promise prior to the maker's insanity.

⁴⁰ *Baldrick v. Garvey*, 66 Iowa 14, 23 N. W. 156; *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153n, 42 Am. St. 743n; In re *Strasburger*, 132 N. Y. 128, 30 N. E. 379.

⁴¹ In re *Rhodes*, L. R. 44 Ch. D. 94; *Borum v. Bell*, 132 Ala. 85, 31 So. 454; Ex parte *Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Henry v. Fine*, 23 Ark. 417; *Miller v. Hart*, 135 Ind. 201, 34 N. E. 1003; *Palmer v. Hudson River State Hospital*, 10 Kans. App. 98, 61 Pac. 506; *Sawyer v. Lufkin*, 56 Maine 308; *Hallett v. Oakes*, 1 Cush. (Mass.) 296; *Kendall v. May*, 10 Allen (Mass.) 59; *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; *Sceva v. True*, 53 N. H. 627; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592; *Van Horn v. Hann*, 39 N. J. L. 207; *Waldron v. Davis*, 70 N. J. L. 788, 58 Atl. 293, 66 L. R.

A. 591; *Ingraham v. Baldwin*, 9 N. Y. 45, Seld. Notes 167; *Richardson v. Strong*, 35 N. Car. 106, 55 Am. Dec. 430; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. 720; *La Rue v. Gilkyson*, 4 Pa. St. 375, 45 Am. Dec. 700; *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *Wirebach v. First Nat. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821; *Stannard v. Burns' Admr.*, 63 Vt. 244, 22 Atl. 460. As with infants those things are necessities which are suitable to the condition and habits of life of the insane person. *Richardson v. Strong*, 35 N. Car. 106, 55 Am. Dec. 430. In addition see cases cited above.

⁴² *Creagh v. Tunstall*, 98 Ala. 249, 12 So. 713; *Fruitt v. Anderson*, 12 Ill. App. 421; *Miller v. Hart*, 135 Ind. 201, 34 N. E. 1003; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; *Sawyer v. Lufkin*, 56 Maine 308; *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Re Renz*, 79 Mich. 216, 44 N. W. 598; *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; *Darby v. Cabanne*, 1 Mo. App. 126; *Barnes v. Hathaway*, 66 Barb. (N. Y.) 452; *Stannare v. Burns*, 63 Vt. 244, 22 Atl. 460; *Maughan v. Burns' Estate*, 64 Vt. 316, 23 Atl. 583. It is the duty of the guardian to furnish his ward with necessities of life suitable to his con-

cessities for his wife and children.⁴³ Under the head of necessities has also been included the expenses of a nurse and guard for such person,⁴⁴ and a not unreasonable journey for his enjoyment.⁴⁵ In some jurisdictions he is by statute made liable for his support while in an asylum.⁴⁶ The services of an attorney may also be a necessity.⁴⁷ It would also seem that the general rule limiting contracts for necessities to matters that concern the person is given a more liberal interpretation when applied to persons non compos mentis than when applied to infants and is made to include whatever is necessary for the preservation of the insane person's estate.⁴⁸ There is a further analogy between the contracts of an infant and those of an insane person, in that courts of law and equity imply a promise on the part of one non compos mentis as well as on the part of an infant to pay for necessities actually supplied him. It follows that he is liable for the reasonable value of such necessities regardless of an express agreement to pay therefor.⁴⁹ If the insane person is really sup-

dition out of the ward's estate. *Spence v. Miner*, 89 Nebr. 610, 131 N. W. 1044, 132 N. W. 942.

⁴³ *Read v. Legard*, 6 Exch. 637, 20 L. J. Ex. 309, 15 Jur. 494; *Booth v. Cottingham*, 126 Ind. 431, 26 N. E. 84. In the above case the medical attention furnished wife of an insane man was held a necessity. *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; *D. M. Smith's Committee v. Forsythe*, 28 Ky. L. 1034, 90 S. W. 1075; *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655. Liable for board furnished wife. In re *Stiles*, 120 N. Y. S. 714, 64 Misc. (N. Y.) 658; *Barnes v. Hathaway*, 66 Barb. (N. Y.) 452.

⁴⁴ *Richardson v. Strong*, 35 N. Car. 106, 55 Am. Dec. 430. See also, *Edson v. Hammond*, 142 App. Div. (N. Y.) 693, 127 N. Y. S. 359.

⁴⁵ *Kendall v. May*, 10 Allen (Mass.) 59. In determining what are to be considered as necessities for a lunatic it would seem that courts give the term even a more liberal construction than in the case of infants, and include matters that partake of the nature of luxuries if supplied in the proportion to the means and condition of the insane person's life. See *Baxter v.*

Earl of Portsmouth, 5 B. & C. 17, 11 E. C. L. 415. See also, *Borum v. Bell*, 132 Ala. 85, 31 So. 454; *Cantrill v. Pecile*, 22 Ky. L. 1121, 60 S. W. 16.

⁴⁶ *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298, 94 Pac. 597; In re *Callen's Estate*, 152 Cal. 769, 93 Pac. 1011; *Board of Chosen Freeholders &c. v. Ritson*, 68 N. J. L. 666, 54 Atl. 839; *State v. Ikley's Estate*, 84 Vt. 363, 79 Atl. 850.

⁴⁷ *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 582. He is liable for the reasonable value of the services rendered. *McKee's Admr. v. Ward*, 18 Ky. L. 987, 38 S. W. 704; *McKee's Admr. v. Purnell*, 18 Ky. L. 879, 38 S. W. 705.

⁴⁸ See *Williams v. Wentworth*, 5 Beav. 325; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *First Nat. Bank of Navasato v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495. The sister has been allowed to recover the cost of erecting an addition to her dwelling in order that the lunatic might be cared for. *Cecil v. Cantrill* (Ky.), 128 S. W. 84.

⁴⁹ *Borum v. Bell*, 132 Ala. 85, 31 So. 454; *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Fruitt v. Anderson*, 12 Ill. App. 421; *Renado v. Mis-*

plied with necessities he is not liable for a further supply of such goods although furnished without notice that they are not needed.⁵⁰

In case the insane person is under guardianship, however, there is a *prima facie* presumption that the guardian has furnished his ward with necessities. Thus a kinsman of an insane person who furnishes him with clothing and board cannot recover of the guardian of the latter therefor, unless the guardian has requested such supplies, or neglects or refuses to supply the ward with necessities suitable to his estate and condition.⁵¹ It does not follow because one has been adjudged insane and is under guardianship that he cannot make a valid contract for necessities. He can at least be held liable for the value of necessary services rendered or of material furnished, when they were in fact necessary.⁵²

play, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; *Sceva v. True*, 53 N. H. 627; *Johnson v. Ballard*, 11 Rich. (S. Car.) 178. See, however, *Massachusetts General Hospital v. Fairbanks*, 132 Mass. 414; *Bicknell v. Spear*, 38 Misc. (N. Y.) 389, 77 N. Y. S. 920. In case an insane person borrows money on a note recovery may be had against him for such portion thereof as was spent for necessities or for the protection and benefit of his estate. *First Nat. Bank of Navasota v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495.

⁵⁰ *Renando v. Misplay*, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13.

⁵¹ *Creagh v. Tunstall*, 98 Ala. 249, 12 So. 713, per Stone, C. J.: "From these unaided facts the law does not raise a promise on the part of the guardian that he will pay her for such supplies. There is neither contractual nor legal privity between them. *Prima facie*, the guardian alone is authorized to select the ward's abiding place, and to supply his wants, and the present record fails to show his omission to do so. We concur with the chancellor in holding that the petition fails to make a case authorizing relief. *Call v. Ward*, 4 Watts & S. (Pa.) 118; *Bredin v. Dwen*, 2 Watts (Pa.) 95; *Barnum v. Frost*, 17 Grat. (Va.) 398; *Tucker v. McKee*, 1 Bail. (S. Car.)

344; *Nicholson v. Spencer*, 11 Ga. 607; *Gwaltney v. Cannon*, 31 Ind. 227." In 54 J. P. 337, a periodical published in London, the editors thus sketch the theories relating to lunatics' liability for necessities: "It will be useful to notice the chief authorities at present bearing on the question whether a lunatic is impliedly liable for necessities, the difficulty started being this, that, inasmuch as a lunatic would not, by express contract, bind himself for anything, it is suggested that it would be absurd to hold that such a contract can be implied, which implied contract is, at most, only a substitute for what would, if express, be valid." See also, *Howard v. Digby*, 2 Cl. & Fin. 634; *Wentworth v. Tubb*, 2 Y. & C. Ch. 537; *Williams v. Wentworth*, 5 Beav. 325; *Beavan v. McDonnell*, 9 Exch. 309; *Molton v. Camroux*, 2 Exch. 487; *Brockwell v. Bullock*, L. R. 22 Q. B. D. 567; *In re Rhodes*, 62 L. T. R. (N. S.) 22; *In re Weaver*, L. R. 21 Ch. D. 615; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

⁵² *Dandurand v. Kankakee*, 96 Ill. App. 464, *affd.*, 196 Ill. 537, 63 N. E. 1011; *Hart v. Miller*, 29 Ind. App. 222, 64 N. E. 239; *Stannard v. Burns' Admr.*, 63 Vt. 244, per Start, J.: "It does not necessarily follow, when there has been an adjudication by the

§ 375. **Effect of inquisition and adjudication of insanity.**—The procedure by which inquiry is made as to the mental competency of a person with a view to his guardianship or commitment to an asylum, or both, is in the main regulated by a statutory enactment in the various states. This does not concern contracts except in an indirect manner. It is sufficient to say that the form of procedure has little or no bearing on the effect of the ultimate finding. Until the finding of insanity and resultant guardianship, conservator, or committee is superseded, the person adjudged insane is incapable of forming a valid contractual relation at least when found incompetent to have the custody and management of his estate.⁶³ By the better rule the inquisition and finding of insanity binds the world.⁶⁴ It is conclusive evidence that he was insane at the time of the finding,⁶⁵ which insanity is presumed to continue until the contrary is shown.⁶⁶

§ 376. **Adjudication covering period of time prior to finding.**—An inquisition and adjudication of insanity which is

Probate Court that a person is insane, that the insanity is of that character which disqualifies him from making a valid contract for necessities. *Motley v. Head*, 43 Vt. 633; *Blaisdell v. Holmes*, 48 Vt. 492. In the last-named case the plaintiff was permitted to recover of the defendant for services rendered for him under a contract made with him, after he had been adjudged an insane person by the Probate Court, and while he was under guardianship." Adult daughters of an insane person, who have lived with him prior to his insanity, and who take care of him at his home at the request of his guardian, and on the latter's promise that they shall receive pay therefor, are not precluded from receiving compensation by the rule that when relatives live together as members of a common family there is no implied obligation to pay for services rendered for each other. *Masters v. Jones*, 158 Ind. 647, 64 N. E. 213. To same effect, *Jessup v. Jessup*, 17 Ind. App. 177, 46 N. E. 550.

⁶³ There are perhaps two exceptions to this rule, the first one is, that if

the guardian fails to furnish his ward with necessities the ward may himself purchase them and is liable for their reasonable value, see ante, § 373; the second is, that a person may be so insane as to require his commitment to an asylum in order to prevent personal injury to himself or to others, and yet be capable of managing his estate, in case the insanity is of this character and no guardian is in fact appointed his contracts may be held binding, see ante, § 369.

⁶⁴ *American Trust & Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. 167. The adjudication is final and conclusive everywhere and upon all persons. *Foran v. Healy*, 73 Kans. 633, 85 Pac. 751, 86 Pac. 470; *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. 386.

⁶⁵ *Redden v. Baker*, 86 Ind. 191.

⁶⁶ *Wiser v. Clinton*, 82 Conn. 148, 72 Atl. 928, 135 Am. St. 264; *American Trust & Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. 167; *In re Nelson*, 148 Iowa 118, 126 N. W. 973; *Andrews v. Andrews Committee*, 120 Ky. 718, 27 Ky. L.

made to overreach a period of time prior to such finding is no more than prima facie evidence, however, as to the past condition of the person adjudged insane and is not conclusive on one who enters into a contract with such person prior to the adjudication and within the time overreached by it.⁵⁷ An inquisition under a writ de lunatico inquirendo, stating that at the time of the execution of the deed the grantor was non compos mentis, is presumptive but not conclusive evidence of the grantor's incapacity in an action wherein a party claims under the deed.⁵⁸

§ 377. Adjudication—Collateral attack.—The adjudication cannot be attacked collaterally unless absolutely void.⁵⁹ The reason for the foregoing rule is that it is a proceeding in rem to determine the status of a person once and for all, and thus avoid driving the guardian to the constant litigation that would result if the question of the ward's sanity might be tried upon the performance of any and every act by the guardian.⁶⁰ The effect of the adjudication on the contractual capacity of the party declared insane will be treated more at length in the succeeding sections of this chapter.⁶¹

1119, 28 Ky. L. 882, 87 S. W. 1080, 90 S. W. 581; *Wallace v. Frey*, 27 Misc. (N. Y.) 29, 56 N. Y. S. 1051.

⁵⁷ *Sergeson v. Sealy*, 2 Ayk. 412; *Titcomb v. Vantyle*, 84 Ill. 371; *Lower v. Schumacher*, 61 Kans. 625, 60 Pac. 538; *Hopson v. Boyd*, 6 B. Mon. (Ky.) 296; *Wall v. Hill's Heirs*, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. 386; *Searles v. Harvey*, 6 Hun (N. Y.) 658; *Reals v. Weston*, 28 Misc. (N. Y.) 67, 59 N. Y. S. 807; *In re Gangwere's Estate*, 14 Pa. St. 417, 53 Am. Dec. 554; *Wright v. Market Bank* (Tenn.), 60 S. W. 623; *Small v. Champney*, 102 Wis. 61, 78 N. W. 407.

⁵⁸ *Van Deusen v. Sweet*, 51 N. Y. 378. See *L'Amoureux v. Crosby*, 2 Paige Ch. (N. Y.) 422-427, 22 Am. Dec. 655; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Griswold v. Miller*, 15 Barb. (N. Y.) 520. See also, *Eakin v.*

Hawkins, 48 W. Va. 364, 37 S. E. 622.

⁵⁹ *Soules v. Robinson*, 158 Ind. 97, 62 N. E. 999, 92 Am. St. 301; *Frazer v. Frazer*, 25 Ky. L. 882, 76 S. W. 546; *Bible v. Wisecarver* (Tenn. Ch. App.), 50 S. W. 670.

⁶⁰ "Proceedings in rem are of two kinds, namely: (1) Those which determine the status of a person, and (2) those which determine the status of a thing. In the former all persons are concluded by the judgment because they have no legal interest in the question, or, in less polite but more forcible language, it is none of their business, and they cannot be admitted into the litigation as parties." *The Law of Former Adjudication*, Van Fleet, Vol. 2, § 515, p. 1022.

⁶¹ As to the power of a guardian or committee to bind his ward or his estate by his contract see *Reams v. Taylor*, 31 Utah 288, 87 Pac. 1089, 8 L. R. A. (N. S.) 436n, 120 Am. St. 930.

§ 378. **Contracts after office found.**—It is held by the decided weight of authority that an insane person whose lunacy has been judicially determined and for whom a guardian or committee has been appointed is incapable of entering into any contract or executing any conveyance, and that any contract or conveyance that he may assume to make while in that situation is absolutely void.⁶² However, if no guardian has been appointed⁶³ or if the guardianship has been abandoned⁶⁴ the insane person's contract or conveyance will not, under such circumstances, be generally considered void.⁶⁵ The incapacity of a lunatic whose lunacy

⁶² See cases cited in § 367, Contracts of an insane person generally voidable. See also, *Wager v. Wagoner*, 53 Nebr. 511, 73 N. W. 937.

⁶³ *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Topeka Water & Co. v. Root*, 56 Kans. 187, 42 Pac. 715; *Grimes v. Shaw*, 2 Tex. Civ. App. 20, 21 S. W. 718, per *Pleasants, J.*: "Our Supreme Court, in accord with the great weight of authority, has said that a contract made with one who has been adjudged insane, and is under the control and custody of a guardian, duly appointed, is void. See *Elston v. Jasper*, 45 Tex. 409. But in this case the judgment of lunacy pronounced by the county court was suspended by the appeal and the supersedeas bond at the time of the purchase of the land by appellant, and at the time B was without a guardian of either his person or his estate; and, when such is the case, it seems a judgment in lunacy is only prima facie evidence against third persons. See *Black on Judgments*, p. 803, § 802; *Van Deusen v. Sweet*, 51 N. Y. 379; *Aber v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 417." See also, *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187. *Contra Kiehne v. Wessell*, 53 Mo. App. 667, per *Rombauer, P. J.*: "The rule at common law is that insanity once proved to have existed is presumed to continue, unless it was accidental or temporary in its nature, as where it was occasioned by violence or disease. 2 *Greenleaf on Evidence*, § 371; *Hix v. Whittemore*, 4 Metc. (Mass.) 545; *Shelford on Lunacy*, 275 (2 Law Lib. 175). The plaintiff offered no evidence that the defendant's insanity in this case was

due to temporary causes. The rule under the statute makes this presumption conclusive in the case of an adjudication of lunacy, as was held by the Supreme Court in *Rannells v. Garner*, 80 Mo. 474. In that case *Sherwood, J.*, cites with approval *Imhoff v. Witmer*, 31 Pa. St. 243, where it is said that, after inquisition, the fact of lunacy cannot be controverted by evidence of lucid intervals at the moment of contraction."

⁶⁴ *Willworth v. Leonard*, 156 Mass. 277, 31 N. E. 299, per *Morton, J.*: "So long as the guardianship continued, the decree of the probate court may well have been regarded as conclusive on the question of the ward's sanity, on the ground that the decree fixed the ward's status as to all the world, and also because it might greatly have embarrassed the executors of his trust if the guardian could have been compelled to try the question of his ward's sanity in every action for or against him. *White v. Palmer*, 4 Cush. (Mass.) 147; *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Leggate v. Clark*, 111 Mass. 308, 310. But when the guardianship has terminated, and a controversy has arisen between third parties, one of whom claims under a contract made with the ward after the termination of the guardianship, the reason ceases for holding the decree conclusive." *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1. See also, *Kimball v. Bumgardner*, 16 Ohio Cir. Ct. 587, 9 Ohio Dec. 409.

⁶⁵ It has been held that where the guardian was removed and the petition for the appointment of another dismissed that the former adjudica-

has been judicially ascertained in lunacy proceedings to bind himself, does not relieve his estate from debts or liabilities incurred anterior to the lunacy.⁶⁶ Proof of a lucid interval cannot be made after adjudication and appointment of a guardian.⁶⁷ One under a conservator or guardian may receive title even if he cannot give it.⁶⁸

§ 379. Effect of knowledge of the other party.—As has already been mentioned there are cases holding that where a contract is made with or a conveyance accepted from one known to be insane, notwithstanding he has never been so adjudged, the transaction is absolutely void.⁶⁹ It would seem unnecessary to so hold, however, since the rights of the insane party are amply protected through the privilege of disaffirmance. If the contract is held void he would thereby not lose the benefit of any advantageous agreement he might make. This is especially true when one remembers that one dealing with a party known to be insane is entitled to no consideration in a court of equity, the insane party having the right to disaffirm without making any restitution.⁷⁰ Persons who contract with one who is, to their knowledge, insane, are deemed to have perpetrated a fraud on such insane party and courts of equity may set the contract aside on the ground of fraud.⁷¹

tion ceases to be conclusive. *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299.

⁶⁶ *Gross v. Jones*, 89 Miss. 44, 42 So. 802; *In re Heller*, 3 Paige (N. Y.) 199; *In re Hopper*, 5 Paige (N. Y.) 489. See also, *Crippen v. Culver*, 13 Barb. (N. Y.) 424.

⁶⁷ *Kiehne v. Wessell*, 53 Mo. App. 667; *Imhoff v. Witmer*, 31 Pa. St. 243. See, however, *Stitzel v. Farley*, 148 Ill. App. 635.

⁶⁸ *Wiser v. Clinton*, 82 Conn. 148, 72 Atl. 928, 135 Am. St. 264.

⁶⁹ *Bethany Hospital Co. v. Philippi*, 82 Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194.

⁷⁰ See ante, §§ 370, 371. See also, *Mathews v. Nash*, 151 Iowa 125, 130 N. W. 796. See post, *Restoration of Consideration*, § 384. See, however, the following case in which the court refused to set aside the

conveyance of a person known to be insane after the property had come into the hands of an innocent purchaser for value in good faith and without any knowledge of the incapacity of the grantor when no fraud was practiced on the insane party nor any undue influence exercised over him and the deed was made under the advice of counsel and for a full and fair consideration and the transaction was for the advantage of the grantor and his family. *Odon v. Riddick*, 104 N. Car. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. 686. See also, *Myers v. Knabe*, 51 Kans. 720, 33 Pac. 602.

⁷¹ *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. 339; *Fecel v. Guinault*, 32 La. Ann. 91; *Godwin v. Parker*, 152 N. Car. 672, 68 S. E. 208. See also, *De Vries v. Crofoot*, 148 Mich. 183, 111 N. W. 775.

§ 380. **Effect of want of knowledge.**—The only effect which want of knowledge of the insanity of the other party has upon an agreement made with him is in the equitable relief to which the person non compos mentis is entitled. When a contract is entered into with another who is in fact insane but apparently sane at the time the contract is executed and to whom is paid an adequate consideration he will not be permitted to rescind unless he restores what he has received under the agreement or otherwise places the adversary party in statu quo. This phase of the subject will be treated more in detail in a subsequent section of this chapter.⁷²

§ 381. **Ratification and avoidance.**—The contracts of an insane person not under guardianship that are voidable in character may be ratified or rescinded.⁷³ They may be ratified by the insane party in a lucid interval or upon recovering mental capacity.⁷⁴ It is not necessary that the ratification be made by express words, it may be evinced by any intelligent act or conduct of the party, made with full knowledge of the facts, which clearly shows an intention to be bound by the contract.⁷⁵ Thus if the insane party knowingly accepts the benefits of the agreement he may be held to have ratified it.⁷⁶ A conveyance of real

⁷² See post, Restoration of Consideration, § 384.

⁷³ See ante, §§ 370, 371.

⁷⁴ *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Howe v. Howe*, 99 Mass. 88; *King v. Siple*, 166 Mich. 258, 131 N. W. 572; *Wolcott v. Connecticut &c. Ins. Co.*, 137 Mich. 309, 100 N. W. 569; *Whitcomb v. Hardy*, 73 Minn. 285, 76 N. W. 29; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. 806; *Gibson v. Western &c. R. Co.*, 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. 586. See also, *San Francisco &c. Clearing House v. MacDonald* (Cal. App.), 122 Pac. 964; *Newman v. Taylor* (Tex. Civ. App.), 122 S. W. 425. In the above case it appears that appellee purchased property while insane. After restoration to sanity he inspected it with the aid of an expert and subsequently called upon the seller to set it up. For at least twelve

months he gave no indication of an intention to disaffirm. Held that by conduct and failure to disaffirm within a reasonable time he had ratified the agreement. He must upon recovering his sanity disaffirm within a reasonable time. *West v. Seaboard Air Line Co.*, 151 N. Car. 231, 65 S. E. 979.

⁷⁵ *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187; *Bond v. Bond*, 7 Allen (Mass.) 1.

⁷⁶ *Gibson v. Western &c. R. Co.*, 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. 586. See also, the case of *Wolcott v. Connecticut &c. Ins. Co.*, 137 Mich. 309, 100 N. W. 569, in which it is held that a delay of over a year after the grantor had been discharged from the insane hospital as cured, in bringing suit to set aside his conveyance of real estate, accompanied by evidence showing that he had, after regaining his sanity, exhibited a full understanding of the conveyance and

estate may be ratified by an intelligent reacknowledgment of the deed in the manner prescribed by law.⁷⁷ Retaining the property received under the contract after one has recovered his mind may amount to a ratification.⁷⁸ This may be especially true if the property has decreased in value.⁷⁹ As with infants the voidable contracts of an insane person are valid and binding until disaffirmed. It is the act of disaffirmance which destroys voidable contracts or deeds.⁸⁰ This distinction between ratification and

had given his reasons for executing it, showed a ratification. For a case stating the rule that the ratification must be the intelligent act of the person ratifying, see *Bond v. Bond*, 7 Allen (Mass.) 1. For a case similar to the case of *Wolcott v. Connecticut General Life Ins. Co.*, cited 137 Mich. 309, 100 N. W. 569, see *Howe v. Howe*, 99 Mass. 88.

⁷⁷*Doran v. McConlogue*, 150 Pa. St. 98, 24 Atl. 357.

⁷⁸*Barry v. Hospital (Cal.)*, 48 Pac. 68; *Strodger v. Granite Co.*, 99 Ga. 595, 27 S. E. 174.

⁷⁹*Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707. A suit brought by the guardian which abates at the insane person's death does not ratify the contract. *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. 656.

⁸⁰*Louisville, N. A. & C. R. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556, where it is said: "There is no question but that the contracts executed or executory may be avoided on the ground that the maker was of unsound mind, but what is necessary to accomplish the avoidance? Here the contract was executed by one not under guardianship, and not judicially determined to be of unsound mind. The contract was more than an executory contract; it was executed in part. Such contracts are not void, but are merely voidable, and to avoid them it is necessary that they shall be disaffirmed. *Ashmead v. Reynolds*, 127 Ind. 441, 26 N. E. 80; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Schuff v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Wray v. Chandler*, 64 Ind. 146; *Freed v. Brown*, 55 Ind. 310; *Nichols v. Thomas*, 53 Ind. 42; *Musselman v. Cravens*, 47 Ind. 1. As said in

Ashmead v. Reynolds, 127 Ind. 441, 26 N. E. 80: 'It is the act of disaffirming which destroys a voidable contract or deed, and not the proceedings which may be taken to give force and effect to the disaffirmance after it has been made.' See also, *Potter v. Smith*, 36 Ind. 231, and *Long v. Williams*, 74 Ind. 115. The reply does not allege that after the execution of the contract the appellee's reason was restored, nor does it allege any act by him, or a guardian for him, disaffirming the contract. Such restoration and disaffirmance, or continued unsoundness of mind and disaffirmance by guardian, are necessary to the sufficiency of a plea in avoidance of a contract. *Hardenbrook v. Sherwood*, 72 Ind. 403. No guardianship being alleged, we cannot presume its existence. Insanity being alleged, and it not appearing that he had been restored, we cannot presume the existence of that condition essential to a valid disaffirmance by him. While the reply does allege that the appellee did not receive or accept the money or the pass, it alleges the apparently inconsistent fact that both have been returned to the appellant. The construction of the pleading must be taken most strongly against the pleader, and we must hold the theory of the pleading to be that, while having been put into possession of the money and the pass, his mind did not concur in the acceptance of the same, and that they were returned. That the return was made with the concurrence of the appellee's mind is a fact essential to a disaffirmance, but is, as we have said, absent from the reply. *Northwestern Insurance Co. v. Blankenship*, 94 Ind. 535; *Lange v. Dammier*, 119 Ind. 567, 21 N. E. 749;

avoidance should be borne in mind. The contract is valid and binding until disaffirmed, the only effect of ratification being to shut off the right to disaffirm.⁸¹

§ 382. **Who may affirm or avoid.**—In case an insane person executes a conveyance or enters into a contract prior to the appointment of a guardian, the guardian subsequently appointed cannot make a valid affirmation of such conveyance or contract without an order of the court which appointed him.⁸² Since the contract of an insane person under guardianship is, as a general rule void, the guardian can give his ward's contract, made while under guardianship, no validity by his ratification or assent thereto.⁸³ An insane person's personal representative may upon his death ratify his contract.⁸⁴ The voidable contract of an in-

Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249."

⁸¹ See Bunn v. Postell, 107 Ga. 490, 33 S. E. 707; Gingrich v. Rogers, 69 Nebr. 527, 96 N. W. 156.

⁸² Funk v. Rentchler, 134 Ind. 68, 33 N. E. 364. "The guardian has no authority to ratify the conveyances of his ward, either directly or indirectly." King v. Siple, 166 Mich. 258, 131 N. W. 572. As to the right of the guardian to ratify an agreement made by his ward prior to his appointment as guardian, see: Gingrich v. Rogers, 69 Nebr. 527, 96 N. W. 156, in which it is held that collections by a guardian of principal and interest on a purchase-price note did not amount to a ratification of a conveyance made by his ward. The court seems to question the right of the guardian to ratify such an agreement at all. It says: "Counsel for the appellee insists that these transactions amounted to a ratification by the guardian and county court, or, what amounts to practically the same thing, to an election to enforce the collection of the securities given as payment for the land, and to abandon any claim or right to rescission. Here again counsel fails to cite us any authority upholding the right or power of the guardian or county court to make such an election, and it would be manifestly an extremely objectionable public policy which would vest such a discretion in

either or both. Untrammelled as it would be, if it should exist at all, it might frequently be employed by incompetent or dishonest officials to the detriment and destruction of the ward's estate; and, once having been exercised, it would, as counsel rightly contends, be irrevocable." The guardian is bound at his peril to disaffirm and avoid. Bowman v. Wade, 54 Ore. 347, 103 Pac. 72. See, however, ante for cases where the guardian has been discharged or the guardianship abandoned.

⁸³ Rannels v. Gerner, 80 Mo. 474, revg. 9 Mo. App. 506; Coleman v. Farrar, 112 Mo. 54, 20 S. W. 441; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235.

⁸⁴ Bunn v. Postell, 107 Ga. 490, 33 S. E. 707; Bullard v. Moor, 158 Mass. 418, 33 N. E. 928. If the deed of an insane grantor has been neither ratified nor avoided in the lifetime of the grantor, his heirs may avoid it after his decease; if the invalid deed was made to one of his heirs, the other heirs or any one or more of them may according to their respective interests avoid it. The executor of his will or the administrator of his estate has no power to ratify such deed to the prejudice of his heirs, especially when he is the wrongful grantee named in the deed. Brown v. Brown, 209 Mass. 388, 95 N. E. 796.

sane person may be disaffirmed by himself in a lucid interval or on recovering mental capacity,⁸⁵ or by his guardian, committee, or conservator,⁸⁶ or on his death by his personal representative, heirs, or devisees.⁸⁷

§ 383. Acts showing a disaffirmance.—Any act or conduct that evinces an intention so to do is sufficient as a disaffirmance;

⁸⁵ *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352, 93 Am. St. 146; *Muselman v. Cravens*, 47 Ind. 1; *Turner v. Rusk*, 53 Md. 65; *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744. It must appear that the insane party's mentality has been restored before he can make a valid disaffirmance. *Louisville &c. R. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556. One may rescind a conveyance of personal property made while insane after regaining his sanity. In the present case the one to whom the property had been given so negligently cared for it that the property was lost or stolen. The court said: "When he (the one to whom the property was given) learned that the jewels were the property of an insane man, it was his duty to take ordinary care of them, with a view of returning the same when defendant's reason was restored." *Patton v. Washington*, 54 Ore. 479, 103 Pac. 60. See also, *Hardenbrook v. Sherwood*, 72 Ind. 403.

⁸⁶ *Smith v. Smith*, 29 App. D. C. 408; *Covington v. Neftzger*, 140 Ill. 608, 30 N. E. 764, 33 Am. St. 261; *Greene v. Maxwell*, 251 Ill. 335, 96 N. E. 227, 36 L. R. A. (N. S.) 418; *McClain v. Davis*, 77 Ind. 419; *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 50 Am. Rep. 405; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Reason v. Jones*, 119 Mich. 672, 78 N. W. 899; *Halley v. Troester*, 72 Mo. 73; *Moore v. Hershey*, 90 Pa. 196. If the ward has the right to recall his promise his guardian who has control of his person and estate may do likewise and revoke the promise. *Buhler v. Trombly*, 139 Mich. 557, 108 N. W. 343, 102 N. W. 647.

⁸⁷ *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707; *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Downham v. Holloway*, 158 Ind. 626, 64 N.

E. 82, 92 Am. St. 330; *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Hovey v. Hobson*, 53 Maine 451, 89 Am. Dec. 705; *Hunt v. Rabitoay*, 125 Mich. 137, 84 N. W. 59, 84 Am. St. 563; *Campbell v. Kuhn*, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479. The following cases are instances in which a devisee was held to have sufficient interest in the property devised to him, to entitle him to attack a transfer of the property devised: *Bethany Hospital Co. v. Philippi*, 82 Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194. In the above case the hospital company was a devisee under the will of R. While insane R. deeded the same property to the defendant. Held, that the devisee had sufficient interest under the will to maintain an action against the defendant to have the deed declared void. *Valpey v. Rea*, 130 Mass. 384; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Goodyear v. Adams*, 1 Silv. (N. Y.) 185, 24 N. Y. St. 31, 5 N. Y. S. 275. See also, *Powell v. Powell*, 30 Ala. 697; *Rickman v. Meier*, 213 Ill. 507, 72 N. E. 1121; *Le Gendre v. Goodridge*, 46 N. J. Eq. 419, 19 Atl. 543; *Van Deusen v. Sweet*, 51 N. Y. 378; *Wolf v. Harris*, 57 Ore. 276, 106 Pac. 1016, 111 Pac. 54. It has been said that the court could see no good reason why a corporation may not seek to be excused from performing its contract on the sole ground that its representative who made the contract for it did not have sufficient mental capacity to know and understand the character and effect of the transaction. The agent was held, however, to have had capacity at the time the contract was executed. *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 123 S. W. 271. Parties who are neither privies in blood nor the legal rep-

thus a suit in ejectment,⁸⁸ or to quiet title,⁸⁹ or a conveyance of the property made to a third person after the grantor has regained his sanity⁹⁰ has been held sufficient as a disaffirmance.⁹¹ The privilege of disaffirmance is personal to the parties above mentioned, and cannot be exercised by the adversary party to the contract.⁹² The statute of limitations once having commenced to run against a person, his subsequent insanity does not toll it,⁹³ but it will not begin to run against a person of unsound mind so long as he is insane.⁹⁴

§ 384. Restoration of consideration.—As a general rule the contract of a person of unsound mind that is fair and beneficial to him and made in good faith without knowledge of his mental infirmity cannot be avoided unless the other party is placed in statu quo.⁹⁵ Under such circumstances if the insane

representative of an insane grantor cannot avoid her conveyance. *Hunt v. Rabitoay*, 125 Mich. 137, 84 N. W. 59, 84 Am. St. 563. See also, *Murphree v. Clisby*, 168 Ala. 339, 52 So. 907, 29 L. R. A. (N. S.) 933.

⁸⁸ *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461n, 123 Am. St. 609.

⁸⁹ *Owing's Case*, 1 Bland. Ch. (Md.) 370, 17 Am. Dec. 311.

⁹⁰ *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352, 93 Am. St. 146.

⁹¹ The mortgage of an insane person cannot be forfeited without his being properly represented by a guardian or conservator, and equity will relieve against an attempted forfeiture in which the insane party was not so represented. *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. 339.

⁹² *San Francisco &c. Clearing House v. MacDonald* (Cal. App.), 122 Pac. 964; *Harmon v. Harmon*, 51 Fed. 113; *Allen v. Berryhill*, 27 Iowa 534, 1 Am. Rep. 309; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. 463; *Hunt v. Rabitoay*, 125 Mich. 137, 84 N. W. 59, 84 Am. St. 563. See *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819, holding that where the adversary party was the wife of the other party to the agreement that she could not disaffirm the contract on the ground

that her husband was unconscious at the time she signed the agreement and remained so until his death which prevented the delivery of the contract when she had received the agreed consideration. See also, ante, § 382.

⁹³ *Black v. Ross*, 110 Iowa 112, 81 N. W. 229.

⁹⁴ *Moore v. City of Waco*, 85 Tex. 206, 20 S. W. 61.

⁹⁵ *Molton v. Camroux*, 4 Exch. 17, 18 L. J. Ex. 356; *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. 1000; *Scanlan v. Cobb*, 85 Ill. 296; *Eldredge v. Palmer*, 185 Ill. 618, 57 N. E. 770, 76 Am. St. 59; *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Harrison v. Otley*, 101 Iowa 652, 70 N. W. 724; *Abbott v. Creal*, 56 Iowa 175, 9 N. W. 115; *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584, 55 Am. Rep. 233; *Myers v. Knabe*, 51 Kans. 720, 33 Pac. 602, per curiam: "A contract or conveyance made fairly and in good faith with a lunatic who is apparently sane, and before any finding of lunacy is made, cannot be annulled by a mere showing of incapacity at the time it was made. If the other party entered into the contract without any knowledge of the insanity, his equitable rights must be protected before there

person does not offer to, or cannot place the other party in his former position the contract is binding.⁹⁶ The reason given for this rule is that, "if a merely voidable contract can be repudiated by one of the parties, even though he be a lunatic, and a recovery can be defeated in the face of these circumstances simply because the party who made the purchase was of unsound mind, though not at the time adjudged to be so, the loss would fall upon a confessedly innocent person, instead of on the one who received and used the article delivered in good faith under the contract." A lunatic who causes the loss must be made to bear the consequences of his infirmity as he must bear his misfortune.⁹⁷

§ 385. Illustrations of the rule.—Thus an insane grantor not under guardianship and not known to be non compos mentis cannot avoid his deed without offering to restore the consideration received therefor,⁹⁸ or in case he purchases land and gives

can be a rescission or annulment. *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584; *Leavitt v. Files*, 38 Kans. 26, 15 Pac. 891." *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. 418; *Moran v. Moran*, 106 Mich. 8, 63 N. W. 989, 58 Am. St. 462; *Shoulters v. Allen*, 51 Mich. 529, 16 N. W. 888; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628; *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Jamison v. Culligan*, 151 Mo. 410, 52 S. W. 224; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Matthiessen & Weichers Refining Co. v. McMahon's Admr.*, 38 N. J. L. 536; *Riggs v. American Tract Society*, 84 N. Y. 330; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Riggan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77; *Lancaster Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Wirebach's Ex'r. v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821. But see *Woodley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. 22; *Hovey v. Hobson*, 53 Maine 451, 89 Am. Dec. 705; *Gibson v. Soper*, 6 Gray (Mass.)

279, 66 Am. Dec. 414; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Wager v. Wagoner*, 53 Nebr. 511, 73 N. W. 937; *Rea v. Bishop*, 41 Nebr. 202, 59 N. W. 555; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766.

⁹⁶ *Burnham v. Kidwell*, 113 Ill. 425; *Scanlon v. Cobb*, 85 Ill. 296; *Alexander v. Haskins*, 68 Iowa 73, 25 N. W. 935; *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584, 55 Am. Rep. 233; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; *Matthiessen & Weichers Refining Co. v. McMahon's Admr.*, 38 N. J. L. 536; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Riggan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77; *Lancaster Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *Sims v. McLure*, 8 Rich. Eq. (S. Car.) 286, 70 Am. Dec. 196; *National Metal Edge Box Co. v. Vanderveer* (Vt.), 82 Atl. 837. See also, *Voris v. Harshbarger*, 11 Ind. App. 555, 39 N. E. 521.

⁹⁷ *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. 418.

⁹⁸ *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. 1000;

a note and mortgage in payment therefor he cannot retain the land and avoid his note and mortgage.⁸⁹ Contracts concerning personal property are controlled by the same principles.¹ The compromise of an insane person before he has been adjudged non compos mentis can only be avoided by placing the other party in statu quo.² Thus it has been held that where an employé while mentally incompetent signed a release of liability for personal injuries and subsequently recovered judgment in an action for the injury, the amount received under the release should be deducted from the judgment.³ If the insane person did not derive any benefit or receive any part of the consideration, he may rescind without making restitution or placing the other party in statu

Studebaker v. Faylor, 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; Gribben v. Maxwell, 34 Kans. 8, 7 Pac. 584, 55 Am. Rep. 233.

⁸⁹Wiser v. Clinton, 82 Conn. 148, 72 Atl. 928, 135 Am. St. 264; National Metal Edge Box Co. v. Vanderveer (Vt.), 82 Atl. 837 (old mortgage taken up and new one given). See also, Bates v. Hyman (Miss.), 28 So. 567, in which it is held that an insane vendee need not offer to restore the property sold to him as a condition precedent to disaffirmance where the vendor retained a mortgage on the property, the vendor's right in the property being fully secured by the mortgage.

¹Flach v. Gottschalk Co., 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. 418.

²Morris v. Great Northern R. Co., 67 Minn. 74, 69 N. W. 628. It has been held that the deed of an insane person not under guardianship will not be avoided, even though the grantee knew the grantor to be insane, where it appears that the transaction was absolutely fair and for the advantage of the grantor and his family. Odom v. Reddick, 104 N. Car. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. 686. In the above case it also appears that the insane person's grantee had conveyed the property to an innocent purchaser. There is authority to the effect, however, that restitution is not necessary. Thus it has been said: "To say that an insane man, before he can avoid a voidable deed, must first put the grantee in statu quo, would be

to say in effect that in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution." It would be absurd to annul the bargain for the mental incompetency of a party and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming when, with restored intellect, he shall seek annulment. Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Hovey v. Hobson, 53 Maine 451, 89 Am. Dec. 705; Dewey v. Algire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. 468. In the above case the insane party's grantee conveyed to another person. This third person was found not to be an innocent purchaser. The court said this was immaterial, however. Wager v. Wagoner, 53 Nebr. 511, 73 N. W. 937. In the above case it is said "this (restitution), in the case of an insane person, is not essential, as a condition of granting relief. It did not appear that the ability existed to restore the consideration in specie." In the cases above cited the insane party or his personal representative were granted affirmative relief. In case of Rea v. Bishop, 41 Nebr. 202, 59 N. W. 555, it is held that the defense of insanity may be interposed to an action on the agreement without offering to make restitution.

³Ipock v. Atlantic & C. R. Co. (N. Car.), 74 S. E. 352.

quo. Thus where the consideration is given a third person there need be no restitution made by the insane party.⁴ The same is true where he executes a negotiable instrument as surety⁵ or becomes an accommodation indorser.⁶

§ 386. **Restoration as a condition precedent.**—If the agreement is harsh or oppressive,⁷ or is detrimental to the interest of the insane party,⁸ it may be disaffirmed in a proper case without placing the other party in statu quo.⁹ Should one party know or have reasonable cause to believe the other to be insane the person non compos mentis may rescind without being required to make restitution. One dealing with a person known to be insane is not entitled to be placed in statu quo as a condition precedent to an avoidance of the agreement.¹⁰ This does not mean, however, that there need be no restitution in any case; it merely means that restitution is not a condition precedent.¹¹ So much

⁴ Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185. In the above case an insane wife mortgaged her property to secure money loaned her husband. *Physio-Med. College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167. In the case last cited the consideration received was an education furnished a nephew and niece of the insane grantor. *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405. In the case last cited a deed of conveyance was executed without consideration.

⁵ Van Patton v. Beals, 46 Iowa 62.

⁶ *Wirebach's Exr. v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821; *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. 788. It is held that one who signs as accommodation indorser while sane and renews the same after he has become non compos mentis is nevertheless bound. Insanity of the maker of a promissory note does not relieve the surety. The surety warrants that the maker of the note is competent to contract. *Caldwell v. Ruddy*, 2 Idaho 1, 1 Pac. 339. See, however, *Grove v. Johnston*, Ir. L. R. 24 C. L. 352, in which it is held that insanity on the part of a collector before he could enter upon his duties relieved his bondsman.

⁷ *Mulligan v. Albertz*, 103 Wis. 140, 78 N. W. 1093.

⁸ *Reason v. Jones*, 119 Mich. 672, 78 N. W. 899.

⁹ See also, *Hale v. Kobbert*, 109 Iowa 128, 80 N. W. 308, in which the heirs were allowed to rescind, notwithstanding they could not place the other party in statu quo, where it appeared that their insane ancestor had made a bargain greatly to his disadvantage.

¹⁰ *Henry v. Fine*, 23 Ark. 417; *Elder v. Schumaker*, 18 Colo. 433, 33 Pac. 175; *Studebaker v. Faylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Hale v. Kobbert*, 109 Iowa 128, 80 N. W. 308; *Clark v. Lopez*, 75 Miss. 932, 23 So. 648, rehearing denied, 23 So. 957; *Matthiessen Refining Co. v. McMahon's Admr.*, 38 N. J. L. 536; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Creekmore v. Baxter*, 121 N. Car. 31, 27 S. E. 994; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. 720; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. St. 766; *Allore v. Jewell*, 94 U. S. 506, 24 L. ed. 260; *Harding v. Wheaton*, 2 Mason (U. S.) 278, Fed. Cas. No. 6051. See, however, *Odum v. Reddick*, 104 N. Car. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. 686.

¹¹ *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Wager v. Wagoner*, 53 Nebr. 511, 73 N. W. 937. See also,

of the consideration as remains in the hands of the insane party must be restored by him upon rescission.¹²

§ 387. Liability for benefits received—Subrogation—Insanity a question of fact.—By another authority the insane person has been held liable to the extent of the actual benefit received by him.¹³ It has also been held that where money is loaned a person known to be insane and the insane party uses such money to pay valid and binding debts, the party making the loan is subrogated to the right of creditors.¹⁴ The sanity of one of the parties to a contract is a question for the jury.¹⁵

Mathews v. Nash, 151 Iowa 125, 130 N. W. 796.

¹² *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. 339; *Encking v. Simmons*, 28 Wis. 272.

¹³ *Creekmore v. Baxter*, 121 N. Car. 31, 27 S. E. 994. In the above case advances were made on the mortgage to one known to be insane. See also, *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Alexander v. Haskins*, 68 Iowa 73, 25 N. W. 935 (holds that the insane party need not make further restitution where the benefits actually received by the other party are equal to the consideration parted with by him).

¹⁴ *McCracken v. Levi*, 24 Ohio Cir. Ct. 584; *Cathcart v. Sugenhimer*, 18 S. Car. 123. In the above case sale was made by committee. See, however, *German & Co. v. DeLashmutt*, 67 Fed. 399. As to what circumstances will charge one with notice that the other contracting party is of unsound mind, see *Groff v. Stitzer*, 77 N. J. Eq. 260, 77 Atl. 46, 31 L. R. A. (N. S.) 1159. See also, the note on this subject in 31 L. R. A. (N. S.) 1159. In this connection see *Murphree v. Clisby*, 168 Ala. 339, 52 So. 907, 29 L. R. A. (N. S.) 933, in which A, an insane person, contracted to purchase certain real estate of B. A borrowed a part of the purchase-price from C, which was paid by C, directly to B, A giving C a mortgage on the premises. Neither B or C knew of A's insanity. C attempted to hold B liable for the return of the purchase-money loaned A, on the ground that he was subrogated to A's claim

against B for a return of the purchase-money. The principles of subrogation were held inapplicable to the case.

¹⁵ *Shook v. Illinois Central R. Co.*, 115 Fed. 57, 52 C. C. A. 615. Under the laws of Kansas when one spouse is insane the other has no power to alienate the homestead. *Withers v. Love*, 72 Kans. 140, 83 Pac. 204, 3 L. R. A. (N. S.) 514n. See also, the note on the subject in 3 L. R. A. 515. To same effect, *Weatherington v. Smith*, 77 Nebr. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430 and note. According to the general rule insanity of the insured at the time a premium becomes due on his insurance policy does not excuse payment thereof at that time and is no ground for avoiding a forfeiture of the policy. *Pitts v. Hartford Life & Co. Ins. Co.*, 66 Conn. 376, 34 Atl. 95, 50 Am. St. 96; *Hawkshaw v. Supreme Lodge & Co.*, 29 Fed. 770; *Grand Lodge & Co. v. Jesse*, 50 Ill. App. 101; *Ingram v. Supreme Council & Co.*, 28 N. Y. Weekly Digest, 320, 14 N. Y. St. 600; *Klein v. New York Life Ins. Co.*, 104 U. S. 88, 26 L. ed. 662; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. ed. 765; *Sheridan v. Modern Woodmen*, 44 Wash. 230, 87 Pac. 127, 7 L. R. A. (N. S.) 973. See, however, *Buchanan v. Supreme Conclave & Co.*, 178 Pa. St. 465, 35 Atl. 873, 34 L. R. A. 436, 56 Am. St. 774. As to the right of an insane person to sue and be sued see *Haines v. West*, 101 Tex. 226, 105 S. W. 1118, 130 Am. St. 839 and note on page 841.

CHAPTER XIII.

MARRIED WOMEN.

- § 390. Incapable of contracting at common law.
391. Contracts void at common law.
392. Contracts in cases of necessity.
393. Contracts in equity—Separate estate—Origin.
394. Equitable separate estate—Powers over.
395. Equitable separate estate—Limitations on powers over.
396. Must intend to bind her separate estate.
397. Intention to bind separate estate—Rule in equity.
398. Rule that intention to bind must expressly appear.
399. Feme covert cannot bind herself personally.
400. Liability attaches to property in her control at time liability assumed.
401. Conveyances directly to husband.
402. Contracts under modern statutes.
403. Contract must be in form prescribed by law.
404. Contracts as to separate estate under statutes.
405. Power conferred to contract with reference to statutory separate estate as to feme sole.
406. Other statutes conferring limited capacity.
407. Statutes requiring husband to join or consent.
408. Statutes requiring written contracts.
- § 409. Statutes giving power to contract as a feme sole.
410. Contracts as sole trader.
411. Contracts of suretyship.
412. Securing husband's debt.
413. Contracts with husband.
414. Contract with husband must not contravene public policy.
415. Consideration need not proceed from husband.
416. Contracts of agency.
417. May appoint husband her agent.
418. Evidence of husband's agency.
419. Wife may act as husband's agent.
420. Power to pledge credit of husband.
421. Power to take and hold lands as trustee.
422. Ratification or confirmation.
423. Restoration.
424. Estoppel.
425. May be estopped by agreement within limit of her capacity to contract.
426. Illustration of the rule.
427. Estoppel by silence or acquiescence.
428. Estoppel—When abandoned by husband.
429. Coverture a personal defense and must be pleaded.
430. Conflict of laws—*Lex loci contractus*.
431. *Lex loci contractus*—Exceptions.
432. *Lex fori* controls as to remedy.

§ 390. Incapable of contracting at common law.—In the chapter on Parties it was pointed out that married women were incapable of contracting at common law, except in a few instances arising, in the main, out of necessity.¹ But, as was inti-

¹ See ante, ch. 10.

mated in that chapter, and as will more fully appear in this chapter, the modern rule, especially under comparatively recent legislation, is much more liberal.

§ 391. **Contracts void at common law.**—The contracts of a feme covert were void at common law.² This disability extended even to contracts for necessities.³ Under the common-law rule the husband and wife were one, the husband being that one. Feme coverts were practically a nonentity. In the words of Blackstone, “the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband.”⁴ Indeed, the same writer catalogs marriage as “a sixth method of acquiring property in goods and chattels.”⁵

§ 392. **Contracts in cases of necessity.**—Under this head are included those instances and circumstances under which a married woman may make a valid and binding contract. These exceptions to the general rule will be found enumerated under the head of Coverture in the chapter on Parties and need not be repeated here.

² See *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028; *Harris v. Webster*, 58 N. H. 481. See ante, § 271, Coverture, and, also, § 276, where incapacity is such as to make contracts voidable.

³ *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Fell v. Brown*, 115 Pa. St. 218, 8 Atl. 70; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251. See also, *Smout v. Ilbery*, 10 M. & W. 1, in which it is held that the wife is not liable for provisions furnished her after her husband's death but prior to the time word was received by either party of his death. *Drais v. Hogan*, 50 Cal. 121; *Whipple v. Giles*, 55 N. H. 139; *Wilson v. Burr*, 25 Wend. (N. Y.) 386; *Clark v. Tenneson*, 146 Wis. 65, 130 N. W. 895, 33 L. R. A. (N. S.) 426. See, however, *First National Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 498, 97 Am. St. 840, in which it is said: “In Tennessee the contracts of a married

woman are voidable and will not be enforced against her when there is a plea of coverture.” It does not appear from the case whether there is a statutory provision making the contract of married women voidable, or whether the language employed is merely loosely used. See also, *Clewis v. Malone*, 119 Ala. 312, 24 So. 767. In equity, however, she could by express contract bind her separate estate for necessities. *Miller v. Newton*, 23 Colo. 554 (holding that promise need not be in writing); *Craft v. Rolland*, 37 Conn. 491; *Porter v. Baldwin*, 7 Humph. (Tenn.) 175; *Priest v. Conc*, 51 Vt. 495, 31 Am. Rep. 695. See also, *Hall v. Faust*, 9 Rich. Eq. (S. Car.) 294.

⁴ 2 Bl. Com. 433. See also, *Hall v. Johns*, 17 Idaho 224, 105 Pac. 71; *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; *Spencer v. Parsons*, 89 Ky. 577, 11 Ky. L. 769, 13 S. W. 72, 25 Am. St. 555.

⁵ 2 Bl. Com. 433.

§ 393. Contracts in equity—Separate estate—Origin.—

The courts of chancery were the pioneers in the emancipation of women movement. About the end of the seventeenth century they recognized a separate proprietorship in the wife utterly at variance with the well-established principles of common law. This was accomplished through the medium of trusts and developed into what is known as her equitable separate estate vested in her for her separate use, to the exclusion of the husband's marital rights therein.⁶

⁶ See, generally, *Alston v. Rowles*, 13 Fla. 117; *Duke v. Duke*, 81 Ky. 308; *Struss v. Norton*, 20 Ky. L. 1116, 43 S. W. 976; *Petty v. Malier*, 14 B. Mon. (Ky.) 246; *Flaum v. Wallace*, 103 N. Car. 296, 9 S. E. 567. See also, the case *Drake v. Storr*, *Freem. ch.* 205, which shows that as early as the year A. D. 1695 the wife's separate estate was a well settled doctrine of equity. *Taylor v. Meads*, 4 DeG., J. & S. 597, in which it is said: "When the courts of equity established the doctrine of the separate use of a married woman and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a feme sole. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the feme covert is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. * * * The violence thus done by courts of equity to the principles and policy of the common law as to the status of the wife during coverture is very remarkable, but the doctrine is established and must be consistently followed to its legitimate consequences." This disposition of courts of equity to evade the harsh and unjust rules of the common law as relates to married women has in many cases resulted in a statement of the general rule that is too broad. They seem to consider that equity regards a married woman absolutely

as if she were a feme sole. Thus in the case of *Currier v. Teske*, 84 Nebr. 60, 120 N. W. 1015, 133 Am. St. Rep. 602, it is said: "In equity a wife has ever been regarded as distinct person, capable of contracting, and whenever equitable grounds for relief have existed her rights have been enforced and protected." As to the wife's power to contract and the attitude of equity toward that power it is said in the case of *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454: "As I understand their (counsels') argument it is this, that a court of equity deals with a married woman who has a separate estate as if she were a feme sole. Now, is that correct? First of all there is one clear and absolute distinction. Can a feme sole, or can a man, be restrained from anticipating, or disposing by way of anticipation, of any property to which she or he is entitled? No. A married woman under coverture can; but how and why? Simply as regards property settled to her separate use, and because equity can modify the incidents of separate estate, which is the creation of equity, and thus the position of a married woman having separate property differs materially from that of a feme sole. Is it true that she is regarded in equity as a feme sole? She is regarded as a feme sole to a certain extent, but not as a feme sole absolutely, and there is the fallacy. She, in my opinion, is regarded as a feme sole only as regards property which, under the trust, she is entitled to deal with as if she were a feme sole, but as regards property which she is restrained from anticipating, she is not, as regards persons other than her

§ 394. **Equitable separate estate—Powers over.**—The methods by which an equitable separate estate may be created and the language necessary to create it do not come within the scope of this work, and will not be considered. Equitable separate estates concern the law of contracts only so far as they remove the disabilities of coverture and give a married woman the right to contract. In these respects it is held as a general rule, where the distinction obtains in its full scope, that a married woman has full power to charge or alienate her equitable separate property or interest therein practically as a feme sole unless specifically restrained by the instrument creating it;⁷ and that it is also within the power of a feme covert to bind her separate estate by her contracts and obligations, and render it liable for the satisfaction of her debts and the fulfilment of her obligations,⁸ except in so far as she may be prohibited from so doing

husband, in the position of a feme sole. As regards her husband, no doubt she is, as regards property settled to her separate use (whether there is a restraint upon anticipation or not), treated as a feme sole, that is to say, she, and not her husband, is the person who alone can receive and give a discharge for the money, and her husband is absolutely excluded; but as regards the outside world she is not regarded as a feme sole in respect of property subject to a restraint upon anticipation." See also, *Johnson v. Gallagher*, 3 DeG., F. & J. 494.

⁷ *Johnson v. Gallagher*, 3 DeG., F. & J. 494; *Hulme v. Tenant*, 1 Bro. C. C. 16, 1 Lead. Cas. in Equity (4th Am. Ed.) 679, and note; *Taylor v. Meads*, 4 DeG. & Sm. 597; *Stead v. Nelson*, 2 Beav. 245; *Jackson v. Hobhouse*, 2 Mer. 483. See, for additional English authorities, *Ewing v. Smith*, 3 Desaus. (S. Car.) 47, 5 Am. Dec. 557, note. *Collins v. Rudolph*, 19 Ala. 616; *Imlay v. Huntington*, 20 Conn. 146; *Cooke v. Husbards*, 11 Md. 492; *Cadematori v. Granger*, 160 Mo. 352, 61 S. W. 195; *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. 319; *Jacques v. M. E. Church*, 17 Johns (N. Y.) 549, 8 Am. Dec. 447; *Todd v. Lee*, 15 Wis. 400.

⁸ *Hulme v. Tenant*, 1 Bro. C. C. 16,

1 Lead. Cas. in Equity (4th Am. Ed.) 679, and note; *Peacock v. Monk*, 2 Ves. 190; *Norton v. Turvill*, 2 P. Wms. 145; *Butler v. Cumpston*, L. R. 7 Eq. 16; *In re Leeds Banking Co.*, L. R. 3 Eq. 781; *Murray v. Barlee*, 3 Myl. & K. 209; *Owens v. Dickenson*, *Craig & Ph.* 48; *Johnson v. Gallagher*, 3 DeG., F. & J. 494; *McHenry v. Davies*, L. R. 10 Eq. 88, 39 L. J. Ch. 866, 22 L. T. (N. S.) 643, 18 W. R. 855; *Chubb v. Stretch*, L. R. 9 Eq. 555, 39 L. J. Ch. 329, 22 L. T. (N. S.) 86, 18 W. R. 483; *Merrick v. Sherwood*, 22 U. C. C. P. 467. See also, *Burrows v. Leavens*, 1 Can. L. T. 697; *Stephen v. Beall*, 22 Wall. (U. S.) 329, 22 L. ed. 786; *In re Kinkead*, 3 Biss. (U. S.) 405, Fed. Cas. No. 7824. But see *Boyd v. Withers*, 1 Chicago Leg. N. 401, 3 Fed. Cas. No. 1752; *Bolman v. Overall*, 86 Ala. 168, 5 So. 455; *Brame v. McGee*, 46 Ala. 170; *Paulk v. Wolfe*, 34 Ala. 541; *Kaiser v. Stickney*, 3 MacArthur (D. C.) 118; *Staley v. Hamilton*, 19 Fla. 275; *Major v. Symmes*, 19 Ind. 117; *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; *McKee v. Syper*, 6 Ky. L. 519; *Lillard v. Turner*, 16 B. Mon. (Ky.) 374; *Coleman v. Wooley*, 10 B. Mon. (Ky.) 320. But see *Daniel v. Robinson*, 18 B. Mon. (Ky.) 301; *Hanly & Co. v. Downing*, 4 Metc. (Ky.) 95; *Price v. Bigham*, 7 Har. &

by the provisions of the instrument creating the separate estate.⁹

§ 395. Equitable separate estate—Limitations on powers over.—In many jurisdictions, however, the foregoing rule is greatly limited in its application. By some authorities the separate estate of a feme covert is chargeable with her contracts only when entered into for its benefit.¹⁰ In other jurisdictions it seems that the contract will be good only when personally beneficial to the wife or her estate.¹¹ In still others, instead of hav-

J. (Md.) 296; *Hall v. Eccleston*, 37 Md. 510; *Carpenter v. Leonard*, 5 Minn. 155; *Pond v. Carpenter*, 12 Minn. 430; *Futch v. Jeffries*, 59 Miss. 506; *Franklin v. Beatty*, 27 Miss. 347; *Frierson v. Williams*, 57 Miss. 451. See also, *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Boatmen's Sav. Bank v. Collins*, 75 Mo. 280; *Davis v. Smith*, 75 Mo. 219; *Morrison v. Thistle*, 67 Mo. 596; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Meyerson v. Van Wagoner*, 56 Mo. 115; *Metropolitan Bank v. Taylor*, 53 Mo. 444; *Lincoln v. Rowe*, 51 Mo. 571; *Kimm v. Weippert*, 46 Mo. 532, 2 Am. Rep. 541; *Bruner v. Wheaton*, 46 Mo. 363; *Schafroth v. Ambs*, 46 Mo. 114; *Whitesides v. Cannon*, 23 Mo. 457; *Coats v. Robinson*, 10 Mo. 757; *Mendenhall v. Leivy*, 45 Mo. App. 20; *Boatmen's Sav. Bank v. McMenamy*, 35 Mo. App. 198; *Kloke v. Martin*, 55 Nebr. 554, 76 N. W. 168; *Oakley v. Pound*, 14 N. J. Eq. 178; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Miller v. Richardson*, 88 Hun (N. Y.) 49, 68 N. Y. St. 290, 34 N. Y. S. 506; *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9; *Gardner v. Gardner*, 7 Paige (N. Y.) 112, 22 Wend. (N. Y.) 526; *Curtis v. Engel*, 2 Sandf. Ch. (N. Y.) 287; *Ballin v. Dillaye*, 37 N. Y. 35, 35 How. Pr. (N. Y.) 216; *Merchants' Bank v. Scott*, 59 Barb. (N. Y.) 641; *Treadwell v. Archer*, 76 N. Y. 196, affg. 10 Hun (N. Y.) 73; *Palen v. Starr*, 7 Hun (N. Y.) 422; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, revg. 21 Barb. (N. Y.) 286; *Little v. Rawson*, 8 Abb. N. Cas. (N. Y.) 253; *Jaques v. M. E. Church*, 17 Johns. (N. Y.) 549, revg. 3 Johns. Ch. (N. Y.) 77;

Firemen's Ins. Co. v. Bay, 4 Barb. (N. Y.) 407, affd., 4 N. Y. 9; *Rope v. Van Wagner*, 41 Hun (N. Y.) 642, 3 N. Y. St. 156; *McVey v. Cantrell*, 70 N. Y. 295, 26 Am. Rep. 605, affg. 6 Hun (N. Y.) 528; *Frazier v. Brownlow*, 3 Ired. Eq. (N. Car.) 237, 42 Am. Dec. 165; *Phillips v. Graves*, 20 Ohio St. 371, 5 Am. Rep. 675; *Karns v. Moore*, 5 Pa. Super. Ct. 381; *Ellis v. American Mortg. Co.*, 36 S. Car. 45, 15 S. E. 267; *Dial v. Agnew*, 28 S. Car. 454, 6 S. E. 295; *Cummings v. Irvin* (Tenn. Ch. 1900), 59 S. W. 153; *Warren v. Freeman*, 85 Tenn. 513; *Howe v. Chesley*, 56 Vt. 727; *Frery v. Booth*, 37 Vt. 78; *Price v. Planters' Nat. Bank*, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214; *Bain v. Buff's Admr.*, 76 Va. 371; *Darnall v. Smith's Admr.*, 26 Gratt. (Va.) 878; *Crockett v. Doriot*, 85 Va. 240, 3 S. E. 128; *Wooster v. Northrup*, 5 Wis. 245; *Todd v. Lee*, 15 Wis. 400. ⁹ *Bank of Shelby v. James*, 95 Tenn. 8, 30 S. W. 1038. Restraint may be expressed or implied. *Collins v. Wassell*, 34 Ark. 17; *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488; *Bain v. Buff's Admr.*, 76 Va. 371; *Atkinson v. McCormick*, 76 Va. 791; *Dezendorf v. Humphreys*, 95 Va. 473, 28 S. E. 880.

¹⁰ *Heburn v. Warner*, 112 Mass. 271, 17 Am. Rep. 86; *Musson v. Trigg*, 51 Miss. 172; *Adams v. Mackey*, 6 Rich. Eq. (S. Car.) 75; *Owens v. Johnson*, 8 Baxt. (Tenn.) 265.

¹¹ *Halle v. Einstein*, 34 Fla. 589, 16 So. 554; *Smith's Admr. v. Poythress*, 2 Fla. 92, 48 Am. Dec. 176; *Johnson v. Cummings*, 16 N. J. Eq. 97, 84 Am. Dec. 142; *Armstrong v. Ross*, 20 N.

ing every power from which she is not negatively debarred in the instrument creating the separate estate, she is deemed to have none but those positively given to or reserved for her.¹² Other jurisdictions give her the right to dispose of her separate property when it consists of personalty, and in this is included rents and profits from real estate, but they deny her the right to dispose of or charge the corpus of realty settled upon her as her separate estate.¹³

§ 396. **Must intend to bind her separate estate.**—It will be seen from the foregoing that there is no uniformity among the decided cases on this question, and that they range all the way from those which practically hold that a married woman has no power to charge her separate estate except as that power is expressly conferred upon her by the instrument creating it, to those which give her unrestricted freedom in this respect except as expressly prohibited by the instrument itself. Nor does the confusion end here. There is a further conflict as to what contracts which are within the scope of a feme covert's power to make do in fact bind her estate. The wife's separate estate is not bound unless it appears that she intended to bind it. The question of whether or not her separate estate is charged, therefore, becomes clearly a question of intent on the part of the parties, to be ascertained according to the rules of equity. It thus is made to appear

J. Eq. 109; Perkins v. Elliott, 8 C. E. Green (N. J.) 526, revg. 22 N. J. Eq. 127; Homeopathic Mut. Life Ins. Co. v. Marshall, 32 N. J. Eq. 103; Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503; Dyett v. North American Coal Co., 20 Wend. (N. Y.) 570, 32 Am. Dec. 598; Patrick v. Littell, 36 Ohio St. 79, 38 Am. Rep. 552; Avery v. Vansickle, 35 Ohio St. 270; Winternitz v. Porter, 86 Pa. St. 35; Elliott v. Gower, 12 R. I. 79, 34 Am. Rep. 600; Scottish American Mortg. Co. v. Deas, 35 S. Car. 42, 14 S. E. 486, 28 Am. St. 832; Cater v. Eveleigh, 4 Desaus. (S. Car.) 19, 6 Am. Dec. 596; James v. Mayrant, 4 Desaus. (S. Car.) 591, 6 Am. Dec. 630; Hubbard v. Bugbee, 55 Vt. 506, 45 Am. Rep. 637; Dale v. Robinson, 51 Vt. 20, 31 Am. Rep. 669.

¹² Palmer v. Rankins, 30 Ark. 771; Cookson v. Toole, 59 Ill. 515; Doty v. Mitchell, 9 Sm. & M. (Miss.) 435; Cochran v. O'Hern, 4 Watts & S. (Pa.) 95, 39 Am. Dec. 60; Thomas v. Folwell, 2 Whart. (Pa.) 11, 30 Am. Dec. 230; Maurer's App., 86 Pa. 380; Metcalf v. Cook, 2 R. I. 355; Creighton v. Clifford, 6 S. Car. 188; Ewing v. Smith, 3 Desaus. (S. Car.) 417, 5 Am. Dec. 557; Morgan v. Elam, 4 Yerg. (Tenn.) 375; Kirby v. Miller, 4 Coldw. (Tenn.) 3.

¹³ Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478; Price v. Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214; Burnett v. Hawpe's Exr., 25 Grat. (Va.) 481; Patton v. Merchants' Bank, 12 W. Va. 587; Radford v. Carwile, 13 W. Va. 572, reviewing a large number of English and American cases.

that the conflict does not arise from the test to be applied, but from the uncertainty as to what shall be sufficient evidence of her intention to bind her equitable separate estate. It is apparent that no question of intent arises where such intention expressly appears from the contract itself, as where entered into expressly on the credit of her separate estate,¹⁴ or where the obligation incurred by a note or mortgage is made a charge upon her separate estate.¹⁵

§ 397. Intention to bind separate estate—Rule in equity.—However, equity may in certain jurisdictions appropriate a married woman's property for the satisfaction of a debt; and it may do this although nothing is said in the contract in regard to her separate property, and no express charge is made on her separate property by the contract. This is on the theory that since she cannot bind herself personally at law she must have intended, *prima facie*, at least, to bind her separate estate in equity, since it is only by this means that her contract can be given any effect. Unless this intention is ascribed to her she would be in position of having perpetrated a deliberate fraud on the other party.¹⁶ Thus it has been held that in case a feme covert executes a promissory note or other written contract an intention to charge her separate estate is presumed, notwithstanding the note makes no mention thereof.¹⁷

¹⁴ *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366; *Rogers v. Ward*, 8 Allen (Mass.) 387, 85 Am. Dec. 710; *Heburn v. Warner*, 112 Mass. 271, 17 Am. Rep. 86; *Jones v. Craigmiles*, 114 N. Car. 613, 19 S. E. 638; *Singluff v. Tindal*, 40 S. Car. 504, 19 S. E. 137; *Martin v. Suber*, 39 S. Car. 525, 18 S. E. 125; *National Exchange Bank v. Cumberland Lumber Co.*, 100 Tenn. 479, 47 S. W. 85; *Priest v. Cone*, 51 Vt. 495, 31 Am. Rep. 695.

¹⁵ *Hester v. Barker*, 42 S. Car. 128, 20 S. E. 52. The words "I hereby bind my separate estate" have been held to create an express charge. *National Exchange Bank v. Cumberland Lumber Co.*, 100 Tenn. 479, 47 S. W. 85.

¹⁶ *Miller v. Newton*, 23 Cal. 554; *Deering v. Boyle*, 8 Kans. 525, 12 Am. Rep. 480; *Lillard v. Turner*, 16

B. Mon. (Ky.) 374; *Cardwell v. Perry*, 82 Ky. 129, 6 Ky. L. 97, 5 Ky. L. 936; *Vanderheiden v. Mallory*, 1 N. Y. 452; *Phillips v. Graves*, 20 Ohio 371, 5 Am. Rep. 675; *Hershizer v. Florence*, 39 Ohio St. 516; *Williams v. Urmston*, 35 Ohio St. 296, 35 Am. Rep. 611 (overruling *Levi v. Earl*, 30 Ohio St. 147, and *Rice v. Railroad Co.*, 32 Ohio St. 380, 30 Am. Rep. 610); *Phillips v. Graves*, 20 Ohio St. 371, 5 Am. Rep. 675; *Price v. Planters' Nat. Bank*, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214.

¹⁷ *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; *Coates v. Robinson*, 10 Mo. 757; *Machir v. Burroughs*, 14 Ohio 519; *Williams v. Urmston*, 35 Ohio St. 296, 35 Am. Rep. 611.

§ 398. Rule that intention to bind must expressly appear.

—Other authorities hold that no such presumption arises, but that the feme covert's intention to bind her separate estate must be made to expressly appear from the contract itself or the surrounding circumstances.¹⁸ Under this rule a promissory note signed by a married woman gives rise to no presumption that she intended to bind her separate estate, but such intention must be proved.¹⁹ Other cases give expression to a modified form of this rule, to the effect that the intent to bind her separate estate must expressly appear unless the contract is for the benefit of the estate itself.²⁰ It will be seen from the foregoing that there is great confusion on this branch of the subject, it being impossible to reconcile in many instances cases decided in the same jurisdictions. No attempt even has been made to do so, as it would be hopeless. The various theories upon which the different cases have been decided have merely been roughly indicated.²¹

¹⁸ *Goldsmith v. Ladson*, 9 Mack. (D. C.) 220; *Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587; *Quisenberry v. Thompson*, 19 Ky. L. 1554, 43 S. W. 723; *Benson v. Simmers*, 21 Ky. L. 1060, 53 S. W. 1035; *Westervelt v. Baker*, 56 Nebr. 63, 76 N. W. 440, citing and following *Grand Island Banking Co. v. Wright*, 53 Nebr. 574, 74 N. W. 82; *Ragsdale v. Gossett*, 2 Lea (Tenn.) 729; *Shacklett v. Polk*, 4 Heisk. (Tenn.) 104; *Cherry v. Clements*, 10 Humph. (Tenn.) 552; *Litton v. Baldwin*, 8 Humph. (Tenn.) 209, 47 Am. Dec. 605; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Dismukes v. Shafer* (Tenn. Ch. App.), 54 S. W. 671.

¹⁹ *Grand Island Banking Co. v. Wright*, 53 Nebr. 574, 74 N. W. 82; *Webstervelt v. Baker*, 56 Nebr. 63, 76 N. W. 440; *Farmers' Bank v. Boyd*, 67 Nebr. 497, 93 N. W. 676. Under this principle it has been held that a promissory note does not bind a married woman's separate estate if the intent so to do is given expression only in a trust deed which is void for usury. *Wallace v. Goodlet*, 93 Tenn. 598, 30 S. W. 27.

²⁰ *Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587; *Wilson v. Jones*, 46 Md. 349; *Homeopathic &c. Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Yale v.*

Dederer, 22 N. Y. 450, 78 Am. Dec. 216; *Dale v. Robinson*, 51 Vt. 20, 31 Am. Rep. 669.

²¹ An eminent writer has said of the topic under discussion: "Since the confusion of tongues at the Tower of Babel, there has been nothing more noteworthy, in the same line, than the discordant and ever-shifting utterances of the judicial mind on the subject of the present sub-title. True, there has been sometimes a language, which, though limited in its sphere, was tolerably plain; but, no sooner was the language in the way of becoming understood, than, lo, some conquering power of another sort came in, and all was confusion once more. * * * The practitioner must look carefully at what has been adjudged in his own state, examining the cases in the original reports for himself, look at the true principles, consider the mental conformation and habits of the individual men who at the time when a controversy arises compose the supreme bench of his state, then judge of the question before him somewhat as he would of a game of chance; and if his client, after being informed of the nature of the ground, chooses to travel it, he may well go along over it with her to guide, yet hardly to protect,

§ 399. **Feme covert cannot bind herself personally.**—In connection with this subject there is one other point that must be borne in mind. It is to the effect that in equity a feme covert cannot bind herself personally any more than she can at law.²² In contemplation of law the creditor's remedy lies, not against the married woman, but against her separate estate.²³ Moreover, it has been held that this liability attaches only to such property as was in her possession or control at the time the liability was assumed.²⁴

§ 400. **Liability attaches to property in her control at time liability assumed.**—It does not attach to property acquired after she has incurred the obligation.²⁵ From the foregoing it appears that the claim against the married woman is in the nature of a lien against her separate property. It is not a lien, however, which runs with the estate. If the property is sold or disposed of in any way before judgment it cannot be claimed by her creditors in satisfaction of debts contracted while she owned it.²⁶ It is apparent that since the separate property of a feme covert is liable in a proper case in satisfaction of her

keeping meanwhile in full sight of her husband." 1 Bishop on Married Women, §§ 847, 869.

²² Johnson v. Gallagher, 3 DeG., F. & J. 494; Aylett v. Asnton, 1 Myl. & C. 105; Prentiss v. Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640; Rodemeyer v. Rodman, 5 Iowa 426; Bell v. Kellar, 13 B. Mon. (Ky.) 381; Kocher v. Cornell, 59 Nebr. 315, 80 N. W. 911; Pierson v. Lum, 25 N. J. Eq. 390; Fallis v. Keys, 35 Ohio St. 265; Pilcher v. Smith, 2 Head (Tenn.) 208; Ankeney v. Hannon, 147 U. S. 118, 37 L. ed. 105, 13 Sup. Ct. 206; Canal Bank v. Partee, 99 U. S. 325, 25 L. ed. 390.

²³ Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Burch v. Breckenridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Dougherty v. Sprinkle, 88 N. Car. 300; Bain v. Buff's Admr., 76 Va. 371. "It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is set-

tled to her separate use as a debtor, and liable to satisfy the engagement." Ex parte Jones, L. R. 12 Ch. Div. 484. To same effect, see Shattock v. Shattock, L. R. 2 Eq. 182; London & Bank v. Lempriere, L. R. 4 P. C. 572; Warren v. Freeman, 85 Tenn. 513, 3 S. W. 513.

²⁴ Pike v. Fitzgibbon, 17 Ch. Div. 454.

²⁵ Pike v. Fitzgibbon, L. R. 17 Ch. Div. 454; In re Sykes's Trusts, 2 Johns. & H. 415; Mendenhall v. Leivy, 45 Mo. App. 20; Kocher v. Cornell, 59 Nebr. 315, 80 N. W. 911; Sticken v. Schmidt, 64 Ohio St. 354, 60 N. E. 561; Manahan v. Hart, 24 Ohio C. C. 527; Flanagan v. Oliver Finnie Grocer Co., 98 Tenn. 599, 49 S. W. 1079; Ankeney v. Hannon, 147 U. S. 118, 37 L. ed. 105, 13 Sup. Ct. 206; Filler v. Tyler, 91 Va. 458, 22 S. E. 235.

²⁶ Osborn v. Graham, 46 Mo. App. 28; Flanagan v. Oliver Finnie Grocer Co., 98 Tenn. 599, 40 S. W. 1079.

obligation the right to sue and be sued in equity with respect to it exists.²⁷

§ 401. **Conveyances directly to husband.**—Under the old common-law rule the wife could not convey property directly to the husband.²⁸ In equity, however, it has been held in some jurisdictions that she might make such a conveyance directly to the husband without the intervention of any third person or trustee, when made for an adequate consideration and untainted by fraud, circumvention or undue influence.²⁹ Conveyances by the wife to the husband have, however, been held invalid in equity.³⁰

§ 402. **Contracts under modern statutes.**—The preceding discussion has had to do with the wife's separate estate as developed by courts of equity. Modern statutes, in nearly if not all the states, have made many radical changes in the common-law rights of married women, giving them either complete or limited capacity to contract. Within the scope of her statutory power a married woman may make a valid contract, and her liability is governed by the rules applicable to persons under no disability

²⁷ See *Lombard v. Morse*, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273; *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. 266, and note, p. 271.

²⁸ *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; *Frissell v. Rozier*, 19 Mo. 448; *Alexander v. Shalala*, 228 Pa. 297, 74 Atl. 554, 31 L. R. A. (N. S.) 844n, 139 Am. St. 1004. See also, post, § 407, Statutes requiring husband to join or consent.

²⁹ *Mathy v. Mathy*, 88 Ark. 56, 113 S. W. 1012. The presumption is against its validity, however. *McDonald v. Smith*, 95 Ark. 523, 130 S. W. 515 (presumption against its validity); *Blake v. Blake*, 7 Iowa 46; *Turner v. Shaw*, 96 Mo. 22, 8 S. W. 897, 9 Am. St. 319n; *Wimans v. Peebles*, 32 N. Y. 423; *Scott v. Calladine*, 79 Hun (N. Y.) 79, 29 N. Y. S. 630, affd., 145 N. Y. 639, 41 N. E. 90; *Townshend v. Townshend*, 1 Abb. N. Cas. (N. Y.) 81. See *Wormley v. Wormley*, 98 Ill. 544, in which case the husband bought property and took title in his wife's name. The wife agreed to convey to him. It was held

that this agreement would be enforced in equity. An agreement similar to that in the case last cited may be enforced after the wife's death. In *re Corr's Appeal*, 62 Conn. 403, 26 Atl. 478; *Hulse v. Bacon*, 26 Misc. (N. Y.) 455, 40 App. Div. (N. Y.) 89, 57 N. Y. S. 537. See also, *Grain v. Shipman*, 45 Conn. 572.

³⁰ *Milwee v. Wilwee*, 44 Ark. 112. The above case holds her executory contract to convey voidable at her election, "if not a mere nullity." *Brooks v. Kerns*, 86 Ill. 547; *Kinnaman v. Pyle*, 44 Ind. 275; *Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128; *White v. Wager*, 25 N. Y. 328, affg. 32 Barb. (N. Y.) 250. In the above case it also appeared that the conveyance was without a valuable consideration. *Jarrell v. Crow*, 30 Tex. Civ. App. 629, 71 S. W. 397; *Graham v. Stuve* (sub nomine *Struwe*), 76 Tex. 533, 13 S. W. 381. In the above case it appeared that the conveyance was wholly without consideration. *Smith v. Vineyard*, 58 W. Va. 98, 51 S. E. 871. See also, *Gebb v. Rose*, 40 Md. 387.

whatever.⁸¹ In some jurisdictions the disabilities of coverture are entirely removed.⁸² Thus, under a statute providing that she may enter into any contract, express or implied, the same as if she were sole, it has been held that she might bind herself by a contract entered into with an employé.⁸³ Or where she is given a right to her separate earnings she may contract with a corporation for compensation for services rendered by her to such corporation,⁸⁴ or contract to furnish board and perform services in caring for persons other than her husband or members of her family.⁸⁵ She may be held liable on a contract by which she agrees to compensate an attorney for services rendered by him in an action for divorce brought by⁸⁶ or against her.⁸⁷ Beyond the powers so conferred she cannot go. Her contracts outside the purposes authorized by statute are void. Her power to make certain contracts does not give her authority to enter into agreements of a different character.⁸⁸

⁸¹ *Tarr v. Muir*, 107 Ky. 283, 53 S. W. 663; *McKell v. Merchants' Nat. Bank*, 62 Nebr. 608, 87 N. W. 317; *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920. However, since the statutes are in derogation of the common law, they will be held to have repealed the same only in so far as their language plainly requires. See *Graham v. Tucker*, 56 Fla. 307, 47 So. 563, 131 Am. St. 124; *Cole v. Van Riper*, 44 Ill. 58; *Spier v. Opfer*, 73 Mich. 35, 40 N. W. 909, 2 L. R. A. 345n, 16 Am. St. 556; *Gordon v. Gordon*, 183 Mo. 294, 82 S. W. 11; *Compton v. Pierson*, 28 N. J. Eq. 229; *Alexander v. Shalala*, 228 Pa. 297, 77 Atl. 554, 31 L. R. A. (N. S.) 844n, 139 Am. St. 1004. Such statutes should be liberally construed so as to secure to the wife the rights plainly intended to be given her. *Wills v. Jones*, 13 App. D. C. 482; *Buck v. Buck*, 12 Ky. L. 638; *Burr v. Swan*, 118 Mass. 588; *De Vries v. Conklin*, 22 Mich. 255; *Dunbar v. Meyer*, 43 Miss. 679; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613, 1 Am. Rep. 601; *Kriz v. Peege*, 119 Wis. 105, 95 N. W. 108. For a case giving the statute a very liberal construction, see *Harrington v. Lowe*, 73 Kans. 11, 84 Pac. 570, 4 L. R. A. (N. S.) 547.

⁸² *Harrington v. Lowe*, 73 Kans. 11, 84 Pac. 570, 4 L. R. A. (N. S.) 547. See also, *Murdock v. Leonard*, 15 Wash. 142, 45 Pac. 751. Formerly, the ability of a feme covert to contract was exceptional and her disability general. Now the disability is exceptional and her capacity general. *Atkins v. Grist*, 44 Pa. Super. Ct. 310.

⁸³ *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493.

⁸⁴ *Baker v. Jewel Tea Co.*, 152 Iowa 72, 131 N. W. 674.

⁸⁵ *Elliott v. Atkinson* (Ind. App.), 90 N. E. 779. To same effect, see *Bartholomew v. Adams*, 143 Iowa 354, 121 N. W. 1026.

⁸⁶ *Patrick v. Morrow*, 33 Colo. 509, 81 Pac. 242, 108 Am. St. 107; *Wolcott v. Patterson*, 100 Mich. 227, 58 N. W. 1006, 24 L. R. A. 629 and note, 43 Am. St. 456. In the above case the action was discontinued before decree.

⁸⁷ *Tyler v. Winder*, 89 Nebr. 409, 131 N. W. 592, 34 L. R. A. (N. S.) 1080, and note. The above case reviews the authorities pro and con, and bases its decision on the ground that the right to contract for such services was necessarily incident to and included in her right to bring the suit.

⁸⁸ *Graham v. Tucker*, 56 Fla. 307, 47 So. 563, 131 Am. St. 124; *Haas v.*

§ 403. **Contract must be in form prescribed by law.**—Contracts of married women not made in the form prescribed by law are absolutely void.³⁹ Thus where some statutory requirement is omitted from the deed of a feme covert which is essential to its validity the deed is void,⁴⁰ and the mistake cannot be corrected by a court of equity.⁴¹ But, where her disabilities have been entirely done away with, her deed or contract may be reformed in equity the same as in the case of a feme sole.⁴² The modern statutes, by which a full or limited contractual capacity is conferred on married women, vary greatly in the several states. Since her power to make valid contracts depends on these statutes and their construction, reference must be had to the enactments of each state in order to determine with any

Shaw, 91 Ind. 384, 12 Abb. N. Cas. (N. Y.) 304, 46 Am. Rep. 607; Gilbert v. Brown, 29 Ky. L. 1248, 97 S. W. 40, 7 L. R. A. (N. S.) 1053; Grand Island Banking Co. v. Wright, 53 Nebr. 574, 74 N. W. 82; Citizens' State Bank v. Smout, 62 Nebr. 223, 86 N. W. 1068; Westervelt v. Baker, 56 Nebr. 63, 76 N. W. 440; Stenger Benev. Assn. v. Stenger, 54 Nebr. 427, 74 N. W. 846; Alexander v. Shalala, 228 Pa. 297, 77 Atl. 554, 31 L. R. A. (N. S.) 844n, 139 Am. St. 1004; Thompson v. Morrow (Tex. Civ. App.), 147 S. W. 706; Taylor v. Thomas (Tex. Civ. App.), 145 S. W. 1061; Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. W. 736. See also, Kitchen v. Chapin, 64 Nebr. 144, 89 N. W. 632, 57 L. R. A. 914, 97 Am. St. 637. Thus, under the statutes of Pennsylvania removing the disabilities of married women, it has been held that a feme covert who is given a separate use in land by will did not have the right to mortgage or convey it away, such power not being given in the will, when the statute was silent as to separate use trusts. Holliday v. Hively, 198 Pa. St. 335, 47 Atl. 988. A feme covert who is the mere possessor of a legal estate, under the married women's act, is powerless to bind or in any manner charge that estate, except in the precise manner authorized and pointed out by law. But having once entered into a contract, for which her legal estate may be liable, no verbal understanding nor

evidence aliunde can abate or alter the force and effect of the contract. McCollum v. Boughton, 132 Mo. 601, 30 S. W. 1028, 34 S. W. 480, 35 L. R. A. 480. See also, Smith v. Turpin, 109 Ala. 689, 19 So. 914; In re Twinning's Appeal, 97 Pa. St. 36; MacConnell v. Lindsay, 131 Pa. St. 476, 19 Atl. 306.

³⁹ Barrett v. Tewksbury, 9 Cal. 13; Wedel v. Herman, 59 Cal. 507; Dickinson v. Glenney, 27 Conn. 104; Williams v. Cudd, 26 S. Car. 213, 2 S. E. 14, 4 Am. St. 714.

⁴⁰ Francis v. Rose, 141 Ky. 645, 133 S. W. 550; Buchanan v. Henry, 143 Ky. 628, 137 S. W. 222. See also, Bott v. Wright (Tex. Civ. App.), 132 S. W. 960.

⁴¹ Bowden v. Bland, 53 Ark. 53, 13 S. W. 420, 22 Am. St. 179; Barrett v. Tewksbury, 9 Cal. 13; Wedel v. Herman, 59 Cal. 507; Leonis v. Lazzarovich, 55 Cal. 52; Moulton v. Hurd, 20 Ill. 137, 71 Am. Dec. 257; Hamar v. Medsker, 60 Ind. 413; Grapengether v. Fejervary, 9 Iowa 163, 74 Am. Dec. 336; Gebb v. Rose, 40 Md. 387; Townsley v. Chapin, 12 Allen (Mass.) 476; Montana Nat. Bank v. Schmidt, 6 Mont. 609, 13 Pac. 382; Davenport v. Sovil's Widow, 6 Ohio St. 459; Spencer v. Reese, 165 Pa. St. 158, 30 Atl. 722.

⁴² Bradshaw v. Atkins, 110 Ill. 323; Murdock v. Leonard, 15 Wash. 142, 45 Pac. 751. See also, Stevens v. Holman, 112 Cal. 345, 44 Pac. 670, 53 Am. St. 216.

degree of certainty the status of a married woman in that jurisdiction. These statutes cannot each be given mention in a work of this character. The most that can be done is to group similar statutes together and give the general effect of the statutes so classified.

§ 404. Contracts as to separate estate under statutes.—

Those enactments whereby a statutory separate estate is created may be divided roughly into two classes, namely, those that create a separate estate without providing that she shall have the right to contract with reference thereto as if she were a feme sole, and those that not only give her a separate estate but in addition give her the right to contract as to her separate estate as if she were single. Under statutes of the first class, especially if they contain no provisions whatever as to the feme covert's right to contract with reference to her statutory separate estate, her power to contract as to it is governed by the rules of equity concerning contracts with reference to her equitable separate estate.⁴³ The reason for this rule is that there is, on principle, no difference between separate estates created by statute and those brought into existence by a special conveyance, and it follows that the same circumstances which would induce a court of equity to charge a feme covert's equitable separate estate would operate to render liable her statutory separate estate.⁴⁴

⁴³ Hooper's Exr. v. Smith, 23 Ala. 639; Blevins v. Buck, 26 Ala. 292; Warfield v. Ravesies, 38 Ala. 518; Ankeney v. Hannon, 147 U. S. 118, 37 L. ed. 105, 13 Sup. Ct. 206. But see Wilkinson v. Cheatham, 45 Ala. 337; McCravey's Admr. v. Todd, 66 Ala. 315. See Shulman v. Fitzpatrick, 62 Ala. 571; Cookson v. Toole, 59 Ill. 515; Williams v. Hugunin, 69 Ill. 214, 18 Am. Rep. 607; Bauman v. Street, 76 Ill. 526; Sweazy v. Kammer, 51 Iowa 642, 2 N. W. 506; Brookings v. White, 49 Maine 479; Carpenter v. Leonard, 5 Minn. 155; Johnson v. Cummings, 16 N. J. Eq. 97, 84 Am. Dec. 142; Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216; Ballin v. Dillaye, 37 N. Y. 35, 35 How. Pr. (N. Y.) 216; Corn Exch. Ins. Co. v. Babcock, 42 N. Y. 614, 1 Am. Rep. 601; Phillips v.

Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Fallis v. Keys, 7 Ohio Dec. 8, affd., 35 Ohio St. 265; Williams v. Urmston, 35 Ohio St. 296, 35 Am. Rep. 611; Hershizer v. Florence, 39 Ohio St. 516. See Rice v. Columbus &c. R. Co., 32 Ohio St. 380, 30 Am. Rep. 610; Payne v. Thompson, 44 Ohio St. 192; Wooster v. Northrup, 5 Wis. 245; Conway v. Smith, 13 Wis. 125; Todd v. Lee, 15 Wis. 400.

⁴⁴ "There is no distinction under the chancery rules arising out of the formal nature of the wife's separate estate, with reference to whether it vested at common law, or by statute, or in equity." James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321; Hankins v. Columbia Trust Co., 142 Ky. 206, 134 S. W. 498; Conway v. Smith, 13 Wis. 125.

In some jurisdictions statutes of this same class are construed as giving her the right to make only such contracts as shall be for the benefit of such estate, in accordance with the equitable doctrine there observed.⁴⁵ Thus, she has been held liable for help employed on her farm, although the contract of hiring was originally made by the husband,⁴⁶ and bound by an agreement that the report made by appraisers shall be final.⁴⁷ Loans⁴⁸ made to her and debts contracted by her in her separate business have been held binding on the separate estate.⁴⁹

On the other hand, contracts of suretyship, where the wife receives no consideration for so acting,⁵⁰ or a confession of judgment, except when for the express benefit of her separate estate,⁵¹ have been held not beneficial to her and therefore unenforceable. The contract must also relate to her separate estate as defined by

⁴⁵ *Robertson v. Robertson* (Ky.), 72 S. W. 813; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Russel v. People's Sav. Bank*, 39 Mich. 671, 33 Am. Rep. 444; *Mosher v. Kittle*, 101 Mich. 345, 59 N. W. 497; *Detroit Chamber of Commerce v. Goodman*, 110 Mich. 498, 68 N. W. 295, 35 L. R. A. 96; *Edison v. Babka*, 111 Mich. 235, 69 N. W. 499; *Caldwell v. Jones*, 115 Mich. 129, 73 N. W. 129; *Doane v. Feather's Estate*, 119 Mich. 691, 78 N. W. 884; *Billingsly v. Swenson Land Co.* (Tex. Civ. App.), 123 S. W. 194. The rule is statutory in the above state. Under the Texas statute a simple contract of rental of land has been held not a contract for the benefit of the separate property of the wife. *Taylor v. Thomas* (Tex. Civ. App.), 145 S. W. 161. "Our conclusion is, that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void

at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it." *Willard v. Eastham*, 15 Gray (Mass.) 328, 77 Am. Dec. 366.

⁴⁶ *Mosher v. Kittle*, 101 Mich. 345, 59 N. W. 497.

⁴⁷ *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146, 84 N. W. 175. The above case was decided under the Michigan statute.

⁴⁸ *Fletcher v. Brainerd*, 75 Vt. 300, 55 Atl. 608.

⁴⁹ *First Nat. Bank v. Hirschowitz*, 46 Fla. 588, 35 So. 22.

⁵⁰ *Stiles v. Lord*, 2 Ariz. 154, 11 Pac. 314; *Bank of Commerce v. Baldwin*, 14 Idaho 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676n. In the above case the court said: "It clearly appeared that the statute did not extend her liability beyond that which would be for her own use or benefit, or in reference to her separate estate." *Russel v. People's Sav. Bank*, 39 Mich. 671, 33 Am. Rep. 444; *Caldwell v. Jones*, 115 Mich. 129, 73 N. W. 129; *Hanse v. De Witt*, 63 Barb. (N. Y.) 53; *White v. McNett*, 33 N. Y. 371. A feme covert has been held not liable on her promise to pay her sister's board. *June v. Labadie*, 132 Mich. 135, 92 N. W. 937.

⁵¹ *Real Estate Investment Co. v. Roop*, 132 Pa. St. 496, 19 Atl. 278, 7 L. R. A. 211.

the statute,⁵² since such statutory enactments confer no power to contract in regard to matters other than her separate estate.⁵³ It thus appears that the mere creation of a statutory separate estate does not enlarge the feme covert's power to contract in respect thereto, in the absence of any provision to that effect.⁵⁴ Ordinarily those statutes that confer a limited capacity on married women to contract without reference to their separate estates are held neither to extend nor abridge the power already theirs in equity to charge their separate estates.⁵⁵

⁵² *Pyle v. Gross*, 92 Md. 132, 48 Atl. 713; *June v. Labadie*, 132 Mich. 135, 92 N. W. 937; *Detroit Chamber of Commerce v. Goodman*, 110 Mich. 498, 68 N. W. 295, 35 L. R. A. 96; *Speier v. Opfer*, 73 Mich. 35, 40 N. W. 909, 2 L. R. A. 345n, 16 Am. St. 556; *Edison v. Babka*, 111 Mich. 235, 69 N. W. 499; *Doane v. Feather*, 119 Mich. 691, 78 N. W. 884; *Simon v. Sabb*, 56 S. Car. 38, 33 S. E. 799; *Augusta Nat. Bank v. Beard's Exr.*, 100 Va. 687, 42 S. E. 694.

⁵³ *American Mortgage Co. v. Owens*, 72 Fed. 219, 18 C. C. A. 513; *Shaffer v. Kugler*, 107 Mo. 58, 17 S. W. 698; *Stenger Benev. Assn. v. Stenger*, 54 Nebr. 427, 74 N. W. 846; *Godfrey v. Megahan*, 38 Nebr. 748, 57 N. W. 284; *Hirth v. Hirth*, 98 Va. 121, 34 S. E. 964. See, however, *Tyler v. Winder*, 89 Nebr. 409, 131 N. W. 592, 34 L. R. A. (N. S.) 1080n, which holds that a married woman who has no separate estate may contract for the services of an attorney in a divorce proceeding. The decision turned on the divorce statute, however.

⁵⁴ *Wilkinson v. Cheatham*, 45 Ala. 337; *Fry v. Hamner*, 50 Ala. 52; *Bradley v. Murray*, 66 Ala. 269; *Cook v. Meyer*, 73 Ala. 580; *Carpenter v. Mitchell*, 50 Ill. 470; *Williams v. Hugunin*, 69 Ill. 214, 18 Am. Rep. 607; *Stevens v. Parish*, 29 Ind. 260, 95 Am. Dec. 636; *Brookings v. White*, 49 Maine 479; *West v. Laraway*, 28 Mich. 464; *Kitchell v. Mudgett*, 37 Mich. 81; *Pond v. Carpenter*, 12 Gil. (Minn.) 315; *Self v. Howland*, 23 Miss. 264; *Garrett v. Dabney*, 27 Miss. 335; *McCollum v. Boughton*, 132 Mo. 601, 30 S. W. 1028, 34 S. W. 480, 35 L. R. A. 480; *Bailey v. Pear-*

son, 29 N. H. 77; *Naylor v. Field*, 29 N. J. L. 287; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216; *Ballin v. Dillaye*, 37 N. Y. 35, 35 How. Pr. (N. Y.) 216; *Pippen v. Wesson*, 74 N. Car. 437; *Huntley v. Whitner*, 77 N. Car. 392; *Dougherty v. Sprinkle*, 88 N. Car. 300; *Flaum v. Wallace*, 103 N. Car. 296, 9 S. E. 567; *Phillips v. Graves*, 20 Ohio St. 371, 5 Am. Rep. 675; *Levi v. Earl*, 30 Ohio St. 147; *Mahon v. Gormley*, 24 Pa. St. 80; *Flanders v. Abbey*, 6 Biss. (U. S.) 16, Fed. Cas. No. 4851; *Ankeney v. Hannon*, 147 U. S. 118, 37 L. ed. 105, 13 Sup. Ct. 206; *Wooster v. Northrup*, 5 Wis. 245; *Todd v. Lee*, 15 Wis. 400; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817. "Her estate is wholly statutory and her powers over it are wholly statutory. If she needs more she must resort to a court of chancery." *Wilkinson v. Cheatham*, 45 Ala. 337. But see *Kraemer v. Gless*, 10 U. C. C. P. 470; *Wallace v. Lea*, 28 Can. Sup. Ct. 595, revg. 33 N. B. 492; *Conway v. Smith*, 13 Wis. 125. Under such statutes she may contract for necessities in accordance with the previously existing rules of equity. *Conlin v. Cantrell*, 51 How. Pr. (N. Y.) 312. See also, *Gayle v. Marshall*, 70 Ala. 522; *Hammond v. Corbett*, 51 N. H. 311; *Tierneyer v. Turnquist*, 85 N. Y. 516, 39 Am. Rep. 674. See, however, *Schneider v. Garland*, 1 Mackey (D. C.) 350; *Thomas v. Passage*, 54 Ind. 106; *Howe v. North*, 69 Mich. 272, 37 N. E. 213; *Brown v. Thomson*, 27 S. Car. 500, 4 S. E. 345.

⁵⁵ *Wilkinson v. Cheatham*, 45 Ala. 337; *Sparks v. Moore*, 66 Ark. 437, 56 S. W. 1064; *Arnold v. Engleman*,

§ 405. **Power conferred to contract with reference to statutory separate estate as a feme sole.**—The second group of legislative enactments not only creates a statutory separate estate for married women but confer upon a married woman the power to contract with reference thereto with perhaps certain specified exceptions, as a feme sole.⁵⁶ Under such statutes she may become a surety,⁵⁷ buy property,⁵⁸ or sell it (and this is true whether the property is acquired prior or subsequently to the passage of the statute which gives her the right to deal with her property as a feme sole),⁵⁹ to form a partnership with persons other than her husband,⁶⁰ act as a sole trader,⁶¹ or contract for necessities.⁶²

103 Ind. 512, 3 N. E. 238; Ogden v. Guice, 56 Miss. 330; Corn Exch. Ins. Co. v. Babcock, 42 N. Y. 614, 1 Am. Rep. 601; Mahon v. Gromley, 24 Pa. St. 80.

⁵⁶ American Mortgage Co. v. Owens, 72 Fed. 219, 18 C. C. A. 513; Liebes v. Steffy, 4 Ariz. 11, 32 Pac. 261; Warner v. Hess, 66 Ark. 113, 49 S. W. 489; Kirkley v. Lacey, 7 Houst. (Del.) 213, 30 Atl. 994; Tarr v. Muir, 107 Ky. 283, 53 S. W. 663; Deering v. Boyle, 8 Kans. 525, 12 Am. Rep. 480; Knaggs v. Mastin, 9 Kans. 532; First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133; Citizens' State Bank v. Smout, 62 Nebr. 223, 86 N. W. 1068; Stenger Benev. Assn. v. Stenger, 54 Nebr. 427, 74 N. W. 846; Melick v. Varney, 41 Nebr. 105, 59 N. W. 521; Farwell v. Cramer, 38 Nebr. 61, 56 N. W. 716; Godfrey v. Megahan, 38 Nebr. 748, 57 N. W. 284; Society of Friends v. Haines, 47 Ohio St. 423, 25 N. E. 119; Steffen v. Smith, 159 Pa. St. 207, 28 Atl. 295; Darwin v. Moore, 58 S. Car. 164, 36 S. E. 539; Duval v. Chelf, 92 Va. 489, 23 S. E. 893; Hirth v. Hirth, 98 Va. 121, 34 S. E. 964; Kittitas v. Travers, 16 Wash. 528, 48 Pac. 340; Tufts v. Copen, 37 W. Va. 623, 16 S. E. 793; "A married woman can make all contracts, agreements, and conveyances in regard to her separate estate, * * * and the only prohibition upon her is that she can not 'directly or indirectly become the surety for the husband.'" Sample v. Guyer, 143 Ala. 613, 42 So. 106. Her powers with reference to her separate estate are co-extensive with those of her husband.

Farwell v. Cramer, 38 Nebr. 61, 56 S. W. 716.

⁵⁷ Deering v. Boyle, 8 Kans. 525, 12 Am. Rep. 480; Westervelt v. Baker, 56 Nebr. 63, 76 N. W. 440; Kittitas v. Travers, 16 Wash. 528, 48 Pac. 340. Contra, Bank of Commerce v. Baldwin, 14 Idaho 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676n.

⁵⁸ Liebes v. Steffy, 4 Ariz. 11, 32 Pac. 261; Hays v. Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; Melick v. Varney, 41 Nebr. 105, 59 N. W. 521.

⁵⁹ Jackson v. Everett (Tenn.), 58 S. W. 340. See also, Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917. She may convey her property without the husband joining. Stewart v. Weiser Lumber Co. (Idaho), 121 Pac. 775.

⁶⁰ Vail v. Winterstein, 94 Mich. 230, 53 N. W. 932, 18 L. R. A. 515, 34 Am. St. 334n.

⁶¹ Kirkley v. Lacey, 7 Houst. (Del.) 213, 30 Atl. 994.

⁶² Arnold v. Engleman, 103 Ind. 512, 3 N. E. 238; Mayer v. Lithauer, 28 Misc. (N. Y.) 171, 58 N. Y. S. 1064. See also, Carstens v. Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. 606; Covert v. Hughes, 8 Hun (N. Y.) 305; Wagg v. Gibbons, 5 Ohio St. 580. It has also been held that she may appoint an attorney in fact with power to mortgage her real estate (Linton v. National & C. Ins. Co., 104 Fed. 584, 44 C. C. A. 54. See, however, Frazee v. Frazee, 79 Md. 27, 28 Atl. 1105), assign a policy of life insurance (Supreme Assembly Good Fellows v. Campbell, 17 R. I.

§ 406. **Other statutes conferring limited capacity.**—It is provided by the statutes of some jurisdictions that a feme covert who has been deserted by her husband may contract as if she were single.⁶³ The foregoing is especially true when she contracts for necessities.⁶⁴ By some statutes and in equity a feme covert may contract for necessities furnished the family, and they may be declared a charge to her separate estate.⁶⁵ They must,

402, 22 Atl. 307, 13 L. R. A. 601n), give a release for personal injuries (Cooney v. Lincoln, 20 R. I. 183, 37 Atl. 1031), assume a mortgage on the purchase of real estate (Society &c. v. Haines, 47 Ohio St. 423, 25 N. E. 119; Brewer v. Maurer, 38 Ohio St. 543, 43 Am. Rep. 436), confess judgment (Abell v. Chaffee, 154 Pa. St. 254, 26 Atl. 364; Latrobe Bldg. &c. Assn. v. Fritz, 152 Pa. St. 224, 25 Atl. 558), borrow money (Crampton v. Newton's Estate, 132 Mich. 149, 93 N. W. 250; Steffen v. Smith, 150 Pa. St. 207, 28 Atl. 295), become a stockholder (First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133; Kerr v. Urie, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. 493), or employ an attorney. Wells v. Gilpin, 19 Colo. 305, 35 Pac. 545; Thresher v. Barry, 69 Conn. 470, 37 Atl. 1064; Wolcott v. Patterson, 100 Mich. 227, 58 N. W. 1006, 24 L. R. A. 629n, 43 Am. St. 456.

⁶³ Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707n; Love v. Moynehan, 16 Ill. 277, 63 Am. Dec. 306; Carstens v. Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. 606; Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200; Golden v. Galveston, 20 Tex. Civ. App. 584, 50 S. W. 416. See also, Wagg v. Gibbons, 50 Ohio St. 580; Heagy v. Kastner (Tex. Civ. App.), 138 S. W. 788.

⁶⁴ Carstens v. Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. 606. See also, ante, ch. 10.

⁶⁵ Boyd v. Withers, 1 Chicago Leg. N. 410, 3 Fed. Cas. No. 1752; Collins v. Lavenberg, 19 Ala. 682; Wilkinson v. Cheatham, 45 Ala. 337; Eskridge v. Ditmars, 51 Ala. 245; Lee v. Sims, 65 Ala. 248; Bradley v. Murray, 66 Ala. 269; Lee v. Winston, 68 Ala. 402; Gayle v. Marshall, 70 Ala. 522; Wright v. Strauss, 73 Ala. 227. But

see Halliday v. Jones, 57 Ala. 525; Sellmeyer v. Welch, 47 Ark. 485, 1 S. W. 777; Button v. Higgins, 5 Colo. App. 167, 38 Pac. 390; Edmiston v. Smith, 13 Idaho 645, 92 Pac. 842, 14 L. R. A. (N. S.) 871; Barnett v. Marks 71 Ill. App. 673. See Bauman v. Street, 76 Ill. 526; Arnold v. Engleman, 103 Ind. 512, 3 N. E. 238. But see Thomas v. Passage, 54 Ind. 106; Rodemeyer v. Rodman, 5 Iowa 426; Pell v. Cole, 2 Metc. (Ky.) 252; McKee v. Hays, 9 Ky. L. 288; Marsh v. Alford, 5 Bush (Ky.) 392 (debt must be evidenced by writing signed by her); Young v. Smith, 9 Bush (Ky.) 421; Roberts v. Riggs, 84 Ky. 251, 8 Ky. L. 247, 1 S. W. 431; Gray v. Marshall, 12 Ky. L. 103, 13 S. W. 913; Herr v. Lane, 20 Ky. L. 1950, 50 S. W. 545. But see Toombs v. Stone, 2 Metc. (Ky.) 520; First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133; Gray v. Crook, 12 Gill & J. (Md.) 236; Jackson v. West, 22 Md. 71; Carstens v. Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. 606; Pendleton v. Galbreath, 45 Miss. 43; Porter v. Caspar, 54 Miss. 359; Cook v. Ligon, 54 Miss. 368; Conlin v. Cantrell, 51 How. Pr. (N. Y.) 312, affd., 64 N. Y. 217; Mayer v. Lithauer, 28 Misc. (N. Y.) 171, 58 N. Y. S. 1064; Muller v. Platt, 31 Hun (N. Y.) 121; Crisfield v. Banks, 24 Hun (N. Y.) 159; Rawlins v. Neal, 126 N. Car. 271, 35 S. E. 597; Bazemore v. Mounttain, 121 N. Car. 59, 28 S. E. 17; Hackman v. Cedar, 5 Ohio Cir. Dec. 293, 13 Ohio Cir. Ct. 618; Darlington v. Ervin, 13 Phila. (Pa.) 375; Heugh v. Jones, 32 Pa. St. 432; Wauhhoups Estate, 13 Lanc. Bar. (Pa.) 182; Coyle's Estate, 1 Lanc. L. Rev. (Pa.) 234; Mahon v. Gormley, 24 Pa. St. 80; Bair v. Robinson, 108 Pa. St. 247,

however, be furnished on the credit of the wife, coupled with such circumstances as show a promise on her part to pay therefor.⁶⁶ There are some statutes, however, that render her liable for family expenses, regardless of whether or not she contracted the expense in person or has assented thereto.⁶⁷ In other juris-

56 Am. Rep. 198; *Hall v. Faust*, 9 Rich. Eq. (S. Car.) 376; *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513; *Palmer v. Coghlan* (Tex. Civ. App.), 55 S. W. 1122; *Brown v. Sumner's Estate*, 31 Vt. 671; *Priest v. Cone*, 51 Vt. 495, 31 Am. Rep. 695. But see *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817; *O'Malley v. Ruddy*, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702. But see *In re Dumbrill*, 10 Ont. Pr. 216; *Stack v. Padden*, 111 Wis. 42, 86 N. W. 568.

⁶⁶*Griffin v. Patterson*, 1 Can. L. T. 177; *Pontbriand v. Mazurette*, 5 Rev. de Jur. 125; *Gunn v. Samuel*, 33 Ala. 201; *Dodge v. Knowles*, 114 U. S. 430, 29 L. ed. 144, 5 Sup. Ct. 1108, 1197. But see *O'Connor v. Chamberlain*, 59 Ala. 431; *Craft v. Rolland*, 37 Conn. 491; *Hart v. Goldsmith*, 51 Conn. 479; *McDermott v. Garland*, 1 Mackey (D. C.) 496; *Freeman v. Holmes*, 62 Ga. 556; *Edminston v. Smith*, 13 Idaho 645, 92 Pac. 842, 14 L. R. A. (N. S.) 871, 121 Am. St. 294; *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168; *McMahon v. Lewis*, 4 Bush (Ky.) 138; *Gatewood v. Bryan*, 7 Bush (Ky.) 509; *Bell v. Beadel*, 12 Ky. L. 892; *Quisenberry v. Thompson*, 19 Ky. L. 1554, 43 S. W. 723; *Weber v. Zook* (Ky.), 53 S. W. 1034; *Hirschfield v. Waldron*, 83 Mich. 116, 47 N. W. 239; *Meads v. Martin*, 84 Mich. 306, 47 N. W. 583; *Campbell v. White*, 22 Mich. 178; *Paul v. Roberts*, 50 Mich. 611, 16 N. W. 164; *Fafeyta v. McGoldrick*, 79 Mich. 360, 44 N. W. 617; *Chester v. Pierce*, 33 Minn. 370, 23 N. W. 539; *Cook v. Ligon*, 54 Miss. 368; *Grubbs v. Collins*, 54 Miss. 485; *Caldwell v. Hart*, 57 Miss. 123; *Van Diver v. Buckley* (Miss.), 1 So. 633; *Miller v. Brown*, 47 Mo. 504, 4 Am. Rep. 345; *Jeffrey v. Fleming*, 26 Nebr. 685, 42 N. W. 747; *Hammond v. Corbett*, 51 N. H. 311; *Wilson v. Herbert*, 41 N. J. L. 454, 32 Am. Rep. 243; *Feiner v. Boynton*, 73 N. J. L. 136, 62

Atl. 420; *Maxon v. Scott*, 55 N. Y. 247; *Demott v. McMullen*, 8 Abb. Pr. (N. S.) (N. Y.) 335, 31 N. Y. Super. Ct. 686; *Strong v. Moul*, 22 N. Y. St. 762; *Travis v. Lee*, 58 Hun (N. Y.) 605, 11 N. Y. S. 841; *Kegney v. Ovens*, 50 Hun (N. Y.) 600, 18 N. Y. St. 482, 2 N. Y. S. 319; *Bradt v. Shull*, 46 App. Div. (N. Y.) 347, 61 N. Y. S. 484; *Lugar v. Swayze*, 2 Misc. (N. Y.) 409, affg. 1 Misc. (N. Y.) 209, 20 N. Y. S. 885. But see *Weir v. Groat*, 4 Hun (N. Y.) 193; *Berger v. Clark*, 79 Pa. 340; *Robinson v. Bair*, 2 Sadler (Pa.) 223, 3 Atl. 669 (promise by married women to pay burial expenses of mother); *Reed's Estate*, 4 Phila. (Pa.) 375; *Darlington v. Ervin*, 13 Phila. (Pa.) 127; *Donohoe v. Hughes*, 2 Kulp (Pa.) 52; *Murray v. Keyes*, 35 Pa. St. 384; *In re Bear's Estate*, 60 Pa. St. 430; *In re Sawtelle's Appeal*, 84 Pa. St. 306; *Moore v. Copeley*, 165 Pa. St. 294, 30 Atl. 829, 44 Am. St. 664; *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513.

⁶⁷*McDaniels v. McClure*, 142 Iowa 370, 120 N. W. 1031, 134 Am. St. 424. In reference to what are "family expenses", the above case says: "Generally speaking, the only criterion which the statute furnishes is that the account must be for items of goods furnished for and on account of the family, and to be used therein." *McCartney & Co. v. Carter*, 129 Iowa 20, 105 N. W. 339, 3 L. R. A. (N. S.) 145. The above case holds that the extent of her liability cannot be fixed by a note therefor given by the husband. A note given by the husband does not, however, release the wife from liability. *Smedley v. Felt*, 41 Iowa 588; *Black v. Sippy*, 15 Ore. 574, 16 Pac. 418. A diamond shirt-stud, furnished the husband for his personal use and adornment, has been held a "family expense" for which the wife might be liable. *Neasham v. McNair*, 103 Iowa 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. 202. See, however, *Hyman v. Harding*, 162 Ill.

dictions a woman may contract debts for necessities furnished herself or children, and for all expenses incurred for the benefit of her separate property.⁶⁸ Under such a statute she has been held not liable on a contract for architect's services entered into by her husband as agent,⁶⁹ and on notes given for the purchase-price of a piano.⁷⁰ Other statutes give the court power, in a proper case, to confer upon a married woman the rights of a feme sole. Desertion or its equivalent,⁷¹ or separation by the spouses, the wife living apart and supporting herself,⁷² are the grounds usually specified which will justify a court in making such a decree.

§ 407. Statutes requiring husband to join or consent.—In many jurisdictions married women are at the present time given the right to contract the same as if sole, except when otherwise provided. In some of the above states the husband is, by statu-

357, 44 N. E. 754. A buggy purchased by the husband for use in the family is a family expense for which the wife may be liable, notwithstanding she had on one occasion been denied the use of the buggy and they separated shortly after its purchase. *Houck v. La Junta Hardw. Co.*, 50 Colo. 228, 114 Pac. 645, 32 L. R. A. (N. S.) 939. But a stanhope used by the husband, a physician, is not. *Staver Carriage Co. v. Beaudry*, 138 Ill. App. 147. Wages of a domestic servant have been held a family expense. *Campbell v. Heuer*, 139 Ill. App. 631. To same effect, *Perkins v. Morgan*, 36 Colo. 360, 85 Pac. 640. Medical services are family expenses. *Russell v. Graumann*, 40 Wash. 667, 82 Pac. 998. See *Mueller v. Kuhn*, 59 Ill. App. 353; *Murdy v. Skyles*, 101 Iowa 549, 70 N. W. 714, 63 Am. St. 411. The same is true of hospital expenses. In *re Skillman's Estate*, 146 Iowa 601, 125 N. W. 343. The above case states that "payment by one confers no right of recovery or of contribution from the other". Under the Iowa statute the wife is not, however, liable for the husband's board bill. *Vose v. Myott*, 141 Iowa 506, 120 N. W. 58, 21 L. R. A. (N. S.) 277. Feed for a horse and cow is not a family expense. *Martin v. Vertres*, 130 Iowa

175, 106 N. W. 516. Taking care of a drunken husband is not a family expense (*Featherstone v. Chapin*, 93 Ill. App. 223), nor of an insane husband. *Blackhawk County v. Scott*, 111 Iowa 190, 82 N. W. 492.

⁶⁸*Billingsley v. Swenson Land Co.*, (Tex. Civ. App.), 123 S. W. 194; *Bott v. Wright* (Tex. Civ. App.), 132 S. W. 960.

⁶⁹*Edwards v. Annan* (Tex. Civ. App.), 127 S. W. 299. See also, *Stephens v. Hicks*, 156 N. Car. 239, 72 S. E. 313, 36 L. R. A. (N. S.) 354, holding that in North Carolina a married woman cannot contract for the services of an architect to prepare plans and specifications for a house to be erected by her.

⁷⁰*Hall v. Decherd* (Tex. Civ. App.), 131 S. W. 1133.

⁷¹In *re Hughes* (1898), 1 Ch. 529, 67 L. J. Ch. (N. S.) 279; *Hill v. Cooper* (1893), 2 Q. B. 85; *Azbill v. Azbill*, 92 Ky. 154, 13 Ky. L. 501, 17 S. W. 284.

⁷²*Azbill v. Azbill*, 92 Ky. 154, 13 Ky. L. 501, 17 S. W. 284. Mere insolvency of the husband does not justify such a decree. *Kohn v. Steinau*, 16 Ky. L. 804, 29 S. W. 885. Such a decree rendered without jurisdiction is a nullity. *New England Mortgage Security Co. v. Powell*, 94

tory enactment, required to join in or consent to a deed or conveyance made by the wife of her separate real estate. Under such statutes a deed or conveyance executed by her is valid only if the husband joins therein.⁷³ Consequently deeds by a wife to her children⁷⁴ and her mortgage⁷⁵ in neither of which the husband joined have been declared void. Her deed must be executed in conformity with the statute and even though the husband joins, it has been held that her deed is void where she fails to acknowledge it.⁷⁶ Moreover, it has been held that such statutes contemplate that the husband shall join in the conveyance as grantor and that he cannot be both grantor and grantee. It follows that at law the wife cannot convey directly to the husband, notwithstanding the husband joins in such conveyance.⁷⁷

Ala. 423, 10 So. 324. See *In re Staheli*, 78 N. J. Eq. 74, 78 Atl. 206, for an exposition of the New Jersey statute.

⁷³ *De Roux v. Girard*, 112 Fed. 89, 50 C. C. A. 136. The above case was decided under the statutes of Pennsylvania. *Weber v. Tanner* (Ky.), 64 S. W. 741; *Simpson v. Smith*, 142 Ky. 608, 134 S. W. 1166; *Westlake v. City of Youngstown*, 62 Ohio St. 249, 56 N. E. 873; *Bingler v. Bowman*, 194 Pa. St. 210, 45 Atl. 80; *Merriman v. Blalack*, 56 Tex. Civ. App. 594, 121 S. W. 552. The above case holds that a reference in a subsequent deed executed by the husband to lands conveyed by the wife alone does not cure his nonjoinder. However, under such statutes it has been held that a lease for a period not to exceed three years (*Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803), or a lease for the exclusive right to prospect and explore for gas for the term of one year and as much longer as oil and gas is found in paying quantities thereon have been held not a conveyance or incumbrance in which the husband must join. *Kokomo Nat. Gas & Oil Co. v. Matlock* (Ind.), 97 N. E. 787. In Illinois it is held that a deed from a married woman is not void because not joined in by the husband. *Lawler v. Byrne*, 252 Ill. 194, 96 N. E. 892.

⁷⁴ *Ellis v. Pearson*, 104 Tenn. 591, 58 S. W. 318.

⁷⁵ *Sipley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233.

⁷⁶ *Francis v. Rose*, 141 Ky. 645, 133 S. W. 550. To same effect, *Buchanan v. Henry*, 143 Ky. 628, 137 S. W. 222. See also, *Bott v. Wright* (Tex. Civ. App.), 132 S. W. 960.

⁷⁷ *Ogden v. McArthur*, 36 U. C. Q. B. 246; *Trawick v. Davis*, 85 Ala. 342, 5 So. 83. See, however, in connection with this case, *Osborne v. Cooper*, 113 Ala. 405, 21 So. 320, 59 Am. St. 117, and *Whittaker v. Van Hoose*, 157 Ala. 286, 47 So. 741; *Brooks v. Kearns*, 86 Ill. 547; *Breit v. Yeaton*, 101 Ill. 242; *Kinnaman v. Pyle*, 44 Ind. 275; *McCord v. Bright*, 44 Ind. App. 275, 87 N. E. 654; *Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128; *Johnson v. Jouchert*, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; *Doty v. Cox*, 15 Ky. L. Rep. 68, 22 S. W. 321; *Vicroy v. Vicroy*, 20 Ky. L. 47, 45 S. W. 75; *Preston v. Fryer*, 38 Md. 221; *Gebb v. Rose*, 40 Md. 387; *Alexander v. Shalala*, 228 Pa. 297, 77 Atl. 554, 31 L. R. A. (N. S.) 844n, 139 Am. St. 1004; *Wicker v. Durr*, 225 Pa. 305, 74 Atl. 64; *Worrell v. Drake*, 110 Tenn. 303, 75 S. W. 1015; *Griffin v. Griffin* (Tenn.), 37 S. W. 710; *Smith v. Vineyard*, 58 W. Va. 98, 51 S. E. 871; *Mullins v. Shrewsbury*, 60 W. Va. 694, 55 S. E. 736; *Depue v. Miller*, 65 W. Va. 120.

Under such statutes a married woman's executory contract for the sale of land cannot be specifically enforced unless her husband joins.⁷⁸ The mere fact, however, that the contract cannot be specifically enforced does not in and of itself make the contract void. If she has the power to contract as a feme sole, a married woman may make contracts of all descriptions including contracts to convey real estate, and should the husband fail to join in such executory agreement when required so to do the contract may be valid although it cannot be specifically enforced as against the wife when the husband refuses to join with her in the conveyance.⁷⁹ It may also be provided by statute that no conveyance of her real estate shall be valid unless made with the written consent of her husband.⁸⁰ In Alabama, under the law as it stood in 1892 a married woman could not contract except with the assent or concurrence of her husband expressed in writing.⁸¹ Not only this but the contract into which she did enter must have been expressed in writing; consequently she has been held not liable on her oral promise to pay for her husband's support while in an insane asylum.⁸² In those jurisdictions where she cannot

64 S. E. 740, 23 L. R. A. (N. S.) 775. See ante, § 393, Contracts in Equity.

⁷⁸ *Bartlett v. Williams*, 27 Ind. App. 637, 60 N. E. 715; *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918.

⁷⁹ *Davis v. Watson*, 89 Mo. App. 15; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13. "The impossibility of performance of a contract to convey made by a married woman alone is, however, not, strictly speaking, an impossibility in law such as would make the contract void. It is an impossibility which may or may not arise, and is dependent upon the will of her husband. One authorized to contract may make a valid contract although the possibility of its performance depends upon the will of the other." *Wolff v. Meyer*, 75 N. J. L. 181, 66 Atl. 959, affd. 76 N. J. L. 574, 70 Atl. 1103. "The refusal of the husband to join in the wife's deed cannot operate to relieve her from liability under her contract, any more than her refusal to join in the husband's would relieve him from liability under his." *McCoy v. Niblick*, 228 Pa. 342, 77 Atl. 551, 30 L. R. A.

(N. S.) 353. See also, *Clay v. Mayer*, 183 Mo. 150, 81 S. W. 1066. See, however, *Knepper v. Eggins* (Ind.), 97 N. E. 161.

⁸⁰ *Rea v. Rea*, 156 N. Car. 529, 72 S. E. 573 (construing Laws 1911, C. 109). This case also draws a distinction between contracts and conveyances). See also, *Bazemore v. Mountain*, 126 N. Car. 313, 35 S. E. 542; *Council v. Pridgen*, 153 N. Car. 443, 69 S. E. 404; *Mercantile Nat. Bank v. Benbow*, 150 N. Car. 781, 64 S. E. 891; *Coffey v. Shuler*, 112 N. Car. 622, 16 S. E. 911. This statutory provision does not excuse her from the statutory liability imposed upon her as a stockholder in a banking corporation. *Smathers v. Western Carolina Bank*, 155 N. Car. 283, 71 S. E. 345.

⁸¹ *Wood v. Potts & Potts*, 140 Ala. 425, 37 So. 253; *Cowan v. Motley*, 125 Ala. 369, 28 So. 70. This statutory provision is now obsolete in Alabama and the cases above cited are given here merely for the purpose of illustrating the construction placed on the statutes of this character.

⁸² *McAnally v. Alabama Insane*

convey her property without the written assent of her husband it has been held that her indorsement or transfer of a note without her husband's consent is invalid.⁸³ It has been held, however, that the husband's assent may be shown by a letter written for the wife by him as her agent⁸⁴ or by his joining in the execution of the instrument⁸⁵ or by his signing as a witness.⁸⁶ His assent must be given to the same contract that is entered into by the wife.⁸⁷ Necessary personal expenses such as are for the support of the family or for repairs, and the like, are usually exempted from the operation of such statutes.⁸⁸

§ 408. Statutes requiring written contracts.—In certain jurisdictions the contracts of married women with few exceptions must be in writing. Thus formerly it was provided by the statutes of Alabama that a wife could not contract so as to bind herself except it be in writing and with the written assent or concurrence of her husband unless she has been authorized to enter into and pursue a lawful trade or business.⁸⁹ Under this statute it has been held that the wife could not appoint an agent by parol even though the person on whom she attempted to confer

Hospital, 109 Ala. 109, 19 So. 492, 34 L. R. A. 223n, 55 Am. St. 923.

⁸³ Vann v. Edwards, 128 N. Car. 425, 39 S. E. 66; Walton v. Bristol, 125 N. Car. 419, 34 S. E. 544. Should the husband also endorse the note this is sufficient to show assent. Coffin v. Smith, 128 N. Car. 252, 38 S. E. 864.

⁸⁴ Brinkley v. Ballance, 126 N. Car. 393, 35 S. E. 631. A wife who contracts through her husband as agent, contracts with his assent. Bell v. McJones, 151 N. Car. 85, 65 S. E. 646.

⁸⁵ Rushton v. Davis, 127 Ala. 279, 28 So. 476; Wachovia &c. Bank v. Ireland, 122 N. Car. 571, 29 S. E. 835; In re Freeman, 116 N. Car. 199, 21 S. E. 110.

⁸⁶ Souder v. Bank, 156 Pa. St. 374, 27 Atl. 293. In the above case it also appears that certain blank spaces in the instrument were filled out in the husband's handwriting. See, however, the case of Stromme v. Rieck, 107 Minn. 177, 119 N. W. 948, 131 Am. St. 452, which holds that the signature of a wife attached as a witness to an

executory contract by the husband for the sale of his real estate does not considered by itself constitute on her part a written assent to the sale. The court said: "If she should join in the execution of the contract, though not mentioned in the body thereof, it would undoubtedly bind her. But where she is not mentioned in the contract, nor her interests in any way referred to, and she signs as a witness, expressly so designating her signature, no consent to a release of her interest can follow as a matter of law."

⁸⁷ Walton v. Bristol, 125 N. Car. 419, 34 S. E. 544.

⁸⁸ McAnally v. Hawkins Lumber Co., 109 Ala. 397, 19 So. 417; Bazemore v. Mountain, 126 N. Car. 313, 35 S. E. 542. In this latter case the statute is set out in the opinion of Spark, J.

⁸⁹ Clement v. Draper, 108 Ala. 211, 19 So. 25; Strauss &c. Co. v. Glass, 108 Ala. 546, 18 So. 526; Mitchell v. Mitchell, 101 Ala. 183, 13 So. 147.

authority was her husband.⁹⁰ Under a somewhat similar statute the Supreme Court of North Carolina has held that a wife could not subject her land or separate interest therein to a lien for the cost of a building erected under a parol contract with her⁹¹ and she cannot ratify a void contract.⁹² In Missouri the mere indorsement in blank by the wife of a promissory note payable to her is not such a written consent as is required by the statute as will enable the husband to pass title thereto to another.⁹³ Contracts for necessary personal expenses or for the support of her family are as a general rule excepted from the operation of the statutes above referred to,⁹⁴ and the word necessities is here given a broader construction than is given in the law of infancy. Thus it has been held that a wife's land might be held liable for the payment of a note executed by her for a mule to enable her and her husband to cultivate a farm off of which they make their living.⁹⁵ It has also been held to include supplies furnished her tenants, when it appears that it was necessary for her to make provision for them.⁹⁶ But it does not include the wages agreed to be paid an overseer when it does not appear that his services were necessary.⁹⁷ Nor does it include the rent of a hotel when it appears that the wife went into the hotel business as a means to make money and accumulate a profit and not through necessity, or as a means of support for herself and family.⁹⁸

§ 409. Statutes giving power to contract as a feme sole.—

By the statutes of many states a married woman is given the power to contract the same as if she were sole in all cases except

⁹⁰ Scott v. Cotten, 91 Ala. 623, 8 So. 783.

⁹¹ Weathers v. Borders, 121 N. Car. 387, 28 S. E. 524.

⁹² Weathers v. Borders, 121 N. Car. 387, 28 S. E. 524.

⁹³ Case v. Espenschied, 169 Mo. 215, 69 S. W. 276, 92 Am. St. 633.

⁹⁴ Weathers v. Borders, 121 N. Car. 387, 28 S. E. 524.

⁹⁵ Allen v. Long, 19 Ky. L. 488, 41 S. W. 17.

⁹⁶ Bazemore v. Mountain, 121 N. Car. 59, 28 S. E. 17.

⁹⁷ Sanderlin v. Sanderlin, 122 N. Car. 1, 29 S. E. 55. In the above case

the contract was also invalid for the further reason that it was not in writing.

⁹⁸ Crow v. Shacklett, 18 Ky. L. 908, 38 S. W. 692. This lien against the wife's property for necessities furnished her can only be enforced by due process of law. A creditor is not allowed to take possession of her personal property to satisfy the charge against it. He can only proceed through the court, obtain his judgment and issue his execution. Rawlings v. Neal, 126 N. Car. 271, 35 S. E. 597.

where it is specifically provided otherwise.⁹⁹ In all cases that do not come within the exception specified she may contract as if unmarried.¹ Her liability is personal on those contracts by which she is bound.² Thus, under such statutes it has been held that she may convey the legal or equitable title of land acquired by her since the passage of such law, though executed by her alone, since it was unnecessary for her husband to join.³ She has been held personally liable on her contract of warranty.⁴ The Supreme Court of Kansas has interpreted a statute which gives a married woman the right to contract with respect to her separate estate or carry on a trade or business on her account as giving her the right to contract generally, even though she possesses no separate estate, trade or business.⁵ But as a general rule such a broad construction is not given to statutes which confer upon a married woman the power to contract "with reference to her separate property,"⁶ or which give her the power to acquire this right or to carry on a trade or business or to perform services on her separate account.⁷ Statutes whereby a married woman is

⁹⁹ *Village of Western Springs v. Collins*, 98 Fed. 933, 40 C. C. A. 33; *Stacy v. Walter*, 125 Ala. 291, 28 So. 89, 82 Am. St. 235 (cannot become surety for her husband); *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493; *Goodrich v. Atlanta Nat. Building & Loan Association*, 96 Ga. 803, 22 S. E. 585 (cannot become surety); *Pease v. L. Fish Furniture Co.*, 176 Ill. 220, 52 N. E. 932, affg. 70 Ill. App. 138; *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684, 5 Am. St. 526; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Koh-i-moor Laundry Co. v. Lockwood*, 141 Ind. 140, 40 N. E. 677 (cannot become surety or convey separate real estate without husband joining); *Young v. McFadden*, 125 Ind. 254, 25 N. E. 284; *Security Bank v. Holmes*, 68 Minn. 538, 71 N. W. 699; *Wyatt v. Wyatt*, 81 Miss. 219, 32 So. 317; *McHenry v. Batavia Bldg. & Co.*, 17 Ohio C. C. 206; *Hackman v. Cedar*, 5 Ohio D. C. 293, 13 Ohio Cir. Ct. 618; *First & Co. Bank v. Leonard*, 36 Ore. 390, 59 Pac. 873; *Cooney v. Lincoln*, 20 R. I. 183, 37 Atl. 1031; *Ex parte Nurnberger*, 40 S. Car. 334, 18 S. E. 935, sub nomine *Nurnberger's Estate v. Lundeckins*. 40 S. Car. 334, 18 S. E. 935;

Valentine v. Bell, 66 Vt. 280, 29 Atl. 251; *Brookman v. State Insurance Co.*, 18 Wash. 308, 51 Pac. 395.

¹ *Hackettstown & Co. Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920.

² *McHenry v. Batavia Bldg. & Co.*, 17 Ohio C. C. 206; *First & Co. Bank v. Leonard*, 36 Ore. 390, 59 Pac. 873.

³ *Evans v. Morris*, 234 Mo. 177, 136 S. W. 408; *Farmer's Exch. Bank v. Hageluken*, 165 Mo. 443, 65 S. W. 728, 88 Am. St. 434; *Cadematori v. Guager*, 160 Mo. 352, 61 S. W. 195.

⁴ *Security Bank v. Holmes*, 68 Minn. 538, 71 N. W. 699.

⁵ *Harrington v. Lowe*, 73 Kans. 11, 84 Pac. 570, 4 L. R. A. (N. S.) 547. The court said: "The words *feme covert* no longer have for us anything more than an historical interest. The species is extinct in this state." To the same effect, *Deering v. Boyle*, 8 Kans. 525, 12 Am. Rep. 480.

⁶ *Bank of Commerce v. Baldwin*, 14 Idaho 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676n.

⁷ See generally, *American Mortgage Co. v. Owens*, 18 C. C. A. 513, 72 Fed. 219, 25 U. S. App. 659; *First Nat. Bank v. Hirschowitz*, 46 Fla. 588, 35 So. 22; *Frazee v. Frazee*, 79 Md. 27,

authorized to contract with reference to her separate estate are as a general rule construed as giving her power to enter into a valid contract with respect to the acquisition of such property.⁸

§ 410. Contracts as sole trader.—The statutes of a number of states provide that a married woman may act as a sole trader and as such bind herself by contract.⁹ When she takes advantage of the statutory rights thus conferred upon her and engages in business as a sole trader she is bound by her acts and representations made in respect thereto to the same extent as a single woman or man.¹⁰ It has been held that under such statutes she may conduct her business in the name of an agent.¹¹

When she is given only the powers of a sole trader she is not bound by contracts unconnected with her sole business,¹² and it has been held that she cannot engage in business competition with her husband against his wishes.¹³ The mere fact that she owns a farm which is operated by her husband does not constitute her a sole trader.¹⁴ In case statutes provide that there must be a decree of court authorizing her to act as a sole trader she has no such power without such decree.¹⁵ A married woman who has engaged in trade cannot claim when sued for debts incurred

28 Atl. 1105; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 6 N. W. 88; *Citizens' State Bank v. Smout*, 62 Nebr. 223, 86 N. W. 1068; *Linderman v. Farquharson*, 101 N. Y. 434, 5 N. E. 67; *Buning v. Berteling*, 5 Ohio N. P. 167; *Hirth v. Hirth*, 98 Va. 121, 34 S. E. 964; *Chickering-Chase Bros. Co. v. White*, 127 Wis. 83, 106 N. W. 797.

⁸ *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Minnervs v. Smith*, 40 Misc. (N. Y.) 648, 83 N. Y. S. 117; *Cashman v. Henry*, 75 N. Y. 103, 44 N. Y. Super. Ct. 100n, 31 Am. Rep. 437; *Campe v. Horne*, 158 Pa. 508, 27 Atl. 1106; *Kriz v. Peege*, 119 Wis. 105, 95 N. W. 108. See, however, *Harrison v. Mansur-Tibbetts Implement Co.*, 16 Tex. Civ. App. 630, 41 S. W. 842.

⁹ *Hickey v. Thompson*, 52 Ark. 234, 12 S. W. 475; *Camden v. Mullen*, 29 Cal. 564; *Wallace v. Rowley*, 91 Ind. 586; *Eskridge v. Carter*, 16 Ky. L. 760, 29 S. W. 748; *Clark v. Manko*, 80 Md. 78, 30 Atl. 621. The legislature may

make provision for married women becoming free traders. *Scott-Sparger Co. v. Ferguson*, 152 N. Car. 346, 67 S. E. 750. Under the statutes of North Carolina a married woman who engages in business through her husband without displaying her Christian name is treated as a free trader. *Stone Co. v. McLamb & Co.*, 153 N. Car. 378, 69 S. E. 281.

¹⁰ *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920.

¹¹ *Reed v. Newcomb*, 64 Vt. 49, 23 Atl. 589.

¹² *First Nat. Bank v. Hirschowitz*, 46 Fla. 588, 35 So. 22.

¹³ *Root v. Root*, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837n, Ann. Cas. 1912 B. 740. See, however, in connection with this case *In re Kinkead*, 3 Biss. (U. S.) 405, Fed. Cas. No. 7824.

¹⁴ *Union & Co. Bank v. Coffman*, 101 Iowa 594, 70 N. W. 693.

¹⁵ *McDonald v. Rosen*, 8 Idaho 353, 69 Pac. 125.

therein that the act empowering her to trade as a feme sole is unconstitutional.¹⁶ Under the statutes of Florida which provide that upon decree of the chancellor a married woman may be made a free dealer "in every respect" it has been held that such a decree gave her the right to convey her separate real estate without her husband joining.¹⁷ On the other hand a statute of North Carolina which provides that a married woman who is registered free trader is "authorized to contract and deal as if she were a feme sole" has been considered not to include or describe conveyances of realty and hence that a married free trader cannot convey her real estate without the joinder of her husband and the execution of a deed in conformity to the statutory requirement.¹⁸

§ 411. **Contracts of suretyship.**—At common law the general rule, almost without exception, was that all contracts entered into by married women were void. This of course included contracts of suretyship. The common-law disability to contract has, however, been wholly or partly removed in all the states. In those jurisdictions where her disability to contract has been generally removed, and surety contracts are not excepted, it is obvious that a feme covert may then enter into a contract of suretyship.¹⁹ The statutes of several states, however, expressly provide that a married woman cannot enter into any contract of

¹⁶ *Louisville R. Co. v. Alexander*, 16 Ky. L. 306, 27 S. W. 981. The court said: "It is enough to say that the beneficiary of the act, and the one procuring it, cannot thus impeach it. The appellee cannot take advantage of her own wrong, if wrong there was." A married woman engaged in business as a sole trader is not subject to the act concerning involuntary insolvency. *Clark v. Manko*, 80 Md. 78, 30 Atl. 621.

¹⁷ *Lerch v. Barnes*, 61 Fla. 672, 54 So. 763. In Florida it would seem that a feme covert has no capacity to contract except when the right to act as a sole trader is conferred upon her. *Virginia-Carolina & Co. v. Fisher*, 58 Fla. 377, 50 So. 504; *De Graum v. Jones*, 23 Fla. 83, 6 So. 925; *Hodges v. Price*, 18 Fla. 342.

¹⁸ *Council v. Pridgen*, 153 N. Car. 443, 69 S. E. 404.

¹⁹ *Binney v. Globe Nat. Bank*, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379; *State Bank v. Maxson*, 123 Mich. 250, 82 N. W. 31, 81 Am. St. 196 (under Kansas statute); *King v. Hansing*, 88 Minn. 401, 93 N. W. 307; *Grandy v. Campbell*, 78 Mo. App. 502; *Cooper v. Bank*, 4 Okla. 632, 46 Pac. 475; *Colonial & Co. v. Stevens*, 3 N. Dak. 265, 55 N. W. 578; *Miller v. Purchase*, 5 S. Dak. 232, 58 N. W. 556; *Colonial & Co. v. Bradley*, 4 S. Dak. 158, 55 N. W. 1108; *First & Co. Bank v. Leonard*, 36 Ore. 390, 59 Pac. 873, distinguishing *Knoß v. Kiessling*, 23 Ore. 8, 35 Pac. 248, and *Campbell v. Snyder*, 27 Ore. 249, 41 Pac. 659, in which the wife bound her separate estate only and not herself. *Ritter v. Bruss*, 116 Wis. 55, 92 N. W. 361.

guaranty or suretyship.²⁰ Other statutes merely prohibit her from becoming surety for her husband.²¹ It has been held under such a statute that she is not liable on an appeal bond signed by her as surety for her husband.²² By other statutes she is prohibited from becoming surety for certain purposes.²³

The real difficulty in considering contracts of this class arises under those statutes whereby a married woman is given control over her separate estate. In certain jurisdictions statutes of this character are construed to mean that she can enter into only such contracts as are for her own use or benefit or in reference to her separate estate and since contracts of surety do not generally fall within this class of contracts she is not bound thereby, especially when not expressly made a charge upon her separate estate.²⁴

²⁰ *Thompson v. Wilkinson*, 9 Ga. App. 367, 71 S. E. 678; *Finch v. Barclay*, 87 Ga. 393, 13 S. E. 566; *Smith v. Hardman*, 99 Ga. 381, 27 S. E. 731; *Munroe v. Haas*, 105 Ga. 468, 30 S. E. 654; *Coffee v. Ramey*, 111 Ga. 817, 35 S. E. 641; *Field v. Campbell*, 164 Ind. 389, 72 N. E. 206, 108 Am. St. 301; *Garrigue v. Kellar*, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. 324; *Cook v. Buhrlage*, 159 Ind. 162, 64 N. E. 603; *International & Assn. v. Watson*, 158 Ind. 508, 64 N. E. 23; *Andrysiak v. Satkowski*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286; *West v. Laraway*, 28 Mich. 464; *Seigman v. Streeter*, 64 N. J. L. 169, 44 Atl. 888; *Pittman v. Raysor*, 49 S. Car. 469, 27 S. E. 475; *Gwynn v. Gwynn*, 31 S. Car. 482, 10 S. E. 221. The case of *Booth v. Merchants' Bank*, 9 Ga. App. 650, 72 S. E. 44, holds that while a married woman can neither stand surety for her husband's debts nor lawfully pay them, she may pay the debts of a third person other than her husband although she cannot lawfully become surety for such third person. A provision of the statutes that prevents her from becoming surety does not prohibit her from becoming a partner with her husband if such agreement is not entered into merely for the purpose of rendering her liable for her husband's debts. *Butler v. Frank*, 7 Ga. App. 655, 67 S. E. 884.

²¹ *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39; *Hanchey v. Powell*, 171

Ala. 597, 55 So. 97; *Evans v. Faircloth-Byrd & Co.*, 165 Ala. 176, 51 So. 785; *Sample v. Guyer*, 143 Ala. 613, 42 So. 106; *Schening v. Cofer*, 97 Ala. 726, 12 So. 414.

²² *Succession of Maloney*, 124 La. 672, 50 So. 647.

²³ *Hyner v. Dickinson*, 32 Ark. 776 (cannot become surety on an official bond).

²⁴ *Bank of Commerce v. Baldwin* 14 Idaho 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676n. See also, *Flanders v. Abbey*, 6 Biss. (U. S.) 16, Fed. Cas. No. 4851; *Richardson v. Matthews*, 58 Ark. 484, 25 S. W. 502; *Stiles v. Lord*, 2 Ariz. 154, 11 Pac. 314; *Heburn v. Warner*, 112 Mass. 271, 17 Am. Rep. 86; *Nourse v. Henshaw*, 123 Mass. 96; *Bartlett v. Bartlett*, 4 Allen (Mass.) 440; *Willard v. Eastham*, 15 Gray (Mass.) 328, 77 Am. Dec. 366; *Vankirk v. Skillman*, 34 N. J. L. 109. See, however, in connection with the foregoing Massachusetts cases the following ones from the same jurisdiction: *Commonwealth v. Abbott*, 168 Mass. 471, 47 N. E. 112; *Kenworthy v. Sawyer*, 125 Mass. 28; *Middleborough Nat. Bank v. Cole*, 191 Mass. 168, 77 N. E. 781; *Bailey v. Pearson*, 29 N. H. 77; *People v. Williams*, 8 Daly (N. Y.) 264; *White v. McNett*, 33 N. Y. 371; *Hanse v. De Witt*, 63 Barb. (N. Y.) 53; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216, 68 N. Y. 335; *Drake v. E. M. Birdsall & Co.*, 10 Ohio Dec. Reprint 56, 18

Other jurisdictions with similar statutes hold that they give her the power to enter into contracts of suretyship even though she does not expressly make it a charge upon her separate estate.²⁵ Statutes permitting her to sue and be sued as though sole²⁶ or to make contracts and incur liability as though unmarried,²⁷ have been held to confer upon her power to enter into contracts of suretyship. In still other jurisdictions her contract of suretyship is binding upon her separate estate if it is specifically made a charge thereon,²⁸ or is for the benefit of her separate estate or is supported by a consideration.²⁹

§ 412. Securing husband's debt.—In case the contract of surety is one that the wife was prohibited by law from entering into, any subterfuge resorted to by the parties to evade the statute will not meet with approval from the courts.³⁰ The real nature

Wkly. L. Bul. 243; *Habenicht v. Rawls*, 24 S. Car. 461, 58 Am. Rep. 268. She is bound by her executed contracts of suretyship. *Shipman v. Lord*, 58 N. J. Eq. 380, 44 Atl. 215.

²⁵ *Frazee v. McFarland*, 43 U. C. Q. B. 281; *Deering v. Boyle*, 8 Kans. 525, 12 Am. Rep. 480; *Cartan v. David*, 18 Nev. 310, 4 Pac. 61; *Kittias County v. Travers*, 16 Wash. 528, 48 Pac. 340. See also, *Bank of Commerce v. Baldwin*, 14 Idaho 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676n, for a review of the authorities.

²⁶ *Kenworthy v. Sawyer*, 125 Mass. 28; *Middleborough Nat. Bank v. Cole*, 191 Mass. 168, 77 N. E. 781; *Commonwealth v. Abbott*, 168 Mass. 471, 47 N. E. 112.

²⁷ *Low Bros. & Co. v. Anderson*, 41 Iowa 476. To same effect, *Mayo v. Hutchinson*, 57 Maine 546.

²⁸ *Kershaw v. Barrett*, 3 Nebr. (unof.) 36, 90 N. W. 764; *Briggs v. First Nat. Bank*, 41 Nebr. 17, 59 N. W. 351; *Smith v. Spaulding*, 40 Nebr. 339, 58 N. W. 952; *Spatz v. Martin*, 46 Nebr. 917, 65 N. W. 1063; *First Nat. Bank v. Stoll*, 57 Nebr. 758, 78 N. W. 254; *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488. It would seem, however, that this intention must expressly appear in the contract itself. *Smith v. Bond*, 56 Nebr. 529, 76 N. W. 1062. See, however, *Knowles v. Toone*, 96 N. Y. 534. See also,

Union & C. Bank v. Coffman, 101 Iowa 594, 70 N. W. 693; *Eckman v. Scott*, 34 Nebr. 817, 52 N. W. 822; *Knowles v. Toone*, 96 N. Y. 534; *Woolsey v. Brown*, 11 Hun (N. Y.) 52, 74 N. Y. 82; *Gosman v. Cruger*, 69 N. Y. 87, 25 Am. Rep. 141; *Field v. Leavitt*, 5 Jones & S. (N. Y.) 537. It is provided by the statutes of Kentucky that a married woman's separate estate cannot be made to answer on her surety contract "unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance." *Third Nat. Bank v. Tierney (Ky.)*, 18 L. R. A. (N. S.) 81. See also, *Kentucky Title Saving Bank & Trust Co. v. Langan*, 144 Ky. 46, 137 S. W. 846; *Baker v. Owensboro Sav. Bank & C.*, 140 Ky. 121, 130 S. W. 969.

²⁹ *Goad v. Moulton*, 67 Cal. 536, 8 Pac. 63; *Showman v. Lee*, 79 Mich. 653, 44 N. W. 1061. See also, *Kitchen v. Chapin*, 64 Nebr. 144, 89 N. W. 632, 57 L. R. A. 914, 97 Am. St. 637.

³⁰ *Bond v. Sullivan*, 133 Ga. 160, 65 S. E. 376, 134 Am. St. 199; *Third Nat. Bank v. Tierney*, 128 Ky. 836, 110 S. W. 293, 18 L. R. A. (N. S.) 81; *Keystone Brewing Co. v. Varzaly*, 39 Pa. Super. Ct. 155. The fact that the wife cannot become surety for her husband has been mentioned in the preceding sections of this chapter.

and not the form of the transaction controls.⁸¹ Thus, when the circumstances are not such as to work an estoppel she will not be bound by her individual note given in satisfaction of her husband's debt,⁸² and the same is true where the money is loaned to the husband on the wife's note.⁸³ Should she sign as principal and her husband as surety she will nevertheless be held a surety if it appears that the note was in fact given for the pre-existing debt of her husband.⁸⁴ The same is true when she renews her husband's note as principal,⁸⁵ or gives her own note in lieu of one given by her husband,⁸⁶ or gives her note with collateral security,⁸⁷ or gives a deed intended as a mortgage, to her land⁸⁸ to secure her husband's pre-existing debt. And she remains surety for her husband to the extent the note given by her covers his indebtedness, notwithstanding it is made to include an individual indebtedness owed by her.⁸⁹ Likewise her indorsement of a due bill owing her husband and by him assigned to her in order that she may indorse the same so that he will be able to obtain the money thereon is a contract of suretyship.⁹⁰

⁸¹ *Harbaugh v. Tanner*, 163 Ind. 574, 71 N. E. 145.

⁸² *First &c. Bank v. Hunton*, 69 N. H. 509, 45 Atl. 351. "A woman can neither stand surety for her husband's debts nor lawfully pay them, and if having executed a promissory note as security for her husband, she pays the note, she may maintain an action for money had and received and recover the sum so paid from the creditor who knowingly received it." *Booth v. Merchant's Bank (Ga.)*, 72 S. E. 44, citing *Strickland v. Vance*, 99 Ga. 531, 27 S. E. 152, 59 Am. St. 241. See also, *Kentucky Title Sav. Bank v. Langan*, 144 Ky. 46, 137 S. W. 846, in which a married woman signed as accommodation indorser a draft which her husband had also indorsed. Subsequently after demand by the bank she paid the draft. Held that she might recover the money so paid on the ground that the payment was made under a mistake of law and that the bank in equity and good conscience ought not to retain it.

⁸³ *Fisk v. Mills*, 104 Mich. 433, 66 N. W. 559.

⁸⁴ *Indianapolis Brewing Co. v. Behnke*, 41 Ind. App. 288, 81 N. E.

119; *Crumbaugh v. Postell*, 20 Ky. L. 1366, 49 S. W. 334; 2nd App. *Postell v. Crumbaugh*, 23 Ky. L. 2194, 66 S. W. 830. In the above case the wife added the word "principal" to her name and the husband the word "surety" after his. To same effect, *Planters' Bank &c. Co. v. Major*, 25 Ky. L. 702, 76 S. W. 331.

⁸⁵ *Continental National Bank v. Clarke*, 117 Ala. 292, 22 So. 988; *Patrick v. Smith*, 165 Pa. St. 526, 30 Atl. 1044.

⁸⁶ *Milburn v. Jackson*, 21 Ky. L. 700, 52 S. W. 949; *Deposit Bank v. Stitt*, 107 Ky. 49, 21 Ky. L. 671, 52 S. W. 950; *Burnham-Hanna-Munger &c. Co. v. Carter*, 52 Tex. Civ. App. 294, 113 S. W. 782.

⁸⁷ Her note given as collateral security. *Widger v. Baxter*, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436n; *Stewart v. Stewart*, 207 Pa. 59, 56 Atl. 323.

⁸⁸ *Harper v. T. N. Hayes Co.*, 149 Ala. 174, 43 So. 360.

⁸⁹ *Lanier v. Olliff*, 117 Ga. 397, 43 S. E. 711; *Harbaugh v. Tanner*, 163 Ind. 574, 71 N. E. 145; *Christensen v. Wells*, 52 S. Car. 497, 30 S. E. 611.

⁹⁰ *First Nat. Bank v. Hanscom*, 104

So where the business which was undertaken was to be carried on by both husband and wife jointly such business will be considered as the business of the husband and she will not be liable on a promissory note given by her in connection therewith especially when it appears that such business arrangement was merely a contrivance whereby the wife might become surety for the husband.⁴¹

Even though she obtains, in person, the money upon her own obligation she will not be estopped to set up her suretyship when the party who advanced the money knew it was not to be used for her benefit but instead to satisfy another's indebtedness.⁴² In Kentucky it is held that in the absence of any proof that the note signed by the husband and wife was executed for necessities contracted for by her the presumption is that it was the debt of the husband and that she signed the note as surety for him.⁴³ However, if the note is signed by the wife alone the burden is upon her to allege and prove that she was surety and not principal.⁴⁴ The wife is, however, as a general rule subject to estoppel in pais the same as any other person.⁴⁵

§ 413. Contracts with husband.—Contracts entered into by a feme covert with her husband formed no exception to the general common-law rule that a married woman's contracts were

Mich. 67, 62 N. W. 167. See also, Kentucky Title Sav. Bank v. Langan, 144 Ky. 46, 137 S. W. 846 (accommodation indorsement of draft).

⁴¹Emerson & Co. v. Knapp, 90 Wis. 34, 62 N. W. 945.

⁴²Freeman v. Mutual Bldg. & L. Assn., 90 Ga. 190, 15 S. E. 758; Field v. Campbell, 164 Ind. 389, 72 N. E. 206, 108 Am. St. 301; Field v. Noblett, 154 Ind. 357, 56 N. E. 841; Ft. Wayne Trust Co. v. Sihler 34 Ind. App. 140, 72 N. E. 494; Boyd v. Rada-baugh, 150 Ind. 394, 50 N. E. 301; Temples v. Equitable Mortg. Co., 100 Ga. 503, 28 S. E. 232, 62 Am. St. 326; Moran v. Bates, 16 Lanc. L. Rev. (Pa.) 145. See also, Estoppel, post, § 424.

⁴³Gilbert v. Brown, 29 Ky. L. 1248, 97 S. W. 40, 7 L. R. A. (N. S.) 1053. To same effect, Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145.

⁴⁴Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145. A wife's contract of suretyship has been held prima facie binding upon her. Miller v. Brown, 47 Mo. 504, 4 Am. Rep. 345; Kimm v. Weippert, 46 Mo. 532, 2 Am. Rep. 541; Moeckel v. Heim, 46 Mo. App. 340; Williams v. Urnston, 35 Ohio St. 296, 35 Am. Rep. 611; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917.

⁴⁵See post, § 424, Estoppel. The legislatures of the various states make such frequent changes in the law on this branch of the subject that it is impossible to give an accurate and reliable review of the law in the various states. Nothing more has been attempted than to call attention to the general principles that control irrespective of the statute in force at any given time.

void. They too were void.⁴⁶ In some jurisdictions it still remains true that contracts between husband and wife are absolutely void and unenforcible between the spouses or by strangers into whose hands they may come by transfer.⁴⁷ This rule prevents the husband and wife from entering into a partnership agreement *inter se*.⁴⁸ It does not prevent her, however, from being held liable as accommodation indorser on a promissory note of a firm which is indorsed both by herself and husband, since in such case her contract of indorsement was with the indorsee and not her husband.⁴⁹ Her disability to contract with her husband has, however, in many jurisdictions either been entirely removed or else materially modified. Where her disability in this respect has been entirely removed she may contract with her husband and her contracts with him will be enforced at law, just as if she had contracted with a third person.⁵⁰ Thus under such a statute it has been held that a married woman may lawfully enter into a contract of partnership with her husband.⁵¹

⁴⁶ *Heacock v. Heacock*, 108 Iowa 540, 79 N. W. 353, 75 Am. St. 273; *Pinkham v. Pinkham*, 95 Maine 71, 49 Atl. 48, 85 Am. St. 392; *Kimball v. Kimball*, 75 N. H. 291, 73 Atl. 408; *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029, 6 L. R. A. 559, 15 Am. St. 524. Courts of equity have, however, enforced or granted relief from contracts between husband and wife notwithstanding the existence of the legal disability when the ends of justice would thereby be furthered. *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. 151. "Although courts of law will not enforce contracts made between husband and wife, equity will in many instances recognize and enforce them when they are fair and reasonable." *McDonald v. Smith*, 95 Ark. 523, 130 S. W. 515; *Brown v. Clark*, 80 Conn. 419, 68 Atl. 1001; *Haussman v. Burnham*, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. 74; *Kimball v. Kimball*, 75 N. H. 291, 73 Atl. 408. But see *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029, 6 L. R. A. 559, 15 Am. St. Rep. 524.

⁴⁷ *Spurlock v. Spurlock*, 80 Ark. 37, 96 S. W. 753. By the decisions of the above state such contracts may in a proper case be enforced in equity. See

preceding note. *Atkins v. Atkins*, 195 Mass. 124, 80 N. E. 806, 11 L. R. A. (N. S.) 273n, 122 Am. St. 221 (citing many Massachusetts cases); *Caldwell v. Nash*, 190 Mass. 507, 77 N. E. 515; *MacKeown v. Lacey*, 200 Mass. 437, 86 N. E. 799, 21 L. R. A. (N. S.) 683n; *Crosby v. Clem*, 209 Mass. 193, 95 N. E. 297.

⁴⁸ *Voss v. Sylvester*, 203 Mass. 233, 89 N. E. 241.

⁴⁹ *Middleborough Nat. Bank v. Cole*, 191 Mass. 168, 77 N. E. 781.

⁵⁰ *State v. Shaw*, 79 Kans. 396, 100 Pac. 78, 131 Am. St. 298; *Abbott v. Fidelity Trust Co.*, 149 Mo. App. 511, 130 S. W. 1120; *Montgomery v. Montgomery*, 142 Mo. App. 481, 127 S. W. 118; *Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. 566; *O'Day v. Meadows*, 194 Mo. 588, 92 S. W. 637, 112 Am. St. 542. See further statutes of the various states. See also, *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129; *Blake v. Blake*, 7 Iowa 46; *Allen v. Hooper*, 50 Maine 371; *Savage v. Savage*, 80 Maine 472, 15 Atl. 43; *Wilkinson v. Kneeland*, 125 Mich. 261, 84 N. W. 142.

⁵¹ *Jones v. Jones* (Miss.), 55 So. 361.

Statutes which confer upon married women the power to contract generally, as if sole, with certain specified exceptions give her the right to contract with her husband when agreements between them are not named as an exception.⁵² She may be made the payee of a note executed by her husband.⁵³ In Maine a statute which secures to a married woman her property "in her own right" and gives her the right to "manage, sell, convey and devise" her property of every description "as if sole" has been held to give her the right to contract with but not to sue her husband.⁵⁴ Under statutes giving her the right to convey her separate real estate as if unmarried she may transfer it directly to her husband, unless the instrument under which she held expressly forbid such transfer.⁵⁵ The statutes of other states provide that the wife may not convey her separate estate to her husband unless allowed so to do by a court of competent jurisdiction.⁵⁶

Similar statutes have in various jurisdictions been given a dissimilar construction. Thus the statutes of Missouri declare that

⁵² *Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73. See also, *Druckamiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028, for a construction of the statute. *Townsend v. Huntzinger*, 41 Ind. App. 223, 83 N. E. 619. She may purchase land from her husband and her contract in that regard will be upheld when it appears that it is fair to her and that she was not thereby overreached. *Washburn v. Gray* (Ind. App.), 97 N. E. 190.

⁵³ *Krouse v. Krouse* (Ind.), 95 N. E. 262.

⁵⁴ *Webster v. Webster*, 58 Maine 139, 4 Am. Rep. 253; *Perkins v. Blethen*, 107 Maine 443, 78 Atl. 574, 31 L. R. A. (N. S.) 1148n.

⁵⁵ *Vick v. Gower*, 92 Tenn. 391, 21 S. W. 677. See also, *Glascock v. Glascock*, 217 Mo. 362, 117 S. W. 67. In the following jurisdictions the statute expressly provides that the wife may convey directly to the husband. *Reynolds v. City Nat. Bank*, 71 Hun. (N. Y.) 386, 24 N. Y. S. 1134, 55 N. Y. St. 45, affd. 151 N. Y. 641, 45 N. E. 1134; *Hayden v. Zerbst*, 49 Wash. 103, 94 Pac. 909. See also, *Whittaker v. Van Hoose*, 157 Ala. 286, 47 So. 741; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129; *Glascock v.*

Glascock, 217 Mo. 362, 117 S. W. 67; *Wilkinson v. Kneeland*, 125 Mich. 261, 84 N. W. 142. Agreement by the husband to care for and support his wife's children by a former husband constitutes a sufficient consideration for such deed. *Schroeder v. Smith*, 249 Ill. 574, 94 N. E. 969. It has been held that in case a married woman acquires property by deed from her husband for a nominal consideration only she is not a purchaser for value and stands in no better attitude than her grantor. *Acker v. Pridgen* (N. Car.), 74 S. E. 335.

⁵⁶ *Hood v. Perry*, 75 Ga. 310, construing Ga. Code, § 1785; *Flannery v. Coleman*, 112 Ga. 648, 37 S. E. 878, construing Ga. Civ. Code 1895, § 2490; *Webb v. Harris*, 124 Ga. 723, 53 S. E. 247, construing Ga. Civ. Code 1863, §§ 1732-1735; *Carpenter v. Booker*, 131 Ga. 546, 62 S. E. 983, 127 Am. St. 241; *Roland v. Roland*, 131 Ga. 579, 62 S. E. 1042; *Stonecipher v. Kear*, 131 Ga. 688, 63 S. E. 215, 127 Am. St. 248n; *American Ins. Co. v. Bagley*, 6 Ga. App. 736, 65 S. E. 787, construing Ga. Civ. Code 1895, § 2490; *Buchannon v. James*, 135 Ga. 392, 69 S. E. 543; *Carpenter v. Booker*, 131 Ga. 546, 62 S. E. 983, 127 Am. St. 241.

"a married woman shall be deemed a feme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued," etc. This provision has been held to empower her to make a valid legal contract with her husband.⁵⁷ On the other hand the Supreme Court of Iowa has construed a statute which reads "Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried," as empowering a married woman to contract with her husband only in reference to her separate estate.⁵⁸ It has been said that the statutes which confer upon a married woman the power to contract with her husband are to be strictly construed.⁵⁹ This is no doubt true if the well-established principle that statutes in derogation of the common law are to be strictly construed is followed. This does not always seem to have been done.⁶⁰

§ 414. Contract with husband must not contravene public policy.—It is obvious that notwithstanding the husband and wife are given the power to contract with each other they cannot enter into an agreement which contravenes the public policy of the state where it is executed.⁶¹ Thus contracts between husband

By statutes of North Carolina she may convey directly to her husband upon compliance with certain statutory provisions. *Sims v. Ray*, 96 N. Car. 87, 2 S. E. 443.

⁵⁷ *Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. 566. See also, ante, note 50 et seq., this section.

⁵⁸ *Heacock v. Heacock*, 108 Iowa 540, 79 N. W. 353, 75 Am. St. 273; *Estate of Deaner*, 126 Iowa 701, 102 N. W. 825, 106 Am. St. 374. For a late exposition of the law in this state see *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998. See also, *In re Pieper's Estate*, 145 Iowa 373, 124 N. W. 181. As to the right of the husband to convey directly to the wife see *Currier v. Teske*, 84 Neb. 60, 120 N. W. 1015, 133 Am. St. 602 and note, 120 N. W. 1015, to the effect that such a conveyance is good and overruling *Aultman, Taylor & Co. v. Obermeyer*, 6 Nebr. 260, and *Johnson v. Vander-*

vort, 16 Nebr. 144, 19 N. W. 461, 20 N. W. 122.

⁵⁹ *Pinkham v. Pinkham*, 95 Maine 71, 49 Atl. 48, 85 Am. St. 392.

⁶⁰ *Harrington v. Lowe*, 73 Kan. 11, 84 Pac. 570, 4 L. R. A. (N. S.) 547. See also, ante, § 409.

⁶¹ *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. 107; *In re Kopf's Estate*, 132 N. Y. S. 719. See also, the case of *Ryan v. Dockery*, 134 Wis. 431, 114 N. W. 820, 15 L. R. A. (N. S.) 491, 126 Am. St. 1025, which holds that they cannot enter into an antenuptial agreement against public policy. In this case the intended husband agreed to support, care for and nurse his future wife in consideration of her giving him all property owned by her at her death. The contract was also said to be without consideration. To same effect, *Foxworthy v. Adams* (Ky.), 124 S. W. 381. See also, *Corcoran v.*

and wife looking to a future separation⁶² or to assist in the procurement of a divorce⁶³ are invalid. However, when the parties at the time of or after the separation enter into a separation agreement fair as to all parties it is, with a few exceptions, held valid and enforceable so far as property rights therein contracted for are concerned.⁶⁴ New Hampshire and North Carolina would seem to hold the contrary.⁶⁵ It is held as a general rule that an agreement to dismiss a divorce suit and resume the marital rela-

Corcoran, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. 390.

⁶² Hindley v. Westmeath, 6 Barn. & C. 200; St. John v. St. John, 11 Ves. Jr. 526; Westmeath v. Westmeath, Jac. 126; Proctor v. Robinson, 35 Beav. 329; Boland v. O'Neil, 72 Conn. 217, 44 Atl. 15; Sumner v. Sumner, 121 Ga. 1, 48 S. E. 727; McKee v. Reynolds, 26 Iowa 578; Gould v. Gould, 29 How. Pr. (N. Y.) 441; Carson v. Murray, 3 Paige (N. Y.) 483; Rogers v. Rogers, 4 Paige (N. Y.) 516, 27 Am. Dec. 84; Mercein v. People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; Maney v. Maney, 119 App. Div. (N. Y.) 765, 104 N. Y. S. 541; Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. 453; Kaiser's Estate, 14 Pa. Super. Ct. 155.

⁶³ Merryweather v. Jones, 4 Giff. 509; St. John v. St. John, 11 Ves. Jr. 526; Goodwin v. Goodwin, 4 Day (Conn.) 343. (It was so held in this case, although at the time a valid cause for divorce existed.) Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. 379; Hamilton v. Hamilton, 89 Ill. 349; Stokes v. Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313n; Stebbins v. Morris, 19 Mont. 115, 47 Pac. 642; Schmieding v. Doellner, 10 Mo. App. 373; Wilde v. Wilde, 37 Nebr. 891, 56 N. W. 724; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208n; Palmer v. Palmer, 26 Utah 31, 72 Pac. 3, 61 L. R. A. 641, 99 Am. St. 820.

⁶⁴ Besant v. Wood, L. R. 12 Ch. Div. 605; McGregor v. McGregor, L. R. 20 Q. B. 529; Bowers v. Hutchinson, 67 Ark. 15, 53 S. W. 399; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Daniels v. Benedict, 97 Fed. 367, 38 C. C. A. 592; Sumner v. Sumner, 121 Ga. 1, 48 S. E. 727; Patter-

son v. Patterson, 111 Ill. App. 342; Dutton v. Dutton, 30 Ind. 452; Hilbish v. Hattle, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783; McKee v. Reynolds, 26 Iowa 578; Robertson v. Robertson, 25 Iowa 350; King v. Mollohan, 61 Kans. 683, 60 Pac. 731, affd., 61 Kans. 692, 61 Pac. 685; Labbe's Heirs v. Abat, 2 La. 553, 22 Am. Dec. 151; Helms v. Franciscus, 2 Bland. (Md.) 544, 20 Am. Dec. 402; Walker v. Walker's Exr., 9 Wall. (U. S.) 743, 19 L. ed. 814.

⁶⁵ Kremelberg v. Kremelberg, 52 Md. 553; Randall v. Randall, 37 Mich. 563; Roll v. Roll, 51 Minn. 353, 53 N. W. 716; Stebbins v. Morris, 19 Mont. 115, 47 Pac. 642; Buttlar v. Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. 648 (revg. decision of the chancery court reported in 38 Atl. 300); Garver v. Miller, 16 Ohio St. 527; Thomas v. Brown, 10 Ohio St. 247; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741; McKennan v. Phillips, 6 Whart. (Pa.) 571, 37 Am. Dec. 438; Kaiser's Estate, 14 Pa. Super. Ct. 155; Hitner's Appeal, 54 Pa. St. 110; In re Singer's Estate (Pa.), 81 Atl. 898; Rains v. Wheeler, 76 Tex. 390, 13 S. W. 324; Versyp v. Versyp (Tex. Civ. App.), 146 S. W. 705. See, however, Scherer v. Scherer, 23 Ind. App. 384, 55 N. E. 494, 77 Am. St. 437; Simpson v. Simpson, 4 Dana (Ky.) 140; Whitney v. Closson, 138 Mass. 49; Tourney v. Sinclair, 3 How. (Miss.) 324; Carter v. Carter, 14 Sm. & M. (Miss.) 59; Friedman v. Bierman, 43 Hun (N. Y.) 387; Gibert v. Gibert, 5 Misc. (N. Y.) 555, 26 N. Y. S. 30; Rogers v. Rogers, 4 Paige (N. Y.) 516, 27 Am. Dec. 84; Re Smith's Estate, 13 Misc. (N. Y.) 592, 36 N. Y. S. 820; Morgan

tion by one spouse in return for a consideration moving from the other is valid and not contrary to public policy.⁶⁶

§ 415. Consideration need not proceed from husband.—Moreover, the consideration moving to the wife by which she is induced to dismiss her suit and live with her husband need not proceed from the husband. The promise of a third person made to induce the wife to return to her husband has been declared not in contravention of public policy.⁶⁷ It would also seem that the relation between husband and wife is one of trust and confidence, consequently they must deal fairly with each other in their contracts *inter se*.⁶⁸

§ 416. Contracts of agency.—The general rule concerning contracts of agency is that a person who has capacity to enter into a given contract in his own right may appoint an agent to

v. Potter, 17 Hun (N. Y.) 403; *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47; *Maney v. Maney*, 119 App. Div. (N. Y.) 765, 104 N. Y. S. 541; *Poillon v. Poillon*, 49 App. Div. (N. Y.) 341, 63 N. Y. S. 301; *Tallinger v. Mandeville*, 113 N. Y. 427, 21 N. E. 125; *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; *Collins v. Collins*, 62 N. Car. (1 Phil. Eq.) 153, 93 Am. Dec. 606; (but see *Sparks v. Sparks*, 94 N. Car. 527); *Ellett v. Ellett*, 157 N. Car. 161, 72 S. E. 861; *Archbell v. Archbell* (N. Car.), 74 S. E. 327; *Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. 854. A resumption of marital relations abrogates articles of separation. *Gaster v. Gaster's Estate*, 90 Nebr. 529, 134 N. W. 235; *Archbell v. Archbell* (N. Car.), 74 S. E. 327. See, however, *In re Singer's Estate* (Pa.), 81 Atl. 898; *Hill v. Hill*, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. (N. S.) 848n, 124 Am. St. 966; *Collins v. Collins*, 62 N. Car. (1 Phil. Eq.) 153, 93 Am. Dec. 606. See, however, *Sparks v. Sparks*, 94 N. Car. 527.

⁶⁶ *Webster v. Webster*, 27 L. J. Ch. (N. S.) 115, 3 Jur. (N. S.) 655; *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295; *Rozell v. Redding*, 59 Mich. 331, 26 N. W. 498; *Reithmaier v.*

Beckwith, 35 Mich. 110; *Adams v. Adams*, 24 Hun (N. Y.) 401, *affd.*, 91 N. Y. 381, 43 Am. Rep. 675; *Burkholder's Appeal*, 105 Pa. St. 31; *Reamey v. Bayley* (Pa.), 11 Atl. 438. See also, *Duffy v. White*, 115 Mich. 264, 73 N. W. 363; *Darcey v. Darcey*, 29 R. L. 384, 71 Atl. 595, 23 L. R. A. (N. S.) 886. To same effect, *In re Christie's Estate*, 36 Pa. Super. Ct. 506. See, however, *Fisher v. Koontz*, 110 Iowa 498, 80 N. W. 551; *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271; *Copeland v. Boaz*, 9 Baxt. (Tenn.) 223, 40 Am. Rep. 89; *Roberts v. Frisby*, 38 Tex. 219.

⁶⁷ *Mack v. Mack*, 87 Nebr. 819, 128 N. W. 527, 31 L. R. A. (N. S.) 441.

⁶⁸ *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. 189; *Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. 566; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. 47. Under modern statutes destroying the oneness of husband and wife marriage does not, as a general rule, cancel a prior existing debt owed by one of the parties to the other. *Mackeown v. Lacy*, 200 Mass. 437, 86 N. E. 799, 21 L. R. A. (N. S.) 683 and note. The husband is presumed the dominant party. *Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73.

negotiate it.⁶⁹ This general principle applies to married women. A married woman may appoint an agent to act for her in all such matters as she might lawfully transact in person.⁷⁰

§ 417. **May appoint husband her agent.**—She may confer this power upon her husband in all cases where she might appoint any one to act for her.⁷¹ He does not, however, derive his authority to act from the marital relation.⁷² The existence of

⁶⁹ See post, ch. 15, Agency.

⁷⁰ *Vail v. Meyer*, 71 Ind. 159; *Kenton Ins. Co. v. McClelland*, 43 Mich. 564, 6 N. W. 88 (the above case states the rule negatively); *Baker v. Thompson*, 214 Mo. 500, 114 S. W. 497; *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, 37 Am. St. 374; *Porter v. Haley*, 55 Miss. 66, 30 Am. Rep. 502.

⁷¹ *Nichol v. Gocher*, 12 Manitoba 177; *Hickey v. Thompson*, 52 Ark. 234, 12 S. W. 475; *Coon v. Rigden*, 4 Colo. 275; *Campbell v. Fillmore*, 13 Colo. App. 503, 58 Pac. 790; *Leppe v. Englekamp*, 12 Colo. App. 79, 54 Pac. 403; *Brownell v. Dixon*, 37 Ill. 197; *Wortman v. Price*, 47 Ill. 22; *Dean v. Bailey*, 50 Ill. 482, 99 Am. Dec. 533; *Walker v. Carrington*, 74 Ill. 446; *Blood v. Barnes*, 79 Ill. 437; *Cubberly v. Scott*, 98 Ill. 38; *Bennett v. Stout*, 98 Ill. 47; *Booth v. Smith*, 117 Ill. 370, 7 N. E. 610, affg., 18 Ill. App. 266; *Nichols v. Wallace*, 31 Ill. App. 408; *Nigh v. Dovel*, 84 Ill. App. 228; *McDonald Mfg. Co. v. Williams*, 96 Ill. App. 395; *Baker v. Roberts*, 14 Ind. 552; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 35; *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99; *Whitescarver v. Bonney*, 9 Iowa 480; *Rankin v. West*, 25 Mich. 195; *Lee v. Briggs*, 39 Mich. 592; *Harris v. Weir-Shugart Co.*, 51 Nebr. 483, 70 N. W. 1118; *Tresch v. Wirtz*, 34 N. J. Eq. 124; *Knapp v. Smith*, 27 N. Y. 277; *Buckley v. Wells*, 33 N. Y. 518; *Smith v. Sweeny*, 35 N. Y. 291; *Draper v. Stouvenal*, 35 N. Y. 507; *Owen v. Cawley*, 36 N. Y. 600, affg. 42 Barb. (N. Y.) 105; *Noel v. Kinney*, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; *Wronkow v. Oakley*, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. 661, 16 L. R. A. 209n; *Kingman v. Frank*, 33

Hun (N. Y.) 471; *Abbey v. Deyo*, 44 Barb. (N. Y.) 374; *Whedon v. Champlin*, 59 Barb. (N. Y.) 61; *Stout v. Perry*, 152 N. Car. 312, 67 S. E. 757, 136 Am. St. 826; *Harper v. Dail & Bro.*, 92 N. Car. 394; *Bazemore v. Mountain*, 121 N. Car. 59, 28 S. E. 17; *Murphy v. Bright*, 3 Grant Cas. (Pa.) 296; *Stoops v. Blackford*, 27 Pa. St. 213; *Troxell v. Stockberger*, 105 Pa. St. 405; *Baxter v. Maxwell*, 115 Pa. St. 469, 8 Atl. 581; *Brown v. Thomson*, 31 S. Car. 436, 10 S. E. 95, 17 Am. St. 40; *Young v. Hurst (Tenn. Ch. 1898)*, 48 S. W. 355; *Whitaker v. Lee (Tenn. Ch. 1900)*, 57 S. W. 348; *Perkins v. Baker*, 38 Tex. 45; *Aldridge v. Muirhead*, 101 U. S. 397, 25 L. ed. 1013, revg. 17 Fed. Cas. No. 9904; *Voorhees v. Bonesteel*, 16 Wall. (U. S.) 16, 21 L. ed. 268; *Spaulding v. Drew*, 55 Vt. 253; *Camden v. Hiteshew*, 23 W. Va. 236; *Weisbrod v. Chicago & C. Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Bouck v. Enos*, 61 Wis. 660, 21 N. W. 825; *Mayers v. Kaiser*, 85 Wis. 382, 55 N. W. 688, 21 L. R. A. 623, 39 Am. St. 849. His agency may be inferred from the acts and conduct of himself and wife. *Chamberlain v. Brown*, 141 Iowa 540, 120 N. W. 334. A husband who acts as agent for his wife but does not disclose that he is acting as agent for her is personally bound. *Dayries v. Lindsly*, 128 La. 259, 54 So. 791. To same effect, *Young v. Inman & Nelson*, 146 Iowa 492, 125 N. W. 177.

⁷² *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101; *Fulton County v. Amorous*, 89 Ga. 614, 16 S. E. 201; *Boyd v. Merriell*, 52 Ill. 151; *Geary v. Hennessy*, 9 Ill. App. 17; *Wallace v. Monroe*, 22 Ill. App. 602; *McLaren v. Hall*, 26 Iowa 297; *Price v. Seydel*, 46 Iowa

the relation of principal and agent must be proved.⁷³ Consequently no act of his in respect to her separate estate binds her in the absence of previous authority or a subsequent ratification.⁷⁴ The statutes of a state may, however, make the husband his wife's agent for certain purposes.⁷⁵

§ 418. **Evidence of husband's agency.**—There is considerable conflict in the authorities as to what shall be considered sufficient evidence of a husband's agency. In some of the cases it is held that the mere fact that the wife allows her husband to take the general control and management of her property carries with it sufficient evidence of an implied authority to keep it in repair, and to make such additions to it as may be necessary for its convenient use. Others hold that this is a doctrine dangerous to the rights of the wife. To this it is replied that any other doctrine is dangerous to the rights of creditors.⁷⁶ When a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the construction of improvements upon her land, he may be justly held to have acted as her agent.⁷⁷ In an action by a wife and her husband to recover possession of her separate property, conveyed by the husband under a power of attorney from the wife, where the petition demands judgment for the land, and the notice thereon says the action is brought to try title, although the question may be technically not one of title, but merely whether a boundary was changed by the authority and ratification of the wife,

696; *Treadwell v. Herndon*, 41 Miss. 38; *Partee v. Stewart*, 50 Miss. 717; *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663, 17 Am. St. 580; *Rust-Owen Lumber Co. v. Holt*, 60 Nebr. 80, 82 N. W. 112, 83 Am. St. 512; *Sternberger v. Hurtzig*, 36 N. J. Eq. 375; *Garber v. Spivak*, 114 N. Y. S. 762; *Towles v. Fisher*, 77 N. Car. 437; *Ricks v. Wilson*, 154 N. Car. 282, 70 S. E. 476.

⁷³ *Henderson v. State* (Tex. Civ. App.), 117 S. W. 825. To same effect, *Steele v. Gold Fissure Gold Min. Co.*, 42 Colo. 529, 95 Pac. 349, 126 Am. St. 177.

⁷⁴ *Cox v. Armstrong*, 17 Ky. L. 1395, 34 S. W. 1075; *Norfolk Nat.*

Bank v. Nenow, 50 Nebr. 429, 60 N. W. 936.

⁷⁵ See *Bolling v. Mock*, 35 Ala. 727; *Mobley v. Leophart*, 47 Ala. 257; *O'Brien v. Foreman*, 46 Cal. 80; *American Express Co. v. Lankford*, 2 Ind. T. 18, 46 S. W. 183; *Sawyer v. Biggart*, 114 Iowa 489, 87 N. W. 426; *Toulmin v. Heidelberg*, 32 Miss. 268; *Mitchell v. Mitchell*, 35 Miss. 108; *Leinkauf v. Barnes*, 66 Miss. 207, 5 So. 402; *Wright v. Walton*, 56 Miss. 1.

⁷⁶ *Roberts v. Hartford*, 86 Maine 460, 29 Atl. 1099.

⁷⁷ *Roberts v. Hartford*, 86 Maine 460, 29 Atl. 1099.

under the Texas procedure, the power of attorney and deed are not admissible in evidence to prove such authority and ratification.⁷⁸ When husband and wife are sued jointly, but not as partners, there is no implied authority in the husband to employ counsel in behalf of the wife on her credit.⁷⁹

§ 419. Wife may act as husband's agent.—The husband may also authorize his wife to act as his agent.⁸⁰ But she does not derive, as a general rule any authority from the marital relation alone, to dispose of his property either by sale or exchange.⁸¹ Thus, in a recent case, the plaintiff entered into a contract with the defendant's wife for the performance of certain work. He had no conversation with her husband about the work except once while the work was "in progress when the defendant said "My wife is boss. Anything as far as the wife goes that's all right. You will get your money." These words were held neither to prove defendant's wife was his agent nor to show a ratification on his part.⁸²

§ 420. Power to pledge credit of husband.—Under certain circumstances the wife may, however, pledge her husband's credit for necessities.⁸³ The husband may, however, defeat his liability

⁷⁸ *Mexia v. Oliver*, 148 U. S. 664, 37 L. ed. 602, 13 Sup. Ct. 754.

⁷⁹ *Shelton v. Holderness*, 94 Ga. 671, 19 S. E. 977.

⁸⁰ *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; *Cooper v. Haseltine* (Ind. App.), 98 N. E. 437; *McKee v. Kent*, 24 Miss. 131; *Jones v. Jones*, 3 Strob. (S. Car.) 315; *Sawyer v. Cutting*, 23 Vt. 486.

⁸¹ *Dunnahoe v. Williams*, 24 Ark. 264; *Brown v. Hannibal & Co.*, 33 Mo. 309; *Edwards v. Tyler*, 141 Ill. 454, 31 N. E. 312; *Wheeler & Co. Mfg. Co. v. Morgan*, 29 Kans. 519.

⁸² *Syring v. Zelenski*, 77 N. J. L. 406, 71 Atl. 1119. When the wife contracts as principal the mere promise of the husband to settle the obligation so incurred is without consideration and void. This decision is based on the principle that one cannot ratify the acts of another who did not pro-

fess to act as agent for him. *Shuman v. Steinel*, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. (N. S.) 1048n, 116 Am. St. 961. See post, ch. 15, Agency.

⁸³ *Hughes v. Chadwick*, 6 Ala. 651; *Nissen v. Bendixsen*, 69 Cal. 521, 11 Pac. 29; *Phillips v. Sanchez*, 35 Fla. 187, 17 So. 363; *Eames v. Sweetser*, 101 Mass. 78; *Hamilton v. McEwen*, 144 Mo. App. 542, 129 S. W. 39; *French v. Burlingame*, 155 Mo. App. 548, 134 S. W. 1100; *Calkins v. Long*, 22 Barb. (N. Y.) 97; *Strong v. Moul*, 22 N. Y. St. 762, 4 N. Y. S. 299. The wife may sue and recover from the husband money advanced by her from her separate estate with which to purchase necessities. *De Brauwere v. De Brauwere*, 144 App. Div. (N. Y.) 521, 129 N. Y. S. 587. In *McCarter v. McCarter* (Ga.), 74 S. E. 308, it is held that the wife has the right to provide necessities for their children and look to the father

by showing that she was amply supplied with the necessities furnished or with the means to procure them.⁸⁴

§ 421. **Power to take and hold lands as trustee.**—By the common law married women had the capacity and power to take and hold lands as trustee and to execute the duties and powers of the trust, including that of conveying the trust property by deed, without the concurrence and joinder of their husbands.⁸⁵

§ 422. **Ratification or confirmation.**—Since at common law all contracts of a married woman, with very few exceptions, were void ab initio, they could not be ratified either during coverture or after discovery.⁸⁶ In so far as the common-law dis-

for reimbursement. "What are included in the word 'necessaries,' when applied to goods purchased by a wife, and for which it is sought to charge the husband, are such articles of utility as are suitable to maintain her according to the degree and estate of her husband and his ability to pay." *Schwartz v. Cohn*, 129 N. Y. S. 464. Diamonds and jewelry of the value of \$246, bought by the wife of a man worth \$200,000 have been held necessities. *Cooper v. Haseltine* (Ind. App.), 98 N. E. 437. A physician's services to a sick wife are a necessity for which the husband is liable. *Thrall Hospital v. Caren*, 140 App. Div. (N. Y.) 171, 124 N. Y. S. 1038. See also, *Ketterer v. Nelson* (Ky.), 141 S. W. 409. Artificial teeth have been held necessities. *Clark v. Tenneson*, 146 Wis. 65, 130 N. W. 895, 33 L. R. A. (N. S.) 426n. A set of Stoddard's Lectures has been held not a necessity. *Shuman v. Steinell*, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. (N. S.) 1048n, 116 Am. St. 961.

⁸⁴ *Morel Bro. & Co. v. Earl of Westmoreland* (1903), L. R. 1 K. B. 64; *Baker v. Carter*, 83 Maine 132, 21 Atl. 834, 23 Am. St. 764; *Meuschke v. Riley*, 159 Mo. App. 331, 140 S. W. 639; *Wilson v. Thomass*, 127 N. Y. S. 474; *Wanamaker v. Weaver*, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529n, 98 Am. St. 621n; *Rosenfeld v. Peck*, 134 N. Y. S. 392; *Allen v. Rieder*, 41 Pa. Super. Ct. 534. For a statement of the rule when the parties

live separate, see *Chas. W. Decker & Bros. v. Moyer*, 121 N. Y. S. 630. See also, *Simpson v. Dutcher*, 123 N. Y. S. 340; *Eder v. Grifka*, 149 Wis. 606, 136 N. W. 154. The liability of the husband in cases of this character is not really founded on the wife's agency but on the legal duty imposed upon every husband to support his wife, and supply her with necessities. *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. 362. It is in fact a case of quasi contract. See post, ch. 15, Agency.

⁸⁵ *Insurance Co. of Tennessee v. Waller*, 116 Tenn. 1, 95 S. W. 811, 115 Am. St. 763.

⁸⁶ *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Dixie v. Worthy*, 11 U. C. Q. B. 328; *Lloyd v. Lee*, 1 Strange 94; *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 156; *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632; *Maher v. Martin*, 43 Ind. 314; *Putnam v. Tennyson*, 50 Ind. 456; *Thomas v. Passage*, 54 Ind. 106; *Long v. Brown*, 66 Ind. 160; *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. 456; *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539; *Davis v. Schmidt* (Ind. App.), 31 N. E. 840; *Gilbert v. Brown*, 29 Ky. L. 1248, 97 S. W. 40, 7 L. R. A. (N. S.) 1053; *Rupple v. Kissel*, 24 Ky. L. 2371, 74 S. W. 220; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382. (The last two cases overruled *Franklin v. Beatty*, 27 Miss. 347.) *Macfarland*

abilities of a married woman still attach to her, her contracts are void and cannot be ratified.⁸⁷ It has also been held that she is not bound by a new promise made without additional consideration after the passage of an act giving her the capacity to make a contract, such as that for which the new promise is given. The wife was incapable, at the origin of the consideration to make a valid promise; consequently any new promise based thereon is null.⁸⁸ When, however, a feme covert has capacity to appoint an agent to act in a given case, she may ratify the unauthorized contract of one acting in that case as her agent,⁸⁹ and enforce specific performance.⁹⁰ It is also obvious that she may ratify in all cases in which the contract was merely voidable at her option. The question as to what constitutes a ratification on her part in those cases in which she has capacity to ratify, need not be gone into here. Ratification by married women in such cases is governed by the same general rules that control ratification by principals in general.⁹¹

§ 423. **Restoration.**—Should a married woman seek to avoid a contract executory on her part on the ground of coverture,⁹² or because of such disability seek to recover that which she has parted with under a contract executed on her part,⁹³ she must restore the consideration received by her under the terms of the agreement.⁹⁴ Thus in the first instance it has been held that

v. Heim, 127 Mo 327, 29 S. W. 1030, 48 Am. St. 629; Nesbitt v. Turner, 155 Pa. St. 429, 26 Atl. 750; Brown v. Bennett, 75 Pa. St. 420; Buchanan v. Hazzard, 95 Pa. St. 240; Watson v. Dunlap, 2 Cranch (U. S.) 14, Fed. Cas. No. 17282.

⁸⁷ Gilbert v. Brown, 29 Ky. L. 1248, 97 S. W. 40, 7 L. R. A. (N. S.) 1053. See also, Watters v. Wagley, 53 Ark. 509, 14 S. W. 774, 22 Am. St. 232; Graham v. Tucker, 56 Fla. 307, 47 So. 563, 19 L. R. A. (N. S.) 531n, 131 Am. St. 124n. It is obvious she may disaffirm her unauthorized contract. Edwards v. Stacey, 113 Tenn. 257, 82 S. W. 470, 106 Am. St. 831.

⁸⁸ Lyell v. Walbach, 113 Md. 574, 77 Atl. 1111, 33 L. R. A. (N. S.) 741; Valentine v. Bell, 66 Vt. 280,

29 Atl. 251. See also, Warner v. Warner, 235 Ill. 448, 85 N. E. 630.

⁸⁹ Steiner v. Trantum, 98 Ala. 315, 13 So. 365. She can ratify only in the manner necessary to confer original authority. Shanks & March v. Michael, 4 Cal. App. 553, 88 Pac. 596.

⁹⁰ Newberry v. Slaughter, 98 Mich. 468, 57 N. W. 574.

⁹¹ See post, ch. 15, Agency.

⁹² National Granite Bank v. Tynedale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 477; Willock's Estate, 165 Pa. St. 23, 30 Atl. 1043; Bucknor's Estate (sub nomine, Appeal of Starr), 136 Pa. St. 23, 19 Atl. 1069, 20 Am. St. 891.

⁹³ Pilcher v. Smith, 2 Head (Tenn.) 208.

⁹⁴ See, however, Silcock v. Baker, 25 Tex. Civ. App. 508, 61 S. W. 939.

where a feme covert had obtained money on her promissory note void at law no suit could be maintained thereon, but that she was liable in an action at law for money lent or money had and received.⁹⁵ In either case the well-settled doctrine that one cannot accept the benefits and avoid the obligations of a contract applies.⁹⁶ On the other hand, it has been held that while she might disaffirm either her executory or executed contract to purchase real estate, she could not recover money paid by her under the agreement when it appears that the contract was fairly made.⁹⁷ It is obvious that if the feme covert receives no consideration she is not bound to return any on avoiding her contract.⁹⁸ Thus the fact that a married woman failed to offer to return her portion of the consideration, which was never paid her, but which went toward the payment of her father's debts, does not work an estoppel.⁹⁹

§ 424. **Estoppel.**—In so far as the contracts of a married woman are utterly void she is not estopped thereby.¹ She is not estopped by a contract which she has no legal capacity to make.² To this general rule, however, certain exceptions or qual-

⁹⁵ *National Granite Bank v. Tynedale*, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 477.

⁹⁶ *Kennedy v. Harris*, 3 Ind. Ter. 487, 58 S. W. 567; *Blantz v. Bain*, 95 Tenn. 87, 31 S. W. 159.

⁹⁷ *Jackson v. Rutledge*, 3 Lea (Tenn.) 626, 31 Am. Rep. 655. In the above case the seller was permitted to foreclose a vendor's lien and the feme covert denied the right to recover her payments. *Edwards v. Stacey*, 113 Tenn. 257, 82 S. W. 470, 106 Am. St. 831. In the above case it is said: "The disability of coverture was never intended to enable married women to do injustice or wrong. It is the weapon of defense, not of offense. It is a protection against all attempts to compel them to complete their contracts, if they consider it to their interest to decline to proceed further with them; but it does not give them the right to recover money paid under an agreement fairly made. The money of a married woman is her absolute property, aside from the rights of her husband, and she has the right to

part with it in any manner she may desire, and when she does so, in the absence of fraud her action is irrevocable."

⁹⁸ *McKinney v. Street*, 107 Tenn. 526, 64 S. W. 482. In the above case the husband sold and received payment for property belonging to his wife. It was held that she was not estopped to recover the land when there was nothing to show that she had ever received any of the proceeds of the sale.

⁹⁹ *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30. As to the personal liability of a feme covert on a void contract, see *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.

¹ *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; *Cook v. Walling*, 117 Ind. 9, 19 N. E. 532, 2 L. R. A. 769, 10 Am. St. 17; *Smith v. Ingram*, 130 N. Car. 100, 40 S. E. 987, 61 L. R. A. 878; *Crenshaw v. Julian*, 26 S. Car. 283, 2 S. E. 133, 4 Am. St. 719.

² *Mattox v. Hightshue*, 39 Ind. 95; *Parsons v. Rolfe*, 66 N. H. 620, 27

ifications exist as where she conveys property believing that she has been legally divorced, and she lives as an unmarried woman, is generally known as such, and is unquestionably free from the control of her husband,³ or where she thought her husband dead, or for some other reason assumed that the marriage relation had been terminated, or has for a long period of time passed herself off as an unmarried woman.⁴ At the present time the common-law rule in regard to the contracts of married women need hardly be considered, since she has, by the statutes of the various states, been emancipated in whole or in part.⁵

§ 425. **May be estopped by agreement within limit of her capacity to contract.**—Within the limits of her capacity to contract, a feme covert may be estopped by her agreement with reference to her equitable or statutory separate estate.⁶ She may be bound by estoppel in certain instances independent of statutes permitting her to contract as a feme sole.⁷ Thus married women

Atl. 172; *Bishop v. Bourgeois*, 58 N. J. Eq. 417, 43 Atl. 655; *Sherwin v. Sternberg* (N. J.), 74 Atl. 510.

³*Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83. See also, *Keller v. Lindow* (Tex. Civ. App.), 133 S. W. 304.

⁴*Hand v. Hand*, 68 Cal. 135, 58 Am. Rep. 5n; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Richeson v. Simmons*, 47 Mo. 20. See, however, *Cook v. Walling*, 117 Ind. 9, 19 N. E. 532, 2 L. R. A. 769, 10 Am. St. 17; *Keen v. Coleman*, 39 Pa. St. 299, 80 Am. Dec. 524; *Klein v. Caldwell*, 91 Pa. St. 140.

⁶"The tendency of modern authority is strongly toward the enforcement of the estoppel against married women as against persons *sui juris*." *Engholm v. Ekrem*, 18 N. Dak. 185, 119 N. W. 35. Under the statutes of Missouri the doctrine of estoppel obtains against her identically as it does against other persons not under disability with respect to persons other than her husband. *Tennent v. Union Cent. Life Ins. Co.*, 133 Mo. App. 345, 112 S. W. 754.

⁷*Bein v. Heath*, 6 How. (U. S.) 228, 12 L. ed. 416; *Drake v. Glover*, 30 Ala. 382; *Lathrop v. Soldiers' L. & B. Assn.*, 45 Ga. 483; *Hockett v.*

Bailey, 86 Ill. 74; *Nixon v. Halley*, 78 Ill. 611; *Anderson v. Armstead*, 69 Ill. 452; *Spafford v. Warren*, 47 Iowa 47; *Frazier v. Gelston*, 35 Md. 298; *Shivers v. Simmons*, 54 Miss. 520, 28 Am. Rep. 372n; *Levy v. Gray*, 56 Miss. 318; *Read v. Hall*, 57 N. H. 482; *Bodine v. Killeen*, 53 N. Y. 93; *Smyth v. Munroe*, 84 N. Y. 354; *Noel v. Kinney*, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; *Meiley v. Butler*, 26 Ohio St. 535; *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. St. 438; *Fryer v. Rishell*, 84 Pa. 521; *White v. Goldsberg*, 49 S. Car. 530, 27 S. Car. 517; *Howell v. Hale*, 5 Lea (Tenn.) 405; *Cravens v. Booth*, 8 Tex. 243, 58 Am. Dec. 112; *O'Brien v. Hilburn*, 9 Tex. 297.

⁷*Ramboz v. Stowell*, 103 Cal. 588, 37 Pac. 519; *Birch v. Steppler*, 11 Colo. 400, 18 Pac. 530. See *National Feather-Duster Co. v. Hibbard*, 9 Fed. 558, 11 Biss. (C. C.) 76; *Patterson v. Lawrence*, 90 Ill. 174, 32 Am. Rep. 22; *Gatling v. Rodman*, 6 Ind. 289; *Wright v. Arnold*, 14 B. Mon. (Ky.) 513; *Rusk v. Fenton*, 14 Bush. (Ky.) 490, 29 Am. Rep. 413; *Snow v. Hutchins*, 160 Mass. 111, 35 N. E. 315; *Norton v. Nichols*, 35 Mich. 148; *Robb v. Shephard*, 50 Mich. 189, 15 N. W. 76; *Dobbin v. Cordiner*, 41

may be estopped by judgments in actions to which they are proper parties in the same manner as persons *sui juris*.⁸ This is especially true where a married woman acquiesces in and accepts the benefits of the decree.⁹

§ 426. **Illustration of the rule.**—The warranty deed of a feme covert which is executed in conformity to the statutory requirement is generally binding by way of estoppel upon her, and her subsequent grantee to the same extent as if she were unmarried.¹⁰ If the married woman has power and capacity to make the contract or conveyance and it is entered into in the manner prescribed by law she may be estopped to deny the truth of recitals therein contained. Thus she has been held estopped to show there was no consideration for her conveyance when the deed recites a valuable consideration.¹¹ She is not, however, estopped by her deed which she is induced to execute through fraud or which is not executed in the mode prescribed by statute.¹²

Minn. 165, 42 N. W. 870, 4 L. R. A. 333, 16 Am. St. 683; *Richardson v. Toliver*, 71 Miss. 966, 16 So. 213; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Cooley v. Steele*, 2 Head (Tenn.) 605; *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522; *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362. See also, *Engholm v. Ekrem*, 18 N. Dak. 185, 119 N. W. 35.

⁸ *Grantham v. Kennedy*, 91 N. Car. 148. See also, *Guthrie v. Howard*, 32 Iowa 54; *Van Metre v. Wolf*, 27 Iowa 341.

⁹ *Bingham's Appeal*, 123 Pa. St. 262, 16 Atl. 613, 10 Am. St. 522; *Baily v. Baily*, 44 Pa. St. 274, 84 Am. Dec. 439.

¹⁰ *Harden v. Darwin*, 77 Ala. 472; *St. Louis & C. R. Co. v. Foltz*, 52 Fed. 627; *Guertin v. Mombteau*, 144 Ill. 32, 33 N. E. 49; *Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645; *King v. Rea*, 56 Ind. 1; *Knight v. Thayer*, 125 Mass. 25. She cannot set up an after-acquired title. *Zimmerman v. Robinson*, 114 N. Car. 39, 19 S. E. 102. "Married women cannot enjoy these enlarged rights of action and of property and remain irresponsible for the ordinary and legal and equitable results of their conduct. Incident to this power of married women to deal

with others is the capacity to be bound and to be estopped by their conduct, when the enforcement of the principle of estoppel is necessary for the protection of those with whom they deal, although there are without doubt, limitations upon the application of this doctrine." *Dobbin v. Cordiner*, 41 Minn. 165, 16 Am. St. 683.

¹¹ *Stacey v. Walter*, 125 Ala. 291, 28 So. 89, 82 Am. St. 235. See also, *Trimble v. State*, 145 Ind. 154, 44 N. E. 260, 57 Am. St. 163; *Hill v. West*, 8 Ohio 222, 31 Am. Dec. 422; *Dukes v. Spangler*, 35 Ohio St. 119. See, however, in this connection, *Cockrill v. Hutchinson*, 135 Mo. 67, 36 S. W. 375, 58 Am. St. 564. But if the statute is not complied with the conveyance is void and cannot bind her for estoppel. *Merriam v. Boston & C. R. Co.*, 117 Mass. 241.

¹² *Wood v. Terry*, 30 Ark. 385; *Louisville & C. R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. 303; *Merriam v. Boston & C. R. Co.*, 117 Mass. 241; *Ray v. Wilcoxon*, 107 N. Car. 514, 12 S. E. 443; *Smith v. Ingram*, 132 N. Car. 959, 44 S. E. 643, 95 Am. St. 680; *Stone v. Sledge*, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. 65. See also, *Francis v. Rose*, 141 Ky. 645, 133 S. W. 550.

In case she joins her husband in a conveyance of his separate property she is not personally liable on the covenants of warranty therein contained.¹³ And if she should join in the conveyance merely to release her dower and homestead rights, the covenants of warranty contained in the deed will not prevent her from setting up an after acquired title or an interest owned by her other than that of dower and homestead.¹⁴ Under statutes which require the husband to join in a conveyance of the wife's property, it is held as a general rule that a feme covert is not estopped by her sole deed.¹⁵ She may be estopped by a mortgage to which she is a party.¹⁶ And if she holds her husband out as her agent she may be estopped to deny his agency.¹⁷

¹³ *Moore v. Graves*, 97 Iowa 4, 65 N. W. 1008. Under the statutes of the above state she will not be bound unless she expressly so states in the deed. See also, *Rowley v. Shepardson*, 83 Vt. 167, 74 Atl. 1002, 138 Am. St. 1078. The last case cited lays down the rule that where the wife joins in the conveyance of real estate not her separate property, her responsibility is measured, not by the statute enlarging the powers of married women, but by the common law.

¹⁴ *Village of Western Springs v. Collins*, 98 Fed. 933, 40 C. C. A. 33; *Penny v. British & American Mortgage Co.*, 132 Ala. 357, 31 So. 96. In the case last cited the wife joined with the husband in the execution of a mortgage for the purpose of releasing her dower and homestead rights. The husband and wife were tenants in common and it was held that the mortgage did not convey her undivided moiety in the land. "A married woman cannot estop herself by her acts and declarations from asserting dower and other claims to land, except in those cases where to permit her to do so would operate as a fraud." *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30.

¹⁵ *Vansandt v. Weir*, 109 Ala. 104, 19 So. 424, 32 L. R. A. 201; *Wood v. Terry*, 30 Ark. 385; *Morrison v. Wilson*, 13 Cal. 494, 73 Am. Dec. 593; *Ross v. Singleton*, 1 Del. Ch. 149, 12 Am. Dec. 86; *Oglesby Coal Co. v.*

Pasco, 79 Ill. 164; *Behler v. Weyburn*, 59 Ind. 143; *Unfried v. Heberer*, 63 Ind. 67; *Suman v. Springate*, 67 Ind. 115; *Parke v. Barrowman*, 83 Ind. 561; *Rangeley v. Spring*, 21 Maine 130; *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448; *Pierce v. Chace*, 108 Mass. 254; *Todd v. Railroad Co.*, 19 Ohio St. 514; *Innis v. Templeton*, 95 Pa. St. 262, 40 Am. Rep. 643; *Davison's Appeal*, 95 Pa. St. 394; *Glidden v. Strupler*, 52 Pa. St. 400; *Stivers v. Tucker*, 126 Pa. St. 74, 17 Atl. 541; *Mason v. Jordan*, 13 R. I. 193; *McLaurin v. Wilson*, 16 S. Car. 402; *Daniel v. Mason*, 90 Tex. 240, 38 S. W. 161, 59 Am. St. 815; *Drury v. Foster*, 2 Wall. (U. S.) 24, 17 L. ed. 780. And see *Merriam v. Boston & C. R. Co.*, 117 Mass. 241. See also, *Collins v. Goldsmith*, 71 Fed. 580. See further, ante, § 407, Statutes requiring Husband to Join or Consent.

¹⁶ *Simmons v. Richardson*, 107 Ala. 697, 18 So. 245; *Jones v. Reese*, 65 Ala. 134; *Yerkes v. Hadley*, 5 Dak. 324; *Long v. Crossan*, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783; *Kedy v. Kramer*, 129 Ind. 478, 28 N. E. 1121; *Lane v. Schlemmer*, 114 Ind. 296, 15 N. E. 454, 5 Am. St. 621; *McCullough v. Wilson*, 21 Pa. St. 436; *Bailey v. Seymour*, 42 S. Car. 322, 20 S. E. 62.

¹⁷ *American Mortgage Co. v. Owens*, 64 Fed. 249; *Foster v. Jones*, 78 Ga. 150, 1 S. E. 275; *McNichols v. Kettner*, 22 Ill. App. 493.

§ 427. **Estoppel by silence or acquiescence.**—She may also be estopped by silence or conduct which under the circumstances is intentionally wrong and fraudulent.¹⁸ Could a feme covert stand by and knowingly permit her husband to use her money or property, real or personal, as his own, thereby incurring obligations and obtaining credit upon the faith of others that the property belongs to him, she may be estopped to set up the title as against her husband's creditors.¹⁹ Thus, where a married woman procured a sale of property to be made for her husband's benefit, it was held that she was estopped to subsequently claim that no title passed because the property was in fact hers.²⁰ Even in those jurisdictions in which a feme covert is prohibited from entering into contracts of suretyship it is usually provided by such statutes, or held by the courts, that she may be bound by estoppel in pais as any other person.²¹ But no estoppel in pais will exist where it appears that the creditor knew all the facts and participated in the evasion of the statute.²²

¹⁸ *Schweitzer v. Wagner*, 94 Ky. 458, 22 S. W. 883; *Tracy v. Lincoln*, 145 Mass. 357, 14 N. E. 122; *Grim's Appeal*, 105 Pa. St. 375; *Logan v. Gardener*, 136 Pa. St. 588, 20 Atl. 625, 20 Am. St. 939; *Gwynn v. Gwynn*, 31 S. Car. 482, 10 S. E. 221; *Brown v. Thompson*, 31 S. Car. 436, 10 S. E. 95, 17 Am. St. 40; *Keller v. Lindow* (Tex. Civ. App.), 133 S. W. 304; *Steed v. Petty*, 65 Tex. 490; *Smith v. Weeks*, 65 Vt. 566, 27 Atl. 197; *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424. See also, *Louisville & C. R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. 303; *Johnson v. Bryan*, 62 Tex. 623; *Munk v. Weidner*, 9 Tex. Civ. App. 491, 29 S. W. 409; *Smith v. Powell*, 5 Tex. Civ. App. 373, 23 S. W. 1109.

¹⁹ *Driggs & C. Bank v. Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. 78; *Warner v. Watson*, 35 Fla. 402; *Lecoil v. Armstrong-Landon-Hunt Co.*, 140 Ind. 256, 39 N. E. 922; *Minich v. Shaffer*, 135 Ind. 634, 34 N. E. 987; *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788; *Swartz v. McClelland*, 31 Nebr. 646, 48 N. W. 461; *Hamlen's Admr. v. Bennett*, 52 N. J. Eq. 70, 27 Atl. 651; *Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. 722. But her

mere presence at the time the transaction is consummated does not bind her if she had no knowledge of its nature. *Hoshkowitz v. Sargoy*, 141 App. Div. (N. Y.) 839, 125 N. Y. S. 913.

²⁰ *Overcast v. Lawrence*, 141 Ky. 25, 131 S. W. 1029.

²¹ *Field v. Campbell*, 164 Ind. 389, 72 N. E. 260, 108 Am. St. 301; *Trimble v. State*, 145 Ind. 154, 44 N. E. 260, 57 Am. St. 163n.

²² *Weil v. Waterhouse*, 46 Ind. App. 690, 91 N. E. 746; *Indianapolis Brewing Co. v. Behnke*, 41 Ind. App. 288, 81 N. E. 119; *Field v. Campbell*, 164 Ind. 389, 72 N. E. 260, 108 Am. St. 301. See, however, *Trimble v. State*, 145 Ind. 154, 44 N. E. 260, 57 Am. St. 163n. See also, *White v. Stocker*, 85 Ga. 200, 11 S. E. 604; *Johnson v. A. Leffler Co.*, 122 Ga. 670, 50 S. E. 488; *Johnston v. Gullledge*, 115 Ga. 981, 42 S. E. 354. Before a feme covert will be estopped to deny her suretyship it must appear (1) that there was a misrepresentation or concealment of material facts; (2) that the misrepresentation was made with knowledge of the facts; (3) that the party to whom it was made was ignorant of the truth of the matter;

§ 428. **Estoppel—When abandoned by husband.**—It has been held by the Supreme Court of the state of Washington that if a husband separates from his wife and goes into that state and holds himself out and acquires property as a single man and the wife makes no effort and shows no desire to assert her rights as a spouse, she will be estopped to assert her interest in community property acquired by the husband and by him transferred to another when the latter dealt with the vendor in the good faith belief and on the assumption that he was unmarried and was an innocent purchaser.²³ These decisions would seem to be wrong in theory, however, because under them a married woman might be estopped not because of any fraud or wrong on her part but solely by reason of the husband's wrong in abandoning her and securing another residence in a foreign state without leaving her with the means whereby she might follow him or otherwise making her wifeship and her rights in his property known.²⁴

§ 429. **Coverture a personal defense and must be pleaded.**—Coverture is a personal defense and must be alleged and proved before it can be taken advantage of.²⁵ It must be pleaded when it constitutes a defense to an action brought against the

(4) that it was made with the intention that the other party should act upon it; (5) that the other party was induced to act upon it to his injury. An estoppel can only be predicated upon a wrong. It cannot exist if the person dealing with her knew the fact, or was ignorant from a failure to inquire, or was misled by the representations of the wife. *Neighbors v. Davis*, 34 Ind. App. 441, 73 N. E. 151, p. 153. See also, *Dayries v. Lindsly*, 128 La. 259, 54 So. 791.

²³ *Nuhn v. Miller*, 5 Wash. 405, 31 Pac. 1031, 34 Pac. 152, 34 Am. Rep. 868; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630; *Canadian & Co. v. Bloomer*, 14 Wash. 491, 45 Pac. 34. In the above case the conveyance executed by the husband was a mortgage. See also, *Pickens v. Gillam*, 43 La. Ann. 350, 8 So. 928; *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200;

Daly v. Rizzutto, 59 Wash. 62, 109 Pac. 276, 29 L. R. A. (N. S.) 467n.

²⁴ See *Mason v. Dierks Lumber and Coal Co.*, 94 Ark. 107, 125 S. W. 656, 26 L. R. A. (N. S.) 574; *Hilton v. Stewart*, 15 Idaho 150, 96 Pac. 579, 128 Am. St. 48; *Stevens v. Wooderson*, 38 Ind. App. 617, 78 N. E. 681; *Smith v. Fuller*, 138 Iowa 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98n; *Hall v. Marshall*, 139 Mich. 123, 102 N. W. 658, 111 Am. St. 404; *Cazier v. Hinchey*, 143 Mo. 203, 44 S. W. 1052; *Hilton v. Sloan*, 37 Utah 359, 108 Pac. 689. The cases above cited have to do mainly with homestead and dower rights.

²⁵ *Strauss v. Glass*, 108 Ala. 546, 18 So. 526; *Smoot v. Judd*, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738; *Meade v. Clarke*, 159 Pa. St. 159, 28 Atl. 214, 39 Am. St. 669, 23 L. R. A. 479.

feme covert, otherwise the judgment will be valid.²⁶ And where coverture is pleaded the facts alleged must be sufficient to show that the contract is one which she could not enter into because of coverture.²⁷ On the other hand, in an action against a married woman it has been held that it must appear from the pleading and be proved by the evidence that the contract was one such as she was authorized to make, her liability not being presumed.²⁸ Only the married woman or her privies in blood, representation or estate can set up coverture as a defense.²⁹ No one else can do it for her or compel her to do it.³⁰ The defense cannot be interposed by her husband or those claiming under him.³¹ Nor can the adverse party avoid the agreement because of her coverture, at least when the contract is not entirely executory and the feme covert is able and willing to perform.³² She may enforce specific performance where she has performed her part of the contract and cannot be placed in statu quo.³³ However, where her con-

²⁶ *Landers v. Douglas*, 46 Ind. 522; *Van Metre v. Wolf*, 27 Iowa 341; *Smoot v. Judd*, 161 Mo. 673, 61 S. W. 854, 84 Am. St. 738; *Von Schrader v. Taylor*, 7 Mo. App. 361; *Vantilburg v. Black*, 3 Mont. 459; *Linton v. Jansen*, 1 Nebr. (unof.) 352, 95 N. W. 675; *Vosburgh v. Brown*, 66 Barb. (N. Y.) 421; *Rutherford v. Ray*, 147 N. Car. 253, 61 S. E. 57; *Smith v. Borden*, 17 R. I. 220, 21 Atl. 351, 11 L. R. A. 585n, 33 Am. St. 867; *Carter v. Kaiser* (Tenn. Ch.), 48 S. W. 265; *Woodfolk v. Lyon*, 98 Tenn. 269, 39 S. W. 227; *Phelps v. Brackett*, 24 Tex. 236. See, however, *Weathers v. Borders*, 124 N. Car. 610, 32 S. E. 881, which holds that where it clearly appears throughout the proceedings that the defendant was a married woman, the defense of coverture will not be deemed waived. See also, *Parsons v. Spencer*, 83 Ky. 305, 7 Ky. L. 329; *Howard v. Gibson* (Ky.), 22 Ky. L. Rep. 1294, 60 S. W. 491 (holding that a statute passed subsequently to the giving of a note requiring a feme covert to plead coverture did not interfere with a vested right); *Belcher v. Polly* (Ky.), 106 S. W. 818. Compare, however, with *Turner v. Gill*, 105 Ky. 414, 49 S. W. 311.

²⁷ *Strauss v. Glass*, 108 Ala. 546, 18 So. 526. The above of course applies only when her disability is partial.

²⁸ *Warner v. Hess*, 66 Ark. 113, 49 S. W. 489; *Emmett v. Yandes*, 60 Ind. 548; *Westervelt v. Baker*, 56 Nebr. 63, 76 N. W. 440, citing and following *Grand Island Banking Co. v. Wright*, 53 Nebr. 574, 74 N. W. 82; *Moore v. Wolfe*, 122 N. Car. 711, 30 S. E. 120; *Koechling v. Henkel*, 144 Pa. St. 215, 22 Atl. 808; *Hecker v. Haak*, 88 Pa. St. 238; *Duval v. Chef*, 92 Va. 489, 23 S. E. 893.

²⁹ *Jones v. Harrell*, 110 Ga. 373, 35 S. E. 690; *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076; *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412; *Slagle v. Hoover*, 137 Ind. 314, 36 N. E. 1099.

³⁰ *Meade v. Clarke*, 159 Pa. St. 159, 28 Atl. 214, 23 L. R. A. 479, 39 Am. St. 669.

³¹ *Slagle v. Hoover*, 137 Ind. 314, 36 N. E. 1099.

³² *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076; *Carpenter v. Mitchell*, 54 Ill. 126; *Holmes v. Holmes*, 107 Ky. 163, 21 Ky. L. 831, 53 S. W. 29, 92 Am. St. 342; *O'Connell v. Storey* (Tex. Civ. App.), 105 S. W. 1174. "It is true that the contract was entered into with a married woman, but the defendant cannot avoid it for that reason." *Frazier v. Lambert*, 53 Tex. Civ. App. 506, 115 S. W. 1174.

³³ *Richards v. Doyle*, 36 Ohio St. 37, 38 Am. Rep. 550; *Heagy v. Kastner* (Tex. Civ. App.), 138 S. W. 788.

tract is void and executory it has been held that there is no consideration for the adverse party's promise and he is not bound.³⁴

§ 430. **Conflict of laws—Lex loci contractus.**—The law that governs the capacity of married women to contract depends in the main upon the subject-matter of the agreement. Contracts in relation to real estate are almost universally governed by the law of the place where the land is located (*lex rei sitae*), irrespective of the place where the deed, mortgage or other agreement was executed or the married woman was domiciled.³⁵ Thus the capacity of a married woman to convey land directly to her husband,³⁶ or to be the grantee in a conveyance directly from him,³⁷ is determined by the law of the place where the land is situated.³⁸ By the great weight of authority, capacity on the part of married women to make personal contracts or contracts in relation to personal property is governed by the law of the place where the contract is executed, *lex loci contractus*, and not by the

³⁴ *Shirk v. Stafford*, 31 Ind. App. 247, 67 N. E. 542.

³⁵ *McDaniel v. Grace*, 15 Ark. 465; *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, 63 Am. St. 193; *Walling v. Christian & C. Grocery Co.*, 41 Fla. 479, 27 So. 46, 47 L. R. A. 608; *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105; *Cochran v. Benton*, 127 Ind. 58, 25 N. E. 870; *Doyle v. McGuire*, 38 Iowa 410; *Sell v. Miller*, 11 Ohio St. 331.

³⁶ *Duffy v. White*, 115 Mich. 264, 73 N. W. 363.

³⁷ *Rush v. Landers*, 107 La. Ann. 549, 32 So. 95, 57 L. R. A. 353; *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771.

³⁸ See, however, the case of *Brown v. Dalton*, 20 Ky. L. 1484, 49 S. W. 443, in which it appears that the husband resident in Kentucky bought land located in Virginia. Subsequently he conveyed it to his wife and she assumed the payment of a note given by her husband in part payment. Suit was brought against the wife to recover on this note. The court held: "This transaction is clearly contrary to the public policy of this state, as defined in the statutes in force when it was made, and, if it could be en-

forced, the door might be opened for grave abuses." The court seemed to treat this transaction as in reality a contract of suretyship. See further *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, which lays down the rule, "But it is said that the laws of the parties' domicile could not authorize a contract between them as to land in Massachusetts. Obviously, this is not true. It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res. * * * But the same reason inverted establishes that the *lex rei sitae* cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract. Such precedents as there are, are on the same side." *Augusta Insurance & Banking Co. v. Morton*, 3 La. Ann. 417. See *Kelly*

law of the place where the property is situated or of the domicil of the parties.³⁹

§ 431. *Lex loci contractus*—Exceptions.—To this general rule there are some few real and apparent exceptions. Thus the courts of some states qualify the general rule by adding “unless it can be fairly said that the parties at the time of its (the contract’s) execution clearly manifested an intention that it should be governed by the laws of another state.”⁴⁰ The Supreme Court of New Jersey has recently gone a step farther and held that the proper law of the contract is the law by which the parties thereto intended or may fairly be presumed to have intended the contract to be governed.⁴¹ Other courts lay down the rule that where the contract is valid by the law of the place where it is made and invalid by that of the place of performance, or vice versa, the agreement will be governed by the law of the jurisdiction that upholds it, on the theory that no contract must be held as intended to be made in violation of law, whenever by any reasonable construction it can be made consistent with the law which it was competent for the parties to adopt.⁴² The Supreme Court of Louisiana adheres to the doctrine that a married woman’s capacity to contract is to be determined by the law of her domicil and that if under the law of her domicil she has a right to enter into any given contract as if a feme sole, her capacity to do so accompanies

v. Davis, 28 La. Ann. 773, which holds that where the husband, a resident of Louisiana, conveyed to his wife land located in Louisiana the capacity of the parties was to be determined by the law of the domicil. *Freret v. Taylor*, 119 La. 307, 44 So. 26, 121 Am. St. 522.

³⁹ *First Nat. Bank v. Mitchell*, 92 Fed. 565, 34 C. C. A. 542 (revd. 180 U. S. 471, 21 Sup. Ct. 418, 45 L. ed. 627); *Nixon v. Halley*, 78 Ill. 611; *Garrigue v. Kellar*, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. 324; *Griswold v. Golding*, 8 Ky. L. 777, 3 S. W. 535; *Young v. Bullen*, 19 Ky. L. 1561, 43 S. W. 687; *Hauck & Co. v. Sharpe*, 83 Mo. App. 385; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 57 L. R. A. 513.

⁴⁰ *Garrigue v. Kellar*, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108

Am. St. 324; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774. See also, *Griswold v. Golding*, 8 Ky. L. 777, 3 S. W. 535.

⁴¹ *Mayer v. Roche*, 77 N. J. L. 681, 75 Atl. 235, 26 L. R. A. (N. S.) 763. See also, *Griswold v. Golding*, 8 Ky. L. 777, 3 S. W. 535; *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Partee v. Silliman*, 44 Miss. 272; *Shacklett v. Polk*, 51 Miss. 378; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774; *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, 1 Am. & Eng. Ann. Cas. 85.

⁴² *Bell v. Packard*, 69 Maine 105, 31 Am. Rep. 251. See also, *Mayer v. Roche*, 77 N. J. L. 681, 75 Atl. 235, 26 L. R. A. (N. S.) 763.

her wherever she may go and her liability on such contract is not extinguished by the fact that she may have exercised her legal right in another state.⁴³

§ 432. **Lex fori controls as to remedy.**—Further confusion arises from those cases in which suit is brought on a married woman's contract in a forum other than that in which the contract was made. These cases are not necessarily in conflict with the rule that the law of the place determines the validity of a contract concerning personalty and that if valid there, it is valid everywhere. The court of the state or country in which suit is brought may consider the contract as contrary to its public policy and refuse to enforce the agreement. This usually happens where the law of the forum and that of the domicile coincide.⁴⁴ The state or country in which suit is brought may also refuse to enforce the contract because the law of the forum affords no remedy for the enforcement of such agreement. It is well settled that matters respecting remedies depend upon the law of the forum.⁴⁵ "The law of one state having, *ex proprio vigore*, no validity in another state, the enforcement of a foreign contract which would not be valid by the law of the forum where its enforcement is judicially attempted, depends upon comity which is extended for that purpose, unless the agreement is contrary to the public policy of the state of the forum, in that it is contrary to good morals, or the state or its citizens would be injured by its enforcement,

⁴³ *Freret v. Taylor*, 119 La. 307, 44 So. 26, 121 Am. St. 522; *Baer Bros. v. Terry*, 105 La. 479, 29 So. 886, second appeal, 108 La. 597, 32 So. 353, 92 Am. St. 394; *LeBreton v. Nouchet*, 3 Mart. (La.) (O. S.) 60, 5 Am. Dec. 736; *Garnier v. Poydras*, 13 La. 177; *Roberts v. Wilkinson*, 5 La. Ann. 369. It should be borne in mind that the law of Louisiana is founded on the civil law or code Napoleon. See also, *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. 452.

⁴⁴ *Brown v. Dalton*, 105 Ky. 669, 20 Ky. L. 1484, 49 S. W. 443, 88 Am. St. 325; *Ruhe v. Buck*, 124 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. 439; *Armstrong v. Best*, 112 N. Car. 59, 17 S. E. 14, 25 L. R. A. 188, 34

Am. St. 473; *First Nat. Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 498, 97 Am. St. 840. See also, *Garrigue v. Kellar*, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. 324; *Thompson v. Taylor*, 65 N. J. L. 107, 46 Atl. 567; *Law v. Smith*, 68 N. J. Eq. 81, 59 Atl. 327; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774.

⁴⁵ *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. St. Rep. 319; *Hinkson v. Williams*, 41 N. J. L. 35; *Evans v. Cleary*, 125 Pa. St. 204, 17 Atl. 440, 11 Am. St. 886; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774.

or it perniciously violates positive written or unwritten prohibitory law; the extent to which comity will be extended being very much a matter of judicial policy to be determined within reasonable limitations by each state for itself."⁴⁶

⁴⁶International Harvester Co. v. Krouse (Ind. App.), 95 N. E. 262. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774. In those states where the presumption that the common law prevails does not apply, a contract there executed but sued on in another state whose jurisprudence is based on the common law, will be governed by the laws of the latter state when no proof is made as to the laws of the former. Krouse v. See also, United States Banking Co. v. Yeale, 114 Kans. 385, 114 Pac. 229; Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 S. W. 754. As to a married woman's liability in tort see Graham v. Tucker, 56 Fla. 307, 47 So. 563, 19 L. R. A. (N. S.) 531n, 131 Am. St. 124n; Rowley v. Shepardon, 83 Vt. 167, 74 Atl. 1002, 138 Am. St. 1078.

CHAPTER XIV.

DRUNKEN PERSONS.

- | | |
|--|--|
| § 440. Effect of intoxication on contracts generally. | § 443. Intoxication coupled with fraud and unfair conduct. |
| 441. Extent or degree of intoxication. | 444. Ratification and disaffirmance. |
| 442. Contracts voidable when intoxication is such as to render the party incapable of understanding. | 445. Restoration of consideration. |
| | 446. Habitual drunkards—Effect of adjudication. |
| | 447. Contracts for necessities. |
| | 448. Drugs and drug habit. |

§ 440. **Effect of intoxication on contracts generally.**—One so under the influence of intoxicating liquors as to be deprived of his reason has always been considered as a person *non compos mentis*, for the time being. The ancient rule of law, however, allowed him no indulgence on that account. Lord Coke says: "As for a drunkard who is *voluntaris dæmon*, he hath (as has beene said) no privilege thereby, but what hurt or evil soever he doth, his drunkenness doth aggravate it."¹ The rigor of this rule has been relaxed, however, and it is now well settled that an agreement other than for necessities, made by a person when so drunk as to be incapable of understanding its nature and effect, is voidable at the intoxicated person's option.² The contracts of

¹ Coke's Lit. 247; *Beverly's Case*, 4 Coke, 124a.

² *Gore v. Gibson*, 13 M. & W. 623; *Pitt v. Smith*, 3 Campb. 33; *Clifton v. Davis*, 1 Pars. Sel. Eq. Cas. 31; *Hawkin v. Bone*, 4 Fost. & Fin. (N. P.) 311; *Wright v. Waller*, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440 and note; *Donelson's Admr. v. Posey*, 13 Ala. 752; *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Hale v. Stery*, 7 Colo. App. 165, 42 Pac. 598; *Drummond v. Hopper*, 4 Har. (Del.) 327; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Chicago & C. Ry. Co. v. Lewis*, 109 Ill. 120; *Shackelton v. Sebree*, 86 Ill. 616; *Bates v. Ball*, 72 Ill. 108;

Musselman v. Cravens, 47 Ind. 1; *Cummings v. Henry*, 10 Ind. 109; *Hawley v. Howell*, 60 Iowa 79, 14 N. W. 199; *Johns v. Fritchey*, 39 Md. 258; *Longhead v. B. F. Combs & Co.*, 64 Mo. App. 559; *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717; *Waldron v. Angelman*, 71 N. J. L. 166, 58 Atl. 568; *Cameron-Barkley Co. v. Thornton & C. Power Co.*, 138 N. Car. 365, 50 S. E. 695, 107 Am. St. 532; *Bush v. Breinig*, 113 Pa. 310, 6 Atl. 86, 57 Am. Rep. 469; *Wade v. Colvert*, 2 Mill. Const. (S. Car.) 27, 12 Am. Dec. 652; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289; *Foot v.*

an intoxicated person may be voidable under any one of the following circumstances; first, when it appears that the drunkenness was brought about by the opposite party; second, that a fraudulent advantage was taken of it; and third, that the drunkenness was so complete as to deprive the party of his reason and of an agreeing mind. Transactions rendered voidable because of one or more of the above reasons will be discussed in a succeeding section of this chapter in the inverse order in which they are named.

§ 441. **Extent or degree of intoxication.**—The mere fact that one of the parties is drunk at the time the agreement is entered into is no ground for setting it aside unless one or more of the above-mentioned influences was or were operative at the time the minds of the parties met on the terms of the contract.³ Drunkenness which only clouds or darkens the reason does not render a contract entered into while in such a condition voidable unless procured under such circumstances as to justify the inference that it was obtained by fraud or circumvention.⁴ Intoxication which merely prevents the party from giving proper attention to what he is doing⁵ or from fully realizing the nature of his acts⁶

Tewksbury, 2 Vt. 97; Barrett v. Buxton, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; Reynolds v. Waller's Heirs, 1 Wash. (Va.) 164; Miller v. Sterringer, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596n; Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848.

³Miller v. Sterringer, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596.

⁴Lightfoot v. Heron, 3 Younge & C. 586 (The intoxicated person was considerably in liquor); Holland v. Barnes, 53 Ala. 83, 25 Am. Rep. 595; Caulkins v. Fry, 35 Conn. 170; Van Horn v. Keenan, 28 Ill. 445; Murray v. Carlin, 67 Ill. 286; Schramm v. O'Connor, 98 Ill. 539; Henry v. Ritenour, 31 Ind. 136; Nance v. Kemper, 35 Ind. App. 605, 73 N. E. 937; Willcox v. Jackson, 51 Iowa 208, 1 N. W. 513; Kuhlman v. Wieben, 129 Iowa 188, 105 N. W. 445, 2 L. R. A. (N. S.) 666n; Ducker v. Franz, 7 Bush. (Ky.) 273, 3 Am. Rep. 314 (The intoxicated party was sober

enough to know what he was doing); Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. 886; Johnson v. Phifer, 6 Nebr. 401; Van Wyck v. Brasher, 81 N. W. 260; Hutchinson v. Brown, Clark Ch. (N. Y.) 408 (considerably excited by drink); Birdsong v. Birdsong, 2 Head (Tenn.) 289; Morris v. Nixon, 7 Humph. (Tenn.) 579; Ralston v. Turpin, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. 420; Conley v. Nailor, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. 1001; Conant v. Jackson, 16 Vt. 335. See post, note in section on Habitual Drunkards, on the validity of a contract entered into by one whose mind has been permanently impaired by the long continued use of intoxicating liquors.

⁵Wright v. Waller, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440n.

⁶Nance v. Kemper, 35 Ind. App. 605, 73 N. E. 937. See also, Dewitt v. Bowers (Tex. Civ. App.), 138 S. W. 1147. The following instruction has

is insufficient to invalidate a contract.⁷ Mere intoxication unmixed with any inequitable conduct on the part of the other party to the agreement is insufficient to invalidate a contract entered into while in such condition unless the party so situated is so drunk as to be incapable of understanding the nature and effect of the agreement, or its consequences, that is to say, he must be rendered incapable of intelligent assent and deprived of the power to know what he is doing.⁸

been held erroneous, "Plaintiff does not claim that he was so drunk as that he did not know what he was doing, and he may be entitled to your verdict without proving that he was so drunk as not to know what he was doing." *Sievertsen v. Paxton-Eckman Chemical Co. (Iowa)*, 133 N. W. 744, 745.

⁷ *Pickett v. Sutter*, 5 Cal. 412; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Shackleton v. Sebree*, 86 Ill. 616; *Bates v. Ball*, 72 Ill. 108; *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; *Searles v. Northwestern & Co. Ins. Co.*, 148 Iowa 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405; *Johns v. Fritchey*, 39 Md. 258; *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. 886; *Cavender v. Wadingham*, 5 Mo. App. 457; *Rodman v. Zilley*, 1 N. J. Eq. 320; *Waldron v. Angleman*, 71 N. J. L. 166, 58 Atl. 568; *Commonwealth v. McAnany*, 3 Brewst. (Pa.) 292; *Lee v. Ware*, 1 Hill L. (S. Car.) 313; *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Houston & T. C. R. Co. v. Tierney*, 72 Tex. 312, 12 S. W. 586; *Foot v. Tewksbury*, 2 Vt. 97.

⁸ *Morton v. Nichols*, 12 B. C. 9; *Vivian v. Scoble*, 1 Manitoba 125; *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652; *Abbeville Trading Co. v. Butler*, 3 Ga. App. 138, 59 S. E. 450; *Ryan v. Schutt*, 135 Ill. App. 554; *Moetzel & Mutera v. Koch*, 122 Iowa 196, 97 N. W. 1079; *Drefahl v. Security Sav. Bank*, 132 Iowa 563, 107 N. W. 179; *Girault v. Feucht*, 120 La. 1070, 46 So. 26; *Benton v. Sikyta*, 84 Nebr. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; *Hauber v. Leibold*, 76 Nebr. 706, 107

N. W. 1042; *J. I. Case Threshing Machine Co. v. Meyers*, 78 Nebr. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; *Spoonheim v. Spoonheim*, 14 N. Dak. 380, 104 N. W. 845; *Power v. King*, 18 N. Dak. 600, 120 N. W. 543, 138 Am. St. 784; *Fowler v. Meadowbrook Water Co.*, 208 Pa. 473, 57 Atl. 959; *Fagan v. Wiley*, 49 Ore. 480, 90 Pac. 910; *Dewitt v. Bowers* (Tex. Civ. App.), 138 S. W. 1147. The following instruction to the jury has been held correct. "The mere fact that the defendant's president was drinking was not sufficient, but the jury must find that he was so intoxicated that he could not understand the nature and scope of what he was doing. If the jury find from the greater weight of the testimony that the agent was drinking, it would not be sufficient to invalidate the contract, but if the jury find that the defendant president, at the time he signed the contract or order for the engine was so drunk as to be incapable of knowing the effect of what he was doing, then the contract or order would not be binding upon the defendant." *Cameron & Co. v. Thornton & Co.*, 138 N. Car. 365, 50 S. E. 695, 107 Am. St. 532. The above case and the succeeding case have to do with the degree of intoxication on the part of an agent that will excuse the principal. *Cook v. Babnell Timber Co.*, 78 Ark. 47, 94 S. W. 695, 8 Am. & Eng. Ann. Cas. 251. By other authorities it is stated that the contracting party must be so drunk as to have drowned reason, memory and judgment, the mental faculties being so impaired as to render the party non compos mentis for the time being, especially where the adversary party has not aided or procured the intoxication. *Bates v. Ball*, 72 Ill. 108;

§ 442. **Contracts voidable when intoxication is such as to render the party incapable of understanding.**—The degree of mere intoxication necessary to deprive a person of his contractual capacity has been noted in the preceding section. Its effect on the agreement is now to be ascertained. With few exceptions, which will be mentioned later, the contracts of one so drunk as to be incapable of understanding the nature and effect of the transaction are voidable in his favor.⁹ In a proper case an intoxicated person's conveyance of real estate is voidable the same as his general contract.¹⁰ One exception to the foregoing rule is that a drunken person's contract for necessities is binding upon him the same as with infants and insane persons and cannot be avoided.¹¹ In this connection it may be said generally that the intoxicated person will be bound in any instance where the law will imply a liability.¹² Nor does the rule have any application where it appears that all the terms of a valid contract were fully

Martin v. Harsh, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; Dahlmann v. Gaudente, 238 Ill. 224, 87 N. E. 287. To same effect, Oakley v. Shelley, 129 Ala. 467, 29 So. 385; Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066n; Nance v. Kemper, 35 Ind. App. 605, 73 N. E. 937; Watts v. Vansant, 99 Md. 577, 58 Atl. 433; Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176, 100 Am. St. 895. See also, Jones v. Hughes (Iowa), 110 N. W. 900. See also cases cited in preceding note.

⁹Matthews v. Baxter, L. R. 8 Ex. 132; Mattair v. Card, 18 Fla. 761; Strickland v. Parlin & Co., 118 Ga. 213, 44 S. E. 997; Menkins v. Lightner, 18 Ill. 282; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Mansfield v. Watson, 2 Iowa 111; Lacy v. Mann, 59 Kans. 777, 53 Pac. 754; Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. 595; Broadwater v. Darne, 10 Mo. 277; Eaton's Admr. v. Perry, 29 Mo. 96; Longhead v. B. F. Combs & Co., 64 Mo. App. 559; French v. Hickox, 8 Ohio 214, 31 Am. Dec. 441; Bush v. Breining, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469; Fowler v. Meadowbrook Water Co.,

208 Pa. St. 473, 57 Atl. 959; Williams v. Inabnet, 1 Bail. (S. Car.) 343; Smith v. Williamson, 8 Utah 219, 30 Pac. 753; Barrett v. Buxton, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; Wigglesworth v. Steers, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602; Loftus v. Malony, 89 Va. 576, 16 S. E. 749. See also, ante, § 440, Effect of Intoxication. The agreement is voidable both in law and equity. Donelson's Admr. v. Posey, 13 Ala. 752. There is authority, however, to the effect that a contract entered into by one who is so voluntarily drunk as to not know what he is doing is void. Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Drummond v. Hopper, 4 Harr. (Del.) 327; Cavender v. Waddingham, 2 Mo. App. 551; Prentice v. Achorn, 2 Paige (N. Y.) 30; Hyman v. Moore, 3 Jones (N. Car.) 416; Berkley v. Cannon, 4 Rich. (S. Car.) 136.

¹⁰Miller v. Sterringer, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596. See also cases cited, ante, in preceding note.

¹¹See post, § 447, Contracts for necessities.

¹²Gore v. Gibson, 13 M. & W. 623; Haneklau v. Felchin, 57 Mo. App. 602.

agreed upon when the party was not intoxicated, the formal execution of the agreement alone being made during intoxication.¹³ It has been held that physical ability to sign his own name to the agreement in a smooth and even manner¹⁴ or haggling over the price and securing about one-third more than was originally offered¹⁵ showed that the degree of intoxication was not sufficient to incapacitate the party. Contracts entered into understandingly¹⁶ or during a sober interval¹⁷ are binding.¹⁸

§ 443. Intoxication coupled with fraud and unfair conduct.

—Intoxication coupled with fraud, duress or unfair conduct may render a contract so induced voidable. It is well settled that if one party to a transaction procures the intoxication of the other and then takes advantage of his condition to obtain the contract or conveyance it will be voidable at the intoxicated person's option, notwithstanding the degree of drunkenness may not have

¹³ *Strickland v. Parlin & Co.*, 118 Ga. 213, 44 S. E. 997. The above case holds that intoxication is no defense to notes signed while drunk when their execution was merely the fulfillment of a prior valid agreement. *Drefahl v. Security Sav. Bank*, 132 Iowa 563, 107 N. W. 179. In the above case checks executed while intoxicated but in fulfillment of a prior valid agreement were held good. *Fagin v. Wiley*, 49 Ore. 480, 90 Pac. 910. In the above case it appeared that there was no evidence of any drinking until after the minds of the parties had met. See, however, the case of *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469, where it appears that an oral contract was entered into for the purchase of real estate. This was unenforceable because within the statute of frauds. A subsequent written agreement was entered into when one of the parties was drunk. It was held that he might disaffirm the contract when he became sober. See also, ante, § 373, in the chapter on Insanity, to the effect that a contract executed while the maker was insane is binding if its terms had been agreed upon while the party was sane.

¹⁴ *Watts v. Vasant*, 99 Md. 577, 58 Atl. 433. See also, *O'Neill v. Nolan*, 66 Hun (N. Y.) 631, 50 N. Y. St. 641, 21 N. Y. S. 222.

¹⁵ *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385.

¹⁶ *Coomb's Exr. v. Carthew*, 59 N. J. Eq. 638, 43 Atl. 1057.

¹⁷ *Girault v. Feucht*, 120 La. 1070, 46 So. 26; *Williams v. Williams*, 133 Mich. 21, 94 N. W. 370; *Behrns v. Qualman*, 147 Mich. 635, 111 N. W. 198; *Burnham v. Burnham*, 119 Wis. 509, 79 N. W. 176, 100 Am. St. 895.

¹⁸ Thus intoxication on the night previous has been held not to avoid a contract entered into at ten o'clock the next morning when there is no evidence to show that such party had been drinking prior to the execution of the agreement on that day. *Power v. King*, 18 N. Dak. 600, 120 N. W. 543, 138 Am. St. 784. To same effect, *Spoonheim v. Spoonheim*, 14 N. Dak. 380, 104 N. W. 845. On the other hand the transaction has been held voidable where it appears that before the execution of the agreement one of the parties thereto was so drunk he fell in the street and within three hours after the execution thereof collapsed and had to be put to bed [*Swan v. Talbott*, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066], or was bordering on delirium tremens (*Jones v. Calkin*, 16 N. B. 356; *Hardy v. Dyas*, 203 Ill. 211, 67 N. E. 852), or where it appears that the intoxicated party did an act which he did not intend to

been excessive.¹⁹ Some authorities assert that contracts procured from a drunken person when his intoxication is caused or aggravated by the other party will be declared null and void either at law or in equity.²⁰ This is not, however, supported by the weight of authority. It would seem that the only effect of connivance by one party at the intoxication of the other is to make it easier to defeat an attempted enforcement of the agreement than when the one seeking enforcement is not guilty of such conduct. The same principle applies, even though the liquor was not actually supplied by the other party, when it appears that he has taken advantage of the opportunity offered by the intoxicated party's condition to commit a fraud on him or to secure an undue advantage for himself.²¹ Undue influence coupled with extreme weakness, though falling short of incapacity arising from habitual drunkenness, will avoid a transaction.²²

It thus becomes apparent that the question of knowledge on the part of the sober party of the other's condition has an important bearing on the validity of the contract²³ notwithstanding the fact

do. *More v. Finger*, 128 Cal. 313, 60 Pac. 933.

¹⁹ *Mansfield v. Watson*, 2 Iowa 111. In the above case it appears that the intoxication was less than excessive. *Matthis v. O'Brien*, 137 Ky. 651, 126 S. W. 156 (suit to cancel sale of interest in an estate. Purchaser was vendor's nephew); *Curtis v. Hall*, 4 N. J. L. 361; *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Whitesides v. Greenlee*, 2 Dev. Eq. (N. Car.) 152; *Miller v. Sterringer*, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596. In the above case it appears that the one to whom the drunken party conveyed his property was the saloon keeper who sold him the liquor. The court said: "He continually sold him liquor, and then took advantage of the very weakness which that liquor produced. The very transaction itself shows that Sterringer obtained an unfair advantage from Miller's infirmity. A deed so obtained is promptly overthrown by the gracious court of equity." See also, *Newell v. Fisher*, 11 Sm. & M. (Miss.) 431, 49 Am. Dec. 66; *Wood's Lessee v. Pindall*, *Wright* (Ohio) 507. Notes which were obtained without consideration from a man weak in

mind and fond of liquor by plying him with liquor, by playing on his fears as to the action of supposed creditors, and by threatening and cajoling him while intoxicated are unenforceable when in the hands of the original payee or subsequent holders not bona fide purchasers. *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632. See also, *Kuelpkamp v. Hidding*, 31 Wis. 503.

²⁰ See *Willcox v. Jackson*, 51 Iowa 208, 1 N. W. 513; *Lacy v. Admr. of Garrard*, 2 Ohio 7; *White v. Cox*, 3 Hayw. (Tenn.) 79.

²¹ *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Murray v. Carlin*, 67 Ill. 286; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Maxwell v. Pittenger*, 3 N. J. Eq. 156; *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Prentice v. Achorn*, 2 Paige (N. Y.) 30; *Calloway v. Witherspoon*, 5 Ired. (40 N. Car.) 128; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. 550; *Hall v. Moreman*, 3 McCord (S. Car.) 477; *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792.

²² *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257.

²³ See *Warnock v. Campbell*, 25 N.

that it is seldom raised because ordinarily the degree of intoxication necessary to affect one's contractual capacity must be so great as to be perfectly apparent. Some authorities seem to hold that knowledge on the part of the adversary party is absolutely necessary,²⁴ others that it is immaterial.²⁵ Some authorities hold that intoxication furnishes no ground for the avoidance of a contract unless produced or taken an unfair advantage of by the adversary party.²⁶

§ 444. Ratification and disaffirmance.—The voidable contracts of an intoxicated person may be ratified by him when he becomes sober, and, if so ratified, they become binding upon him and may be enforced.²⁷ This may be done by any act which clearly recognizes the contract as valid and shows an intention to be bound by it, or it may be done by a failure to disaffirm within a reasonable time. Thus if he exchanges²⁸ or sells²⁹ the property received under the contract after he becomes sober he thereby ratifies it. He may also ratify by fulfilling the conditions of the contract³⁰ or by express words of ratification.³¹ It is apparent that the intoxicated party can ratify only after he becomes and while he is sober.³² Lapse of time may also amount to a ratification. If the intoxicated party fails to avoid the agreement

J. Eq. 485; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. 550; *State Bank v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246; *Thackrah v. Hass*, 119 U. S. 499, 30 L. ed. 486; *Bowen v. Clark*, 1 Biss. (C. C.) 128.

²⁴ *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. 731.

²⁵ *Hawkins v. Bone*, 4 Fost. & Fin. (N. P.) 311.

²⁶ *Rottenburgh v. Fowl* (N. J. Eq.), 26 Atl. 338; *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717.

²⁷ *Strickland v. Parlin & Co.*, 118 Ga. 213, 44 S. E. 997; *Mansfield v. Watson*, 2 Iowa 111; *Hawley v. Howell*, 60 Iowa 79, 14 N. W. 199; *Musselman v. Cravens*, 47 Ind. 1; *English v. Young*, 10 B. Mon. (Ky.) 141; *Taylor v. Patrick*, 1 Bibb (Ky.) 168; *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. 595;

Eaton's Admr. v. Perry, 29 Mo. 97. The above case holds the ratification binding on him and his personal representatives. *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469; *Lyon v. Phillips*, 106 Pa. St. 57; *Smith v. Williamson*, 8 Utah 219, 30 Pac. 753; *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749.

²⁸ *Smith v. Williamson*, 8 Utah 219, 30 Pac. 753.

²⁹ *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385. To same effect, *Hawley v. Howell*, 60 Iowa 79, 14 N. W. 199.

³⁰ *Moore v. Reed*, 37 N. Car. 580.

³¹ *Reinicker v. Smith*, 2 Har. & Johnson (Md.) 421; *Arnold v. Hickman*, 6 Munf. (Va.) 15. For a general statement of the rule governing ratification, see *Williams v. Inabnet*, 1 Bail. (S. Car.) 343.

³² *Reinskopf v. Rogge*, 37 Ind. 207; *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271.

within a reasonable time after he becomes sober, this may amount to a ratification.³³ Since the contract is valid until disaffirmed and may be ratified by failure to rescind within a reasonable time, it follows that some positive act must be performed that amounts to an avoidance. This act of disaffirmance has been held a condition precedent to maintaining a suit to recover what has been parted with.³⁴ It is obvious that there can be no ratification in those jurisdictions in which the contracts of a drunken person are held void.³⁵ Nor is it necessary in all cases that recourse be had to law. A court of equity will grant affirmative relief to the intoxicated person when the elements of fraud or imposition are also present.³⁶

§ 445. Restoration of consideration.—A return or offer to return the consideration received by the intoxicated person is, as a general rule, necessary before bringing suit on such disaffirmance.³⁷ The foregoing proposition is qualified by the rule that if fraud was practiced or an unfair advantage taken of the intoxicated person, the latter may rescind without a tender back of the

³³ See *Kelly v. Louisville & C. R. Co.*, 154 Ala. 573, 45 So. 906, in which it is said he must act "promptly and unreservedly." *Strickland v. Parlin & C. Co.*, 118 Ga. 213, 44 S. E. 997 (delay of four years); *J. I. Case Threshing Machine Co. v. Meyers*, 78 Nebr. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970. In the above case it appears the defendant signed a note for the purchase-price of the machinery. The machinery was not delivered until after he had full knowledge of what he had done. It was held that permitting delivery without rescission amounted to a ratification. *Shaw v. Delaware & C. R. Co.*, 126 App. Div. (N. Y.) 210, 110 N. Y. S. 362. In the above case a delay of two years held to amount to a ratification. *Spoonheim v. Spoonheim*, 14 N. Dak. 380, 104 N. W. 845. In the above case a delay of several years was held to bar his right to disaffirm. *Fowler v. Meadow Brook Water Co.*, 208 Pa. 473, 57 Atl. 959. See also, *Cummings v. Henry*, 10 Ind. 109. For illustrations of what does not amount to a ratification, see *More*

v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *Benton v. Sikyka*, 84 Nebr. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. 550. In the case last cited property worth sixteen hundred dollars was sold for a thousand dollars while the owner was intoxicated. He retained the thousand dollars and sued for the difference of six hundred dollars. This was held not to be a ratification but a disaffirmance..

³⁴ *Carpenter v. Rodgers*, 61 Mich. 384, 28 N. W. 156, 1 Am. St. 595.

³⁵ *Newell v. Fisher*, 11 Sm. & M. (Miss.) 431, 49 Am. Dec. 66; *Berkley v. Cannon*, 4 Rich. (S. C.) 136.

³⁶ *Swan v. Talbot*, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

³⁷ *McGuire v. Callahan*, 19 Ind. 128; *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959; *Williams v. Inabnet*, 1 Bail. (S. Car.) 343. To same effect, *Kelly v. Louisville & C. R. Co.*, 154 Ala. 573, 45 So. 906; *Birmingham Ry., Light*

consideration received by him.³⁸ Under all circumstances, however, on disaffirmance, the consideration, or so much thereof as is still in his possession, may be recovered in *assumpsit* or otherwise from the drunken person.³⁹

§ 446. **Habitual drunkards—Effect of adjudication.**—Before office found the mere fact that one is an habitual drunkard does not of necessity render his contract either void or voidable. On the contrary, if the conveyance was made or the contract entered into at a time when the habitual drunkard was sober and no advantage was taken of his weakened condition, the transaction will be upheld.⁴⁰ The effect of an inquisition and finding that one is an habitual drunkard is, as a general rule, practically the same as a finding of insanity, if followed by the appointment of a committee or guardian for such drunkard. He becomes incompetent to subsequently enter into a contract which will bind his estate, except for necessities.⁴¹ The guardian or committee

& Power Co. v. Hinton, 158 Ala. 470, 48 So. 546. See also, *Mattair v. Card*, 18 Fla. 761.

³⁸ *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486; *Dunn v. Amos*, 14 Wis. 106. In such case, however, provision for the repayment of a fair amount may be made in the final decree. *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486. The conditions may be such that no formal rescission or offer to return the consideration received is necessary before bringing an action to set aside the contract. *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. 550.

³⁹ *Haneklau v. Felchlin*, 57 Mo. App. 602. It would also seem on general principles that the drunken person would not be required to account for what he may have lost or wasted during the continuance of the same period of intoxication in which he made the contract.

⁴⁰ *Martin v. Harsh*, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Schramm v. O'Connor*, 98 Ill. 539; *Keough v. Foreman*, 33 La. Ann. 1434; *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. 886; *Wood's Lessee v. Pindall*, *Wright (Ohio)* 507;

Canant v. Jackson, 16 Vt. 335. In the above case the subject is thoroughly reviewed. An habitual drunkard is not *ipso facto* incompetent to execute a deed. *Van Wyck v. Brasher*, 81 N. Y. 260. However, if habitual drunkenness has destroyed his capacity to contract, the agreement will be invalid, notwithstanding he may have been sober at the time. *Menkins v. Lightner*, 18 Ill. 282; *Searles v. Northwestern Mut. Life Ins. Co.*, 148 Iowa 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405; *Franks v. Jones*, 39 Kans. 236, 17 Pac. 663; *Wilson v. Bigger*, 7 Watts. & S. (Pa.) 111; *McClure v. Mausell*, 4 Brewst. (Pa.) 119. See also, *Hale v. Brown*, 11 Ala. 87. It has been held that where an habitual drunkard was cured of the liquor habit under a contract to pay therefor, he could not avoid payment by a return to such habit with the dishonest purpose of evading the contract. *Fiske v. Townsend*, 7 Yerg. (Tenn.) 146.

⁴¹ *Cockrill v. Cockrill*, 92 Fed. 811; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Rannels v. Gerner*, 80 Mo. 474; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Tozer v. Saturlee*, 3 Grant Cas. (Pa.) 162; *Noel v. Karper*, 53 Pa. St. 97.

thereafter has control of the drunkard's estate,⁴² and the latter's conveyances and contracts other than for necessities, while the guardianship continues, are usually void.⁴³

An inquisition by which a person is adjudged an habitual drunkard is *prima facie* evidence of incompetency at any time covered by the finding. The burden is on the adversary party to show the drunkard was in fact competent at the time the contract was executed.⁴⁴ There is authority to the effect that the contracts of an habitual drunkard made after office found, but before a confirmation or appointment of a guardian, are void.⁴⁵ On the other hand, it has been held that one who had no knowledge of the inquisition might recover the price of goods sold before the confirmation thereof where the drunkard appeared competent and transacted other business.⁴⁶ Likewise, it has been held

Thus it has been held in Alabama that according to the statutes of that state a deed executed by an inebriate, notwithstanding it was made during a sober interval and with the assent of his trustee, was absolutely void. *Pinkston v. Semple*, 92 Ala. 564, 9 So. 329. See also in this connection, *Jones v. Semple*, 91 Ala. 182, 8 So. 557, from which it appears that under the Alabama statute the adjudication is solely for the preservation of that part of the drunkard's property set out in the bill. He has full power over all other property. The case of *Ralph v. Taylor* (R. I.), 82 Atl. 279, holds that under the Rhode Island statute an habitual drunkard's contract to render services is null and void and that he cannot maintain an action on the express contract, but must sue for the quantum meruit.

⁴² *Devin v. Scott*, 34 Ind. 67.

⁴³ See cases above cited in note 40. See also on the same subject, § 375 et seq. See also, *Anderson v. Hicks*, 134 N. Y. S. 1018.

⁴⁴ *Yauger v. Skinner*, 14 N. J. Eq. 389. In *re Covenhoven's Case*, 1 N. J. Eq. 19; *Van Wyck v. Brasher*, 81 N. Y. 260. (Compare *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 545); *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. 386; *Hirsch v. Trainer*, 3 Abb. N. Cas. (N. Y.) 274; *Demilt v. Leonard*, 19

How. Prac. 140, 11 Abb. Pr. (N. Y.) 253; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *Lewis v. Jones*, 50 Barb. (N. Y.) 645; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; *In re Patterson* (Sup. Ct., Gen. T.), 4 *How. Pr.* (N. Y.) 34; *Hicks v. Marshall*, 8 Hun (N. Y.) 327; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 427, 22 Am. Dec. 655; *Matter of Christie*, 5 Paige (N. Y.) 242; *In re Giles*, 11 Paige (N. Y.) 243; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *Willis v. Willis*, 12 Pa. St. 159; *In re Gangwere*, 14 Pa. St. 417, 53 Am. Dec. 554; *Noel v. Karper*, 53 Pa. St. 97; *Klohs v. Klohs*, 61 Pa. St. 245; *Moore v. Hershey*, 90 Pa. St. 196; *Miskey's Appeal*, 107 Pa. St. 611; *In re Sampson*, 5 Pa. Dist. 717; *Ruffner v. Luther*, 6 Pa. Dist. 588; *Koons v. Benscoter*, 2 Kulp (Pa.) 451; *Gresh v. Tamany*, 2 Kulp (Pa.) 453; *Hutchinson v. Sandt*, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; *Tozer v. Saturlee*, 3 Grant Cas. (Pa.) 162; *Sill v. M'Knight*, 7 Watts & S. (Pa.) 244; *Draper's Estate*, 26 W. N. Cas. (Pa.) 218; *Donehoo's Appeal* (Pa. 1888), 15 Atl. 924.

⁴⁵ *Clark v. Caldwell*, 6 Watts (Pa.) 139.

⁴⁶ *In re McGarvey*, 64 *How. Pr.* (N.

that if the guardian or committee never acted nor has been abandoned, the drunkard's agreement may be upheld.⁴⁷ Where the finding is not made to overreach or cover a period of time prior to the filing of the petition or adjudication, such decree does not raise a presumption that the party adjudged an habitual drunkard was incapacitated at a time prior to such finding.⁴⁸ The termination of the guardianship terminates the ward's contractual disability.⁴⁹

§ 447. **Contracts for necessities.**—A drunkard or drunken person is liable for necessities actually furnished him on substantially the same principle as infants and insane persons.⁵⁰ And this is true, notwithstanding the necessities are supplied after the one to whom they are furnished has been adjudged an habitual drunkard⁵¹ and a guardian appointed.⁵² Food and clothing,⁵³ nursing,⁵⁴ and the services of an attorney who resisted the adjudication⁵⁵ have been held necessities.⁵⁶

§ 448. **Drugs and drug habit.**—Drunkenness, according to the generally accepted definition, refers to intoxication produced by alcoholic drinks.⁵⁷ By the statutes of some states the term has

Y.) 135. In the above case a saloon-keeper was permitted to recover the price of liquor sold.

⁴⁷ *Bixler v. Gilleland*, 4 Pa. St. 156, distinguishing *Clark v. Coldwell*, 6 Watts (Pa.) 139; *In re Estate of Black*, 132 Pa. St. 134, 19 Atl. 31.

⁴⁸ *Van Wyck v. Brasher*, 81 N. Y. 260. In the above case the contract was made fifteen days before the filing of the petition. See also, the case of *Sill v. McKnight*, 7 Watts. & S. (Pa.) 244, in which it is held that a person adjudged an habitual drunkard may act as administrator or an executor, the court having the power to remove that administrator or executor if he becomes an habitual drunkard. From this it is presumed that the court will remove him if he becomes incapacitated to act.

⁴⁹ *Cockrill v. Cockrill*, 92 Fed. 811, 79 Fed. 143.

⁵⁰ *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Gore v. Gibson*, 13 M. & W. 623; *Devin v. Scott*, 34 Ind. 67;

Hallett v. Oakes, 1 Cush. (Mass.) 296; *Kendall v. May*, 10 Allen (Mass.) 59; *Darby v. Cabanne*, 1 Mo. App. 126; *McCrillis v. Bartlett*, 8 N. H. 569; *Van Horn v. Hann*, 39 N. J. L. 207; *Parker v. Davis*, 53 N. Car. 460; *Richardson v. Strong*, 35 N. Car. 106, 55 Am. Dec. 430; *Bush v. Breinig*, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469.

⁵¹ *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470.

⁵² *Devin v. Scott*, 34 Ind. 67.

⁵³ *Parker v. Davis*, 53 N. Car. 460.

⁵⁴ *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470.

⁵⁵ *Hallett v. Oakes*, 1 Cush. (Mass.) 296.

⁵⁶ See also, *Darby v. Cabanne*, 1 Mo. App. 126, where an habitual drunkard was held liable for the services of an attorney who made application for the appointment of a guardian. The contract with the attorney was made on behalf of the drunkard by his brother.

⁵⁷ See *Youngs v. Youngs*, 130 Ill.

been made to include the effects of opium, cocaine and similar drugs.⁵⁸ There can be no question that drugs such as cocaine and morphine may have the same effect as ordinary drunkenness in destroying one's capacity to contract. It follows that the same principles govern contracts entered into while under the effects of morphine⁵⁹ or an anaesthetic⁶⁰ as control contracts entered into while under the influence of alcoholic drinks; thus a release executed by one when he was so under the influence of opiates or an anaesthetic as to be incapable of contracting is voidable.⁶¹ It follows that he may thereafter, at a time when not under the influence of the drug, avoid⁶² or ratify⁶³ a release so executed. He may ratify the release by acquiescing in the agreement and retaining the consideration received.⁶⁴ In the absence of fraud or other inequitable conduct the mere fact that one of the parties to a contract was under the influence of opiates and not in the possession of his full mental powers is not, in and of itself, sufficient to avoid such agreement.⁶⁵ A contract entered into during mental

230, 22 N. E. 806, 6 L. R. A. 548n, 17 Am. St. 313; *Commonwealth v. Whitney*, 11 Cush. (Mass.) 477; *State v. Kelley*, 47 Vt. 294.

⁵⁸ *In re Houst*, 23 Colo. 87, 33 L. R. A. 832. See Revised Code, N. Dakota 1899, § 802; Revised Statutes, Oklahoma 1903, § 3167.

⁵⁹ *Birmingham R., Light & Power Co. v. Hinton*, 158 Ala. 470, 48 So. 546; *Merchants' Nat. Bank v. Soesbe*, 138 Iowa 354, 116 N. W. 123; *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 123 S. W. 271. (In the above case the president of the defendant corporation was addicted to the use of morphine, and the corporation sought to avoid the contract on the ground that the president was under the influence of morphine at the time the contract was made.) *Swank v. Swank*, 37 Ore. 439, 61 Pac. 846.

⁶⁰ *Gibson v. Western & C. R. Co.*, 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. 586.

⁶¹ *Chicago & C. R. Co. v. Doyle*, 18 Kans. 58; *Buford v. Louisville & N. R. Co.*, 82 Ky. 286, 6 Ky. L. 263; *Alabama & T. R. Co. v. Jones*, 73 Miss. 110, 19 So. 105, 55 Am. St. 488; *Gibson v. Western & C. R. Co.*, 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. 586 (ef-

fect of chloroform and ether); *Union Pac. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003 (effect of morphine and whiskey given for medicinal purposes).

⁶² *Alabama & T. R. Co. v. Jones*, 73 Miss. 110, 19 So. 105, 55 Am. St. 488.

⁶³ *Birmingham R., Light & Power Co. v. Hinton*, 158 Ala. 470, 48 So. 546; *Gibson v. Western & C. R. Co.*, 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. 586.

⁶⁴ *Gibson v. Western & C. R. Co.*, 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. 586. See, however, *Alabama & T. R. Co. v. Jones*, 73 Miss. 110, 19 So. 105, 55 Am. St. 488, which holds that the ratification is not binding when the party ratifying does not know that he has the right in law to avoid it. In the above case it appears that the plaintiff was an old and ignorant man of whom an unconscionable advantage had been taken.

⁶⁵ *Merchants' Nat. Bank v. Loeshe*, 138 Iowa 354, 116 N. W. 123 (In the above case the mortgagor was sick and suffering intense pain. For this reason he was being kept under the influence of opiates. The mortgagee was not allowed to see him until the

incapacity induced by drugs or opiates is merely voidable, and if it be fair and has been executed so far that the parties cannot be restored to their former position and if made with one who is ignorant of the other's condition, as affected by opiates, it is binding.⁶⁸

effect of the opiate had worn off. The mortgagor seemed perfectly rational and signed the mortgage in the right place. The instrument was upheld); *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 123 S. W. 271; *Cooney v. Lincoln*, 21 R. I. 246, 42 Atl. 867, 79 Am. St. 799.

⁶⁸ *Cooney v. Lincoln*, 21 R. I. 246, 42 Atl. 867, 79 Am. St. 799. As to effect of drugs on testamentary capacity, see note in 39 L. R. A. 263. *Davis v. Davis*, 43 Iowa 687. See also, *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227.

CHAPTER XV.

AGENTS.

- | | |
|---|--|
| § 450. Introduction. | § 462. Liability of principal. |
| 451. Capacity to appoint or be an agent. | 463. Liability of agent. |
| 452. Authority of agents—How conferred. | 464. When personally liable. |
| 453. Authority of agents—Extent. | 465. Rights and liabilities of parties where principal is named. |
| 454. Estoppel. | 466. Rights and liabilities of parties where principal is not disclosed—Rights of principal. |
| 455. Ratification. | 467. Rights and liabilities of parties when principal not disclosed—Liability of agent. |
| 456. Ratification—Who may ratify as principal. | 468. Rights and liabilities of parties when principal not disclosed—Rights of third persons. |
| 457. Ratification—What acts may be ratified. | 469. Rights and remedies of principal. |
| 458. Ratification—What amounts to. | 470. Rights and remedies of agent. |
| 459. Implied ratification. | |
| 460. Termination of agent's authority—By lapse of time. | |
| 461. Revocation by act of the parties. | |

§ 450. **Introduction.**—Agents may be considered as intermediaries through whom one or both parties to an agreement form the contractual relation. It follows that it is necessary or at least proper in treating of parties to devote a brief chapter to contracts made by or through agents; but agency may also be regarded as a special form or kind of contract of employment, and the general subject will be treated in another volume devoted to particular kinds or classes of contracts.

§ 451. **Capacity to appoint or be an agent.**—It is a well-known principle of law that one cannot accomplish by indirection that which he cannot do directly. It follows that one who, for any reason is without capacity to contract, cannot appoint an agent with power to contract for him, since by this means he would be permitted to do through indirection that which he cannot do directly. There is also another reason sufficient in itself to render an attempted appointment of an agent by one who has no capacity to contract of no effect; it is, the appointment of an

agent is a special form of employment or contract of hiring. However, one without contractual capacity cannot enter into a valid agreement. Therefore he cannot appoint an agent.

Because of want of capacity to contract it has been held that an insane person cannot appoint an agent.¹ The attempted appointment of an agent by such a person and contracts entered into by the agent in behalf of his principal's behalf are by many authorities considered absolutely void.² A drunken person who is thereby rendered incapable of comprehending the nature and effect of his act cannot appoint an agent.³ An infant cannot authorize an agent or attorney to act for him. Some authorities declare that the appointment of an agent by a minor is absolutely void.⁴ At common law a married woman was incapable of entering into a contract, consequently she could not act through an agent.⁵ As applied to feme coverts, this principle has at the present time little application, since under modern statutes her disabilities have been largely removed.⁶ Alien enemies, convicts or any other person under a statutory disability to contract are, so far as they are incapable of making contracts, incapable of being principals.⁷

As a result of the foregoing principles, it follows as a necessary sequence that any one who has the capacity to contract and who is competent to act in person in a given instance may, in the absence of any statutory prohibition act in that instance through his authorized agent.⁸ It is obvious that any person who has capacity to act for himself may act as agent for another.⁹ However, one may be an agent even though he does not have capacity to act for himself. Thus an infant may act as agent although he cannot

¹ See ante, ch. 12, Insane Persons.

² See ante, ch. 12, Insane Persons.

³ See ante, ch. 14, Drunkards. The general principles governing contracts of drunken persons generally govern appointments of agents by such persons.

⁴ See ante, ch. 11, Infants.

⁵ *Fairthorne v. Blaquiere*, 6 M. & S. 73; *Lewis v. Lee*, 3 B. & C. 291; *Marshall v. Rutton*, 8 T. R. 545; *State v. Clay*, 100 Mo. 571, 13 S. W. 827; *Caldwell v. Walters*, 18 Pa. St.

79, 55 Am. Dec. 592; *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Weisbrod v. Chicago & C. R. Co.*, 18 Wis. 35, 86 Am. Dec. 743.

⁶ See ante, ch. 13, Married Women.

⁷ As to alien enemies, see ante, § 265, Alien Enemies. As to convicts, see ante, § 266, Convicts.

⁸ The statutes of a number of states provide that "Any person, having capacity to contract, may appoint an agent."

⁹ *Lea v. Bringier*, 19 La. Ann. 197.

appoint one.¹⁰ The same is true of married women,¹¹ slaves,¹² monks, persons attainted or outlawed, or aliens.¹³ It would seem that any one except an insane person or a minor so young that he cannot understand the nature and obligation of the trust can act as an agent.¹⁴ Even in these instances it would appear that the principal should be bound in those cases where the agent keeps within the scope of his authority, for the principal alone is to blame if he chooses an incompetent representative.¹⁵ A corporation¹⁶ or partnership¹⁷ may, within the limits of their powers, act as an agent.

§ 452. Authority of agents—How conferred.—A principal may confer authority on his agent by express words written or spoken with that intent,¹⁸ although such express authorization

¹⁰ *Lyon v. Kent*, 45 Ala. 656; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

¹¹ *Whitworth v. Hart*, 22 Ala. 343; *Pullan v. State*, 78 Ala. 31, 56 Am. Rep. 21; *In re Succession of Brown* (La.), *Man. Unrep. Cas.* 216; *Butler v. Price*, 110 Mass. 97; *McKee v. Kent*, 24 Miss. 131; *Singleton v. Mann*, 3 Mo. 464; *Hopkins v. Molli-nieux*, 4 Wend. (N. Y.) 465; *Goodwin v. Kelly*, 42 Barb. (N. Y.) 194; *White v. Oeland*, 12 Rich. (S. Car.) 308; *Gray v. Otis*, 11 Vt. 628; *Sawyer v. Cutting*, 23 Vt. 486; *Birdsall v. Dunn*, 16 Wis. 235. She may act as a trustee. *Springer v. Berry*, 47 Maine 330; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541n; 15 Am. St. 494; *Fullam v. Rose*, 160 Pa. 47, 28 Atl. 497; *Clarke v. Saxon*, 1 Hill Eq. (S. Car.) 69. Under the common law she may act as executrix, her husband consenting. *In re Stewart*, 56 Maine 300. The statutes of many states provide that before she can act as executrix or administratrix she must first procure the consent of her husband. She may act as agent for her husband. This agency may be of two kinds. (1) An agency created by law as a result of the marriage relation, such as pledging his credit for necessities which he fails to furnish. (2) An agency arising from the authority of the husband ex-

pressly or impliedly conferred. *Mechem on Agency*, § 62.

¹² *Governor v. Dailey*, 14 Ala. 469; *Powell v. State*, 27 Ala. 51; *Stanley v. Nelson*, 28 Ala. 514; *Chastain v. Zach*, 1 Hill (S. Car.) 271.

¹³ *Coke Lit.* 52a; *Chitty on Contracts*, 172; *Mechem on Agency*, § 57.

¹⁴ *Lyon v. Kent*, 45 Ala. 656.

¹⁵ See *Lyon v. Kent*, 45 Ala. 656; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747. A debtor may act as an agent for his creditor in obtaining an attachment for the latter on his property. *Bayley v. Bryant*, 24 Pick. (Mass.) 198.

¹⁶ *McWilliams v. Detroit Central Mills Co.*, 31 Mich. 274; 3 *Thomp. Corp.* (2d ed.), § 2156.

¹⁷ *Eggleston v. Boardman*, 37 Mich. 14; *Deakin v. Underwood*, 37 Minn. 98, 33 N. W. 318, 5 Am. St. 827.

¹⁸ *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568; *Hermann v. Niagara &c. Ins. Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; *Cribben v. Deal*, 21 Ore. 211, 27 Pac. 1046, 28 Am. St. 746; *Farmers' & Merchants' Nat. Bank v. Chester*, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318; *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912, B. 148 (holding that as a general rule a principal is not bound by the contracts of one who assumes without authority to represent him as agent).

may be very informal in character,¹⁹ or by implication.²⁰ The general rule applied is that the appointment must be of as high and solemn a character as the act to be done by the agent. Thus an agent cannot act under seal unless he derives his power from an instrument under seal,²¹ except when he acts in the presence and to the knowledge of his principal.²² In those instances in which authority can be conferred only in writing it need not be given by a formal or sealed writing, except when the instrument to be executed is under seal. The agent may be authorized to act by letter,²³ or telegram.²⁴ In case the contract to be consummated by the agent is a simple agreement, any form of authority, in the absence of a specific statutory provision to the contrary, is sufficient. Thus an agent may be authorized by parol to make

¹⁹ *Scheibeck v. Van Derbeck*, 122 Mich. 29, 80 N. W. 880.

²⁰ "Whether one is an agent for another is a question of mixed law and fact, depending on the authority given expressly or impliedly. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed, and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority." *Minto v. Moore*, 1 Ala. App. 556, 55 So. 542, 544, quoting from *Supreme Lodge Knights of Pythias v. Josephine R. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. 611. *Brier v. Mankey*, 47 Ind. App. 7, 93 N. E. 672; *Arnold v. Spurr*, 130 Mass. 347; *Matteson v. Blackner*, 46 Mich. 393, 9 N. W. 445; *Reeves v. Kelly*, 30 Mich. 132; *Neibles v. Minneapolis & C. R. Co.*, 37 Minn. 151, 33 N. W. 332; *Cline v. Stradlee* (Tenn. Ch. App.), 48 S. W. 272; *Sheanon v. Pacific Mut. & C. Ins. Co.*, 83 Wis. 507, 53 N. W. 878; *Van Etta v. Even-son*, 28 Wis. 33, 9 Am. Rep. 486. See also, *Benjamin v. Dockham*, 134 Mass. 418; *Swindell v. Latham*, 145

N. Car. 144, 58 S. E. 1010, 122 Am. St. 430.

²¹ *Hartnett v. Baker*, 4 Pennew. (Del.) 431, 56 Atl. 672; *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758; *Sigmund v. Newspaper Co.*, 82 Ill. App. 178; *Watson v. Sherman*, 84 Ill. 263; *Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53; *Emerson v. Province Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306. Oral authority may be given one to whom a deed is delivered to fill in the name of the grantee. *Otis v. Browning*, 59 Mo. App. 326.

²² *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Croy v. Busenbark*, 72 Ind. 48; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740. "It is not necessary that the authority of an agent to bind his principal by written agreement to convey shall be in writing proved and recorded." *Tyrrell v. O'Connor*, 56 N. J. Eq. 448, 41 Atl. 674.

²³ *Smith v. Allen*, 86 Mo. 178; *Lyon v. Pollock*, 99 U. S. 668, 25 L. ed. 265.

²⁴ *Godwin v. Francis*, L. R. 5 C. P. 295.

a valid executory agreement for the sale²⁵ or leasing²⁶ of real estate.²⁷

An appointment by implication may arise where one knowingly and without dissent permits another to assume to act as his agent in a certain capacity,²⁸ or whenever a person holds out another as his agent with authority to act in a given capacity.²⁹ The law may also create an agency. Thus in those cases where the law authorizes a wife to pledge her husband's

²⁵ *Heard v. Pilley*, 4 Ch. App. Cases 548; *Morrow v. Higgins*, 29 Ala. 448; *Rutenberg v. Main*, 47 Cal. 213; *Watson v. Sherman*, 84 Ill. 263; *Johnson v. Dodge*, 17 Ill. 433; *Taylor v. Merrill*, 55 Ill. 52; *Rottman v. Wasson*, 5 Kans. 552; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; *Ulen v. Kittredge*, 7 Mass. 233; *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Brown v. Eaton*, 21 Minn. 409; *Dickerman v. Ashton*, 21 Minn. 538; *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257; *Riley v. Minor*, 29 Mo. 439; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Champlin v. Parish*, 11 Paige (N. Y.) 405; *McWhorter v. McMahan*, 10 Paige (N. Y.) 386; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Moody v. Smith*, 70 N. Y. 598; *Smith v. Browne*, 132 N. Car. 365, 43 S. E. 915; *Brodhead v. Reinbold*, 200 Pa. St. 618, 50 Atl. 229, 86 Am. St. 735; *Dodge v. Hopkins*, 14 Wis. 630.

²⁶ *Lake v. Campbell*, 18 Ill. 106; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 667.

²⁷ Authority to assign a claim against an insolvent need not be in writing. *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 790. The same is true of authority to sell mules and apply the proceeds. *Hirsch & Co. v. Beverly*, 125 Ga. 657, 54 S. E. 678. Bills of exchange etc. may be executed under authority given by parol or inferred from circumstances. *Harrison v. Tiernans*, 4 Rand. (Va.) 177. As to oral authority authorizing the signing of his name as surety see *Commonwealth v. Magoffin*, 15 Ky. L. 775, 25 S. W. 599; *Banister v. Wallace*, 14 Tex. Civ. App. 452, 37 S. W. 250.

²⁸ *Bank of Ukiah v. Mohr*, 130 Cal. 268, 62 Pac. 511; *Samnis v. Poole*, 188 Ill. 396, 58 N. E. 934; *Weaver v. Ogletree*, 39 Ga. 586; *Simon v. Brown*, 38 Mich. 552; *Dickinson v. Salmon*, 36 Misc. (N. Y.) 169, 73 N. Y. S. 196; *Valiquette v. Clark Bros. Coal Min. Co.*, 83 Vt. 538, 77 Atl. 869, 138 Am. St. 1104 (holding that where a principal pays three separate drafts drawn without authority by his agent in favor of a particular person he impliedly authorizes the agent to draw others and must notify the payee of a revocation of authority); *Hooe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425.

²⁹ *Plummer v. Knight* (Mo. App.), 137 S. W. 1019; *White v. Leighton*, 15 Nebr. 424, 19 N. W. 478; *Sloss Iron and Steel Co. v. Jackson & Co. Iron Works*, 103 App. Div. (N. Y.) 316, 92 N. Y. S. 1056; *Northwest Thresher Co. v. Dahlgren*, 50 Wash. 325, 97 Pac. 228, 19 L. R. A. (N. S.) 324n. A general agency may be implied from a course of dealing or from a number of acts of a particular kind authorized or assented to. *Valiquette v. Clark Brothers & Co.*, 83 Vt. 538, 77 Atl. 869, 138 Am. St. 1104. One may be bound as principal by the acts of another where he affirmatively or intentionally, or through lack of due care, permits such other to assume to act as his agent. *Holt v. Schneider*, 57 Nebr. 523, 77 N. W. 1086; *Lebanon Sav. Bank v. Henry*, 2 Nebr. (unof.) 403, 89 N. W. 169; *Faulkner v. Simms*, 68 Nebr. 295, 89 N. W. 171, 94 N. W. 113; *Harrison Nat. Bank v. Williams*, 2 Nebr. (unof.) 400, 89 N. W. 245. A principal is bound by the acts of his apparent agent, although in fact without authority, only so far as he has given rise to and caused

credit even against his will, it creates a compulsory agency, and her request is his request.³⁰

§ 453. **Authority of agents—Extent.**—Considered as to extent, agency may be either universal, general or special, the nature of the agency having an important bearing on its extent. Thus a universal agency can only be created by clear and express language and will not be raised by implication from any general expressions however broad.³¹ Universal agencies are of rare occurrence, the principles governing the law concerning general agents applying a fortiori to those universal in character. A general agent may be defined as one who is either expressly or impliedly authorized to transact all of the principal's business of a particular kind.³² A special agent is one employed to conduct a particular transaction or piece of business for his principal or authorized to perform a specified act.³³ In neither of the above instances can an agent bind his principal outside the scope of his authority.³⁴ But authority may be either real or apparent. It is

the appearance of authority. *Figueira v. Lerner*, 52 App. Div. (N. Y.) 216, 65 N. Y. S. 293. For an instance when circumstances were insufficient to imply authority see *Hoffmaster v. Black*, 78 Ohio St. 1, 84 N. E. 423, 21 L. R. A. (N. S.) 52n, 125 Am. St. 679.

³⁰ *Johnston v. Sumner*, 3 Hurl. & Nor. 261; *Benjamin v. Dockham*, 134 Mass. 418. Some authorities base the husband's liability in such a case upon the principle of quasi contract.

³¹ *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728.

³² *Great West. & Co. v. Woodmas & Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. 204; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390; *Bouv. L. Dict.* (Rawle's Rev.), p. 114.

³³ *Great West. Min. Co. v. Woodmas & Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. 204; *Union Stockyard & Co. v. Mallory*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. 341; *Harber v. Hutson*, 13 Ky. L. 333. "An agent for a particular act or transaction is called a special agent. All others are general agents." *Moore v. Skyles*, 33 Mont. 135, 82 Pac. 799, 3 L. R. A. (N.

S.) 136, 114 Am. St. 801; *Black's L. Dict.* (2 ed.), p. 50; *Bouv. L. Dict.* (Rawle's Rev.), p. 114. Several instances of one acting as special agent do not show that he is a general agent. *Angle v. Mississippi & C. R. Co.*, 9 Iowa 487. To same effect, *Hoffmaster v. Black*, 78 Ohio St. 1, 84 N. E. 423, 21 L. R. A. (N. S.) 52n, 125 Am. St. 679.

³⁴ *Whitehead v. Tuckett*, 15 East 400; *Smith v. James*, 53 Ark. 135, 13 S. W. 701; *St. Louis & C. R. Co. v. Bennett*, 53 Ark. 208, 13 S. W. 742, 22 Am. St. 187n; *Vescelius v. Martin*, 11 Colo. 391, 18 Pac. 338; *Kearns v. Nickse*, 80 Conn. 23, 66 Atl. 779, 10 L. R. A. (N. S.) 1118n; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535; *Deatherage v. Henderson*, 43 Kans. 684, 23 Pac. 1052; *Kane v. Barstow*, 42 Kans. 465, 22 Pac. 588, 16 Am. St. 490; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827; *Swindell v. Latham*, 145 N. Car. 144, 58 S. E. 1010, 122 Am. St. 430; *Ohio Pottery & Co. v. Talbert*, 87 S. Car. 194, 69 S. E. 211; *Day v. Snyder & Co.* (Tex. Civ. App.), 130 S. W. 716; *Booker-Jones Oil Co. v. National Ref. Co.* (Tex. Civ. App.), 131 S. W. 623, 132 S. W. 815. "No agent can be

also equally well settled that all persons dealing with either a general or special agent do so at their peril, in that they are bound to use at least reasonable diligence to ascertain whether the agent acts within the scope of his powers.³⁵ However, an agent's powers are not to be determined by the authority intended to be conferred upon the agent, but what authority a third person dealing with him is justified, from the acts of the principal and circumstances of the case, in believing were given him. A principal is bound by the apparent, and not merely the actual or express, authority given his agent, where third persons have in good faith relied thereon in ignorance of any limitations or restrictions thereto, whether the agency is a general or special one.³⁶

permitted to assume duties and trusts incompatible with his agency after he has acquired an interest adverse to his principal." *Langlois v. Gragnon*, 123 La. 453, 49 So. 18, 22 L. R. A. (N. S.) 414.

³⁵ *Whitehead v. Tuckett*, 15 East 400; *Golding v. Merchant*, 43 Ala. 705; *Wheeler v. McGuire*, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808n; *Blum v. Robertson*, 24 Cal. 127; *Lester v. Snyder*, 12 Colo. App. 351, 55 Pac. 613; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393, 58 Pac. 358; *National Bank of Oshkosh v. Munger*, 95 Fed. 87, 36 C. C. A. 659; *American Oil Co. v. Gurr*, 114 Ga. 624, 40 S. E. 780; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. 113; *Schilling v. Rosenheim*, 30 Ill. App. 81; *Schneider v. Lebanon Dairy & Co.*, 73 Ill. App. 612; *Brier v. Mankey*, 47 Ind. App. 7, 93 N. E. 672; *Leu v. Mayer*, 52 Kans. 419, 34 Pac. 969; *Blood v. Herring*, 22 Ky. L. 1725, 61 S. W. 273; *Chaffe v. Stubbs*, 37 La. Ann. 656; *Johnson v. Wingate*, 29 Maine 404; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341; *Busch v. Wilcox*, 82 Mich. 337, 47 N. W. 328, 21 Am. St. 563; *Johnson v. Hurley*, 115 Mo. 513, 22 S. W. 492; *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135; *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. 598; *Moore v. Skyles*, 33 Mont. 135, 82 Pac. 799,

3 L. R. A. (N. S.) 136, 114 Am. St. 801; *First Nat. Bank v. Hall*, 8 Mont. 341, 20 Pac. 638; *Hatch v. Taylor*, 10 N. H. 538; *Dowden v. Cryder*, 55 N. J. L. 329, 26 Atl. 941; *Mechanics' Bank v. New York & C. R. Co.*, 13 N. Y. 599, 11 N. Y. Super. Ct. 570; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827; *Ferguson v. Davis & Co.*, 118 N. Car. 946, 24 S. E. 710; *Swindell v. Latham*, 145 N. Car. 144, 58 S. E. 1010, 122 Am. St. 430; *Ellis v. Wait*, 4 S. Dak. 454, 57 N. W. 229; *Schull v. New Birdsell Co. (S. Dak.)*, 86 N. W. 654; *Fabian Mfg. Co. v. Newman (Tenn. Ch. App.)*, 62 S. W. 218; *Taylor Mfg. Co. v. Brown (Tex.)*, 14 S. W. 1071; *Buzard v. Jolly (Tex.)*, 6 S. W. 422; *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264, 7 L. ed. 138; *Cleveland v. Pearl*, 63 Vt. 127, 21 Atl. 261, 25 Am. St. 748; *Bowles Co. v. Charles Clark*, 59 Wash. 336, 109 Pac. 812, 31 L. R. A. (N. S.) 613; *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555. If an agent's authority is in writing the one with whom he deals is presumed to have read it. *Union-town Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912 B., 148.

³⁶ *Antrim Iron Works v. Anderson*, 140 Mich. 702, 104 N. W. 319, 112 Am. St. 434; *Plummer v. Knight (Mo. App.)*, 137 S. W. 1019; *Harrison Nat. Bank v. Austin*, 65 Nebr. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. 639; *General Cartage & Co. v. Cox*, 74 Ohio St. 284, 78 N. E.

The foregoing might lead to the conclusion that the distinction between general and special agents is unimportant. This, however, is not true. The powers of a general agent may be liberally construed according to the necessities of the occasion and the scope of his business and employment. He is unrestricted by other limitations than those which limit his acts to what is usual, proper and necessary under like circumstances.⁸⁷ On the other hand, the powers of a special agent are limited by the terms in which they are conferred and he takes nothing by implication.⁸⁸ Such an agency is limited in its nature and implies limitations of power.⁸⁹ It may be said generally of an agent's powers that the creation of an agency carries with it the usual and appropriate means of accomplishing its object, and clothes the agent with such

371, 113 Am. St. 959; *Howe v. Martin*, 23 Okla. 561, 102 Pac. 128, 138 Am. St. 840; *Galbraith v. Weber*, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341n; *Bowles Co. v. Charles Clark*, 59 Wash. 336, 109 Pac. 812, 31 L. R. A. (N. S.) 613; *Northwest Thresher Co. v. Dahlgren*, 50 Wash. 325, 97 Pac. 228, 19 L. R. A. (N. S.) 324n. See also, *Hartford Fire Ins. Co. v. Brown*, 60 Fla. 83, 53 So. 838. Thus where a principal clothes his agent with apparent authority he will be liable on a contract entered into by the agent with innocent third parties, notwithstanding the agent may have acted fraudulently on the ground that where one of two innocent persons must suffer by the fraud or negligence of the third, whichever of the two has accredited him ought to bear the loss. *Conklin v. Benson*, 159 Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537. See also, *Howe v. Martin*, 23 Okla. 561, 102 Pac. 128, 138 Am. St. 840. "The liability of a principal for the act of his agent, which is beyond actual authority, can be based upon apparent authority only where such apparent authority has misled the other party." *Brennan v. City of Albany*, 143 App. Div. (N. Y.) 752, 128 N. Y. S. 334.

⁸⁷ *Great West. Min. Co. v. Woodmas &c. Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. 204.

⁸⁸ *Great West Min. Co. v. Woodmas &c. Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. 204.

⁸⁹ *Mechem on Agency*, § 285. Thus authority to collect interest does not give rise to an implied agency to collect the principal or any part of it. *Hoffmaster v. Black*, 78 Ohio St. 1, 84 N. E. 423, 21 L. R. A. (N. S.) 52n, 125 Am. St. 679. For additional cases holding that special authority must be strictly pursued see *Fenn v. Harrison*, 3 T. R. 757, 4 T. R. 177; *Wheeler v. McGuire*, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808n; *Montgomery Furniture Co. v. Hardaway*, 104 Ala. 100, 16 So. 29; *Davidson v. Dallas*, 8 Cal. 227; *Sioux City &c. Seed Co. v. Magnes*, 5 Colo. App. 172, 38 Pac. 330; *Yates v. Yates*, 24 Fla. 64, 3 So. 821; *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948; *Reitz v. Martin*, 12 Ind. 306, 74 Am. Dec. 215; *Thomas v. Atkinson*, 38 Ind. 248; *Johnson v. Wingate*, 29 Maine 404; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Brown v. Johnson*, 20 Miss. 398, 51 Am. Dec. 118; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Hatch v. Taylor*, 10 N. H. 538; *Dowden v. Cryder*, 55 N. J. L. 329, 26 Atl. 941; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Joseph v. Struller*, 25 Misc. (N. Y.) 173, 54 N. Y. S. 162; *Pacific Biscuit Co. v. Dugger*, 40 Ore. 362, 67 Pac. 32; *Loudon &c. Soc. v. Hagers-town Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390; *Carmichael v. Buck*, 10 Rich. (S. Car.) 332, 70 Am. Dec. 226; *Ellis v. Wait*, 4 S. Dak. 454, 57 N. W. 229; *Morton v. Morris*, 27

authority as is proper and necessary to effectuate its purpose.⁴⁰ A principal may appoint a number of agents to act for him in the same matter, each to act separately, and in such cases they are to act severally.⁴¹ No one can become the agent of another, however, except by the will of the principal, either express or implied from the particular circumstances, and the extent of the agent's authority depends upon the will of the principal, and any usage or custom pertaining to any particular business will not affect the principal if not known to him, unless it has existed for such a length of time and become so widely known as to warrant the presumption that the principal had it in view when he appointed the agent.⁴² Agency cannot be shown by the mere declaration of one who claims to be agent.⁴³

§ 454. **Estoppel.**—The principles of estoppel find application in cases where contracts are made by an agent in excess of his real authority but within the scope of his apparent authority. As a general rule, one who holds out another as his representative

Tex. Civ. App. 262, 66 S. W. 94; *Blane v. Proudfit*, 3 Call (Va.) 207, 2 Am. Dec. 546.

⁴⁰ *Kearns v. Nickse*, 80 Conn. 23, 66 Atl. 779, 10 Am. & Eng. Ann. Cas. 421, 10 L. R. A. (N. S.) 1118n; *John Gund Brew. Co. v. Tourtellotte*, 108 Minn. 71, 121 N. W. 417, 29 L. R. A. (N. S.) 210n; *Murphy v. Knights of Col. Bldg. Co.*, 155 Mo. App. 649, 135 S. W. 446; *Swindell v. Latham*, 145 N. Car. 144, 58 S. E. 1010, 122 Am. St. 430. See also, *St. Louis & C. R. Co. v. Jones*, 96 Ark. 558, 132 S. W. 636. Thus where one is appointed to sell a particular article to a particular person, this confers on the special agent authority to agree on the price. *R. K. Hopkins & Co. v. Armour & Co.*, 8 Ga. App. 442, 69 S. E. 580. See also, cases cited ante to same effect. Authority to deliver an article to a carrier carries with it the authority to put a valuation thereon and enter into a contract of shipment. *Adams Express Co. v. Byers (Ind.)*, 95 N. E. 513. But authority to collect bills gives no implied authority to indorse negotiable paper.

McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542.

⁴¹ *Minto v. Moore*, 1 Ala. App. 556, 55 So. 542.

⁴² *Plummer v. Knight (Mo. App.)*, 137 S. W. 1019. See, however, ante, §§ 419, 420, *Agency of Wife to Pledge Husband's Credit for Necessities*.

⁴³ *Johnson County Sav. Bank v. Richardson & Son*, 9 Ga. App. 466, 71 S. E. 757; *Williams v. Kelsey*, 6 Ga. 365; *Holland v. Van Beil*, 89 Ga. 223, 15 S. E. 302; *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453; *Harris Loan Co. v. Elliott & Hatch Book & Co.*, 110 Ga. 302, 34 S. E. 1003; *Winch v. Baldwin*, 68 Iowa 764, 28 N. W. 62; *Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276. Before the declaration of an agent can bind the principal, it must be shown that said declarations were made in and about a matter over which the agent had authority from the principal to act, and that said agent was acting under and by virtue of his authority of such agent. *Chellis v. Coble*, 37 Kans. 558, 15 Pac. 505.

authorized to act for him in a given capacity⁴⁴ or has knowingly⁴⁵ or negligently⁴⁶ permitted such other to act as his agent in a given capacity without dissent⁴⁷ or when his acts and the circumstances of the case are such as to reasonably warrant the presumption that such other is his agent with authority to act in a given matter⁴⁸ will be held liable as principal. Whether it involves one or

⁴⁴ *Union Stockyard &c. Co. v. Malory*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. 341; *Rupp v. Stith*, 33 Ind. 244; *Thornburgh v. Madren*, 33 Iowa 380; *Gore v. Royse*, 56 Kans. 771, 44 Pac. 1053; *Heath v. Stoddard*, 91 Maine 499, 40 Atl. 547; *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013; *Lambert v. Metropolitan &c. Assn.*, 65 N. J. L. 79, 46 Atl. 766; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Ferguson v. Hamilton*, 35 Barb. (N. Y.) 427; *General Cartage & Shortage Co. v. Cox*, 74 Ohio St. 284, 78 N. E. 371, 113 Am. St. 959; *Barker v. Troy &c. R. Co.*, 27 Vt. 766. The above principle finds frequent application in those cases where a principal seeks to limit the authority of his agent by secret instructions or limitations on his authority. But such instructions are uniformly held insufficient to defeat the rights of third persons who have dealt with the agent in reliance on the apparent scope of his authority. "No man is at liberty to send another into the market, to buy or sell for him, as his agent, with secret instructions as to manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent—that the instructions were limitations upon his authority—and that those with whom he dealt, in the matter of his agency, acted at their peril, because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that, of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. * * * Where private instructions are given to a special agent, respecting the mode and manner of executing his agency, intended to be kept secret, and not communi-

cated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer." *Hatch v. Taylor*, 10 N. H. 538. And to the same effect, see *Smith v. McGuire*, 3 Hurl. & N. 554; *Browning v. McNear* (Cal.), 111 Pac. 541; *Beem v. Lockhart*, 1 Ind. App. 202, 27 N. E. 239; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Mechanics' Bank v. New York &c. R. Co.*, 13 N. Y. 599, 11 N. Y. Super. Ct. 570. The foregoing rule is so well settled as to render unnecessary the citation of additional authorities.

⁴⁵ *Graff Bros. v. Lena Lumber Co.*, 96 Ark. 350, 131 S. W. 697; *Holt v. Schneider*, 57 Nebr. 523, 77 N. W. 1086; *De Witt v. De Witt*, 202 Pa. St. 255, 51 Atl. 987; *Telephone Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155, 50 L. R. A. 277, 78 Am. St. 906. ⁴⁶ *Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480, 38 Atl. 241; *Hanover Nat. Bank v. American &c. Co.*, 148 N. Y. 612, 43 N. E. 72, 51 Am. St. 721; *Williams v. Southern R. Co.*, 155 N. Car. 260, 71 S. E. 346; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. 428.

⁴⁷ *Heath v. Stoddard*, 91 Maine 499, 40 Atl. 547; *Simon v. Brown*, 38 Mich. 552; *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013; *Harrison Nat. Bank v. Austin*, 65 Nebr. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. 639; *Cheshire Provident Inst. v. Fuesner*, 63 Nebr. 682, 88 N. W. 849; *Knapp v. United States &c. Exp. Co.*, 55 N. H. 348; *Rohrbough v. United States Exp. Co.*, 50 W. Va. 148, 40 S. E. 398, 88 Am. St. 849;.

⁴⁸ *Slaughter v. Fay*, 80 Ill. App. 105; *William v. Pelley*, 96 Ill. App. 346; *Bloomer v. Denman*, 12 Ill. 240; *Mor-*

more transactions, he will be conclusively presumed, so far as it is necessary to protect the rights of an innocent third person who, in the exercise of reasonable prudence, has dealt with such other in good faith, to have authorized such other to act for him and will be held as principal and not heard to deny that the other was his agent authorized to do the act performed so long as such act is within the scope of his apparent authority.⁴⁹ This apparent authority is not, however, to be implied without reason or cause. Instead it must be based on facts. Mere convenience, utility or the propriety of its existence will not give rise to an implied au-

ris v. Posner, 111 Iowa 335, 82 N. W. 755; Conner v. Hill, 6 La. Ann. 7; Pence v. Arbuckle, 22 Minn. 417; Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. 639; Holt v. Schneider, 57 Nebr. 523, 77 N. W. 1086; Lebanon Sav. Bank v. Henry, 2 Nebr. (unof.) 403, 89 N. W. 169; Faulkner v. Simms, 68 Nebr. 295, 89 N. W. 171, 94 N. W. 113; Harrison Nat. Bank v. Williams, 2 Nebr. (unof.) 400, 89 N. W. 245; Morris v. Joyce, 63 N. J. Eq. 549, 53 Atl. 139; Galbraith v. Weber, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341n.

⁴⁹ Smith v. McGuire, 3 Hurl. & Nor. 554; Brocklesby v. Temperance Bldg. Soc. (1893), 3 Ch. 130; Golding v. Merchant, 43 Ala. 705; Rhodes Furniture Co. v. Weedon, 108 Ala. 252, 19 So. 318; Little Rock & C. R. Co. v. Wiggins, 65 Ark. 385, 46 S. W. 731; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67; Little Pittsburgh & C. Co. v. Little Chief & C. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. 236; Hagerman v. Bates, 24 Colo. 71, 49 Pac. 139; Lattomus v. Farmers' Mut. Fire Ins. Co., 3 Houst. (Del.) 404; Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 79 Fed. 181, 38 C. C. A. 108; Louisville & C. R. Co. v. Tift, 100 Ga. 86, 27 S. E. 765; Cincinnati & C. R. Co. v. Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503; Barnett v. Glutting, 3 Ind. App. 415, 29 N. E. 154; German-American Bldg. Assn. v. Droge, 14 Ind. App. 691, 43 N. E. 475; Leu v. Mayer, 52 Kans. 419, 34 Pac. 969; Columbia Land & Co. v. Tinsley, 22 Ky. L. 1082, 60

S. W. 10; Blood v. Herring, 22 Ky. L. 1725, 61 S. W. 273; Caldwell v. Neill Bros., 21 La. Ann. 342, 99 Am. Dec. 738; McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559; Tunison v. Detroit & C. Copper Co., 73 Mich. 452, 41 N. W. 502; Shipman v. Byles, 65 Mich. 690, 32 N. W. 898; Austrian v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. 350; Verdine v. Olney, 77 Mich. 310, 43 N. W. 975; Mason v. Taylor, 38 Minn. 32, 35 N. W. 474; Planters' Compress & C. Co. v. Ireys (Miss.), 16 So. 386; Potter v. Springfield Milling Co., 75 Miss. 532, 23 So. 259; Nicholson v. Golden, 27 Mo. App. 132; Harrison v. Kansas City & C. R. Co., 50 Mo. App. 332; Buckle v. Probasco, 58 Mo. App. 49; Webster v. Wray, 17 Nebr. 579, 24 N. W. 207; Lorton v. Russell, 27 Nebr. 372, 43 N. W. 112; Plano Mfg. Co. v. Nordstrom, 63 Nebr. 123, 88 N. W. 164; Hatch v. Taylor, 10 N. H. 538; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5; Fifth Ave. Bank v. Forty-second St. & C. R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. 712; Hanover Nat. Bank v. American Dock & C. Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. 721; Hardwick v. State Ins. Co., 23 Ore. 290, 31 Pac. 656; Hubbard v. Ten Brook, 124 Pa. St. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. 585; Aldrich v. Willmarth, 3 S. Dak. 523, 54 N. W. 811; Galveston & C. R. Co. v. House, 4 Tex. Civ. App. 263, 23 S. W. 332; Garner v. A. Fisher Brewing Co., 6 Utah 332, 23 Pac. 755; Smith v. Droubay, 20 Utah 443, 58

thority.⁵⁰ Nor will implied authority be given a broader construction than the necessities of the case require. If implied from concurrence on the part of the principal, in acts of a certain kind, its scope is to be limited to the performance of acts of that kind and will not warrant the agent to do a different thing.⁵¹ Thus implied authority to collect interest does not, in the absence of any other element, authorize a collection of the principal.⁵² Nor is a husband's authority to act for his wife to be inferred from the marriage relation alone.⁵³ Nor does the delivery of a subscription list of itself confer authority upon the recipient to collect from and discharge the subscribers.⁵⁴

The doctrine of implied authority has no application in those instances where the third party has actual knowledge of the nature and extent of the agency conferred by the principal on his representative. Any restrictions or limitations placed upon the agent will be binding on third persons who have notice of them, provided the principal does nothing to waive them.⁵⁵ Nor does the doctrine of estoppel apply where the alleged agent made no representation nor claims to the third party in any way that would lead the latter to believe that he was acting in any respect as

Pac. 1112; *Griggs v. Selden*, 58 Vt. 561, 5 Atl. 504; *Cushman v. Somers*, 62 Vt. 132, 20 Atl. 320, 22 Am. St. 92; *Winchell v. National Exp. Co.*, 64 Vt. 15, 23 Atl. 728; *Graton & Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879; *Cannon v. Henry*, 78 Wis. 167, 47 N. W. 186, 23 Am. St. 399; *Hoyer v. Ludington*, 100 Wis. 441, 76 N. W. 348.

⁵⁰ See *Nofsinger v. Golman*, 122 Cal. 609, 55 Pac. 425; *Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483; *Blass v. Terry*, 156 N. Y. 122, 50 N. E. 953; *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438; *Fabian Mfg. Co. v. Newman* (Tenn. Ch. App.), 62 S. W. 218. See also, *Schlesinger v. Forest Products Co.* (N. J.), 76 Atl. 1024, 30 L. R. A. (N. S.) 347. "The principal is liable only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused by the agent." *Bowles Co. v. Clark*, 59 Wash. 336,

109 Pac. 812, 31 L. R. A. (N. S.) 613.

⁵¹ *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568; *Baldwin v. Burrows*, 47 N. Y. 199; *McAlpin v. Cassidy*, 17 Tex. 449.

⁵² *Hoffmaster v. Black*, 78 Ohio St. 1, 84 N. E. 423, 21 L. R. A. (N. S.) 52, 125 Am. St. 679.

⁵³ *Price v. Seydel*, 46 Iowa 696; *Anderson v. Gregg*, 44 Miss. 170; *Crawford v. Redus*, 54 Miss. 700.

⁵⁴ *Antram v. Thorndell*, 74 Pa. St. 442. To same effect, *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232.

⁵⁵ *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360, 11 So. 488; *Longworth v. Conwell*, 2 Black. (Ind.) 469; *Russell v. Cox*, 18 Ky. L. 1087, 38 S. W. 1087; *Bryant v. Moore*, 26 Maine 84; 45 Am. Dec. 96; *Leathers v. Springfield*, 65 Mo. 504; *Jewett v. Chicago & C. R. Co.*, 45 Mo. App. 58; *White v. Massey*, 65 Mo. App. 260; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5.

agent for the one who was sought to be estopped. Where the agent does nothing to induce reliance and no reliance is shown the principal is not estopped.⁵⁶

§ 455. **Ratification.**—There are at least two ways in which a principal may be rendered liable for the unauthorized acts of his agent. One of these is by estoppel. This subject was discussed in the preceding section and nothing further will be added here. The second method is by ratification. One ratifies the unauthorized contract of another made in his behalf and will be held as principal when, after knowledge thereof has been brought to his attention, he gives it his express sanction and adopts it as his own or so conducts himself that the law will imply a sanction and adoption by the principal of such contract. Ratification is equivalent to antecedent authority and as between principal and agent relates back and has the same effect as if authority had been given in the first instance.⁵⁷ It does not, however, defeat the rights of third persons antagonistic to those of the principal acquired subsequently to the performance of the unauthorized act but prior to its ratification.⁵⁸

⁵⁶ *Plummer v. Knight* (Mo. App.), 137 S. W. 1019. "To bind the principal for an unauthorized act of the agent he must not only hold him out, but the apparent authority must be relied on in good faith, and in the exercise of reasonable prudence, by the party invoking the conclusive presumption of authority." *Rail v. City Nat. Bank*, 3 Tex. Civ. App. 557, 22 S. W. 865.

⁵⁷ *Everett v. United States*, 6 Porter (Ala.) 166, 30 Am. Dec. 584; *Second Nat. Bank v. Bank of Alma* (Ark.), 138 S. W. 472; *Grogan v. San Francisco*, 18 Cal. 590; *McDowell v. McKenzie*, 65 Ga. 630; *Wallace v. Lawyer*, 90 Ind. 499; *Welker v. Appleman*, 44 Ind. App. 699, 90 N. E. 35; *Gorten v. Trobridge*, 80 Kans. 720, 104 Pac. 1067; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Planters' Bank v. Sharp*, 4 Sm. & M. (Miss.) 75, 43 Am. Dec. 470; *Davis v. Krum*, 12 Mo. App. 279; *Plummer v. Knight* (Mo.), 137 S. W. 1019; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042; *Rich v. State Nat. Bank*, 7 Nebr. 201,

29 Am. Rep. 382; *Gulich v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728; *Hawley v. Keeler*, 53 N. Y. 114; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Campbell v. Gowans* (Utah) 100 Pac. 397; *Drakely v. Gregg*, 8 Wall. (U. S.) 242, 19 L. ed. 409; *Burgess v. Harris*, 47 Vt. 322; *Ankeny v. Young Bros.*, 52 Wash. 235, 100 Pac. 736; *Keenan v. Lauritzen Malt Co.*, 57 Wash. 367, 106 Pac. 1122. "One may ratify the acts of another purporting to be made on his behalf whether that other is an agent exceeding his authority or no agent at all." *Ramsey v. Miller*, 202 N. Y. 72, 95 N. E. 35. Ratification is unnecessary where the agent acts within the scope of his authority. *Graham v. Edwards* (Tex. Civ. App.), 99 S. W. 436.

⁵⁸ *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Dalton Buggy Co. v. J. H. Wood's Sons & Bros.*, 7 Ga. App. 477, 67 S. E. 121; *Lewis v. Buttrick*, 102 Mass. 412.

A ratification must be in toto. When a principal elects to ratify an unauthorized act, he must ratify the whole of it. He cannot avail himself of such acts so far as beneficial to him, and repudiate its burdens, whether such ratification be express or implied.⁵⁹ The principal must repudiate absolutely or be bound absolutely.⁶⁰ Thus a principal cannot, after knowledge of all the facts, ratify only so far as to retain a renewal note taken by his agent and continue to insist on its collection, with whatever advantages it might give, and yet repudiate as unauthorized all the rest of the agent's acts in the same transaction in which the note was obtained.⁶¹ A degree of caution must be exercised, however, in the application of this rule. Knowledge of all the material facts is essential to a ratification of the unauthorized acts of an agent,⁶² unless the prin-

⁵⁹ *Drennen v. Walker*, 21 Ark. 539; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Mulford v. Rowland*, 45 Colo. 172, 100 Pac. 603; *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Cochran v. Chitwood*, 59 Ill. 53; *Babcock v. D. Deford*, 14 Kans. 408; *Western Mfg. Co. v. Cotton & Long*, 126 Ky. 749, 104 S. W. 758, 12 L. R. A. (N. S.) 427; *Odiorne v. Maxcy*, 13 Mass. 178; *Taylor v. Connor*, 41 Miss. 722, 97 Am. Dec. 419; *Menkins v. Watson*, 27 Mo. 163; *Laughlin v. Excelsior Powder Mfg. Co.*, 153 Mo. App. 508, 134 S. W. 116; *Bennett v. Judson*, 21 N. Y. 238; *Crans v. Hunter*, 28 N. Y. 389; *Skinner v. Dayton*, 19 Johns (N. Y.) 513, 10 Am. Dec. 286; *Anderson v. American Suburban Corp.*, 155 N. Car. 131, 71 S. E. 221, 36 L. R. A. (N. S.) 896; *McLeod v. Despain*, 49 Ore. 536, 90 Pac. 492, 92 Pac. 1088, 124 Am. St. 1066; *Schultheis v. Sellers*, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210n; *Mundorff v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531.

⁶⁰ *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596; *Fort v. Coker*, 11 Heisk. (Tenn.) 579.

⁶¹ *Dolvin v. American Harrow Co.*, 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.) 785.

⁶² *Snow v. Grace*, 29 Ark. 131; *Dean v. Bassett*, 57 Cal. 640; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Chicago & C. R. Co. v. Chickasha Nat.*

Bank, 174 Fed. 923, 98 C. C. A. 535; *Mapp v. Phillips*, 32 Ga. 72; *Foddrill v. Dooley*, 131 Ga. 790, 63 S. E. 350; *Reynolds v. Ferree*, 86 Ill. 570; *Sill v. Pate*, 230 Ill. 39, 82 N. E. 356; *Manning v. Gasharie*, 27 Ind. 399; *Wilke v. Wackershauser*, 143 Iowa 107, 120 N. W. 77; *Tidrick v. Rice*, 13 Iowa 214; *Bank of Owensboro v. Western Bank*, 13 Bush. (Ky.) 526, 26 Am. Rep. 211; *Walters v. Munroe*, 17 Md. 154, 77 Am. Dec. 328; *Steinman v. Baltimore & C. Laundry Co.*, 109 Md. 62, 71 Atl. 517, 21 L. R. A. (N. S.) 884n; *Foote v. Cotting*, 195 Mass. 55, 80 N. E. 600, 15 L. R. A. (N. S.) 693; *Day v. Holmes*, 103 Mass. 306; *John Gund Brew. Co. v. Tourtellotte*, 108 Minn. 71, 121 N. W. 417, 29 L. R. A. (N. S.) 210n; *Steunkle v. Chicago & C. R. Co.*, 42 Mo. App. 73; *Watt v. Davison*, 82 Nebr. 712, 118 N. W. 562; *Hovey v. Brown*, 59 N. H. 114; *Morris & C. R. R. Co. v. Green*, 15 N. J. Eq. 469; *Hankins v. Baker*, 46 N. Y. 661; *Ramsay v. Miller*, 135 App. Div. (N. Y.) 503, 120 N. Y. S. 523; *Daley v. Iselin*, 218 Pa. 515, 67 Atl. 837; *St. Louis & C. R. Co. v. Blocker* (Tex. Civ. App.), 138 S. W. 156; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Owings v. Hull*, 9 Pet. (U. S.) 607; *Ætna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458. "A ratification cannot take place without full knowledge of all material facts." *Findlay v. Hil-denbrand*, 17 Idaho 403, 105 Pac.

principal intentionally and deliberately ratifies knowing he is without knowledge of all such facts.⁶³ Consequently performance on the part of the principal of his part of a contract entered into in his behalf by his agent, when performance is made in ignorance of certain unauthorized provisions in the agreement, does not amount to a ratification of the unauthorized portion.⁶⁴ Nor will an acceptance of the benefits amount to a ratification when they are received without knowledge of the unauthorized acts of the agent, such as accepting money in payment of the purchase-price of land sold by an agent,⁶⁵ or accepting the proceeds from the sale of cattle unlawfully seized by the landlord's agents.⁶⁶ It is even held in a number of jurisdictions that the principal does not ratify the act of his agent by a mere passive acceptance of the benefit derived therefrom. Thus these cases hold that the principal is not liable for, nor bound to repay, money obtained from a third person by the agent and by him expended for purposes beneficial to the principal when the agent was without authority to borrow or otherwise obtain the money so expended, it never actually having come into the principal's hands.⁶⁷

790, 29 L. R. A. (N. S.) 400. See also, cases cited ante, this note.

⁶³ *Carlson v. Stone-Ordeau-Wells Co.*, 40 Mont. 434, 107 Pac. 419.

⁶⁴ *Lindow v. Cohn*, 5 Cal. App. 388, 90 Pac. 485; *Lester v. Kinne*, 37 Conn. 9; *Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098; *John Gund Brew. Co. v. Tourtellotte*, 108 Minn. 71, 121 N. W. 417, 29 L. R. A. (N. S.) 210n; *Bohanan v. Boston & M. R. R. Co.*, 70 N. H. 526, 49 Atl. 103; *Taylor v. Hoey*, 4 Jones & Sp. (N. C.) 402; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. 635; *Daley v. Iselin*, 218 Pa. 515, 67 Atl. 837; *Suderman-Dolson Co. v. Rodgers*, 47 Tex. Civ. App. 67, 104 S. W. 193; *Haynes v. Tacoma & C. R. Co.*, 7 Wash. 211, 34 Pac. 922. Thus, plaintiff authorized his agent to sell a mare. The agent sold the mare and her mule colt. It was held that the ratification of the sale of the mare did not ratify the sale of the colt. "In ratifying the authorized act of his agent he did not thereby ratify his unauthorized act." *Crute v. Burch* (Mo.), 135 S. W. 1004.

⁶⁵ *Lester v. Kinne*, 37 Conn. 9.

⁶⁶ *Lewis v. Read*, 13 M. & W. 234.

⁶⁷ *Roberts v. Rumley*, 58 Iowa 301, 12 N. W. 323; *Eggleston v. Mason*, 84 Iowa 630, 51 N. W. 1; *Arey v. Hall*, 81 Maine 17, 16 Atl. 302, 10 Am. St. 232; *Spooner v. Thompson*, 48 Vt. 259. "No one can make himself a creditor of another by the unsolicited payment of his debt, and it is not enough to create a liability that the defendant had the use of the money." *Kelley v. Lindsey*, 7 Gray (Mass.) 287. To same effect, *Foot v. Cotting*, 195 Mass. 55, 80 N. E. 600, 15 L. R. A. (N. S.) 693n; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503. In the above case money was borrowed by a county official and applied to the payment of town debts. It was held that the town was not liable to refund the money so obtained. *Henry v. Wilkes*, 37 N. Y. 562. See also, *Swindell v. Latham*, 145 N. Car. 144, 58 S. E. 1010, 122 Am. St. 430. In the following cases it is held that the principal is not bound to refund money borrowed in his name, but without his knowledge or connivance,

§ 456. **Ratification—Who may ratify as principal.**—The foregoing has to do with the nature of and general principles concerning ratification. More specific questions will now be taken up. The first one that naturally presents itself is, Who may ratify as principal? The question needs but brief mention here. It has already been seen that in those jurisdictions in which an infant's appointment of an agent is held void the acts of such agent cannot be ratified even after majority.⁶⁸ In no event could the infant affirm his agent's contract until after majority. Under the common law in those jurisdictions in which it is still in force, the contracts of a married woman were void. This included the appointment of an agent. A fortiori, she could not ratify his acts, except when such appointment was made for her equitable separate estate.⁶⁹ The same is true of insane persons under guardianship. Their appointment of an agent is a void act.⁷⁰ It is beyond the power of the agent to ratify an unauthorized act outside the scope of his powers and it is immaterial whether such act was performed by himself or his sub-agent.⁷¹ However, where one agent does an unauthorized act it may be ratified by a second agent who has power to perform the

by his agent to cover up defalcations of the latter: *Craft v. South Boston R. Co.*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214; *Case v. Hammond Packing Co.*, 105 Mo. App. 168, 79 S. W. 732. See, however, in this connection, *First Nat. Bank v. Badger Lumber Co.*, 54 Mo. App. 327. There are some cases, however, which hold that the principal is liable to refund money borrowed by his agent and expended for the principal's benefit on the theory that the latter cannot accept the benefit and repudiate the responsibilities of the contract. The refusal to repay is deemed a ratification. *First Nat. Bank v. Oberne*, 121 Ill. 25, 7 N. E. 85; *Perkins v. Boothby*, 7 Maine 91; *McDermott v. Jackson*, 97 Wis. 64, 72 N. W. 375. See also, *Whitwell v. Warner*, 20 Vt. 425, which holds that if the agent had no authority to borrow, then the application of the funds so obtained to the defendant's business was a misapplication thereof and that the plaintiff

might recover the funds from the hands of those who held them.

⁶⁸ See ante, ch. 11, Infancy.

⁶⁹ *McFarland v. Heim*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. 629.

⁷⁰ See ante, ch. 12, Insane Persons, for a discussion of this subject. Weakness of mind alone is not sufficient to prevent ratification but the principal must be capable of exercising deliberate judgment on matters essential to constitute ratification. *Welke v. Wackershauser*, 143 Iowa 107, 120 N. W. 77.

⁷¹ *Britt v. Gordon*, 132 Iowa 431, 108 N. W. 319; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Hotchin v. Kent*, 8 Mich. 526; *Driscoll v. Modern Brotherhood of America*, 77 Nebr. 282, 109 N. W. 158; *Horton v. Thompson*, 71 N. Y. 513. See also, *Turner v. Turner*, 123 Ga. 5, 50 S. E. 969, 107 Am. St. 76. One of two joint agents cannot ratify the act of his co-agent. *Penn v. Evans*, 28 La. Ann. 576.

act done by the first.⁷² It is well settled that any person, natural or artificial, may ratify the unauthorized act of his agent in all cases where such person has capacity to appoint an agent and at the time of ratification capacity to bind himself by a contract such as that entered into by his agent on his behalf.⁷³ Thus a corporation may ratify those acts of its agents not ultra vires in character,⁷⁴ and such ratification may be implied.⁷⁵ The same is true of a partnership.⁷⁶

⁷² Thus A and B are agents of C. A is a special agent; he enters into a contract outside the scope of his authority. B is a general agent with power to bind his principal by such a contract as that entered into by A on behalf of C. B may ratify A's act. See *Mound City Mutual L. Ins. Co. v. Huth*, 49 Ala. 529; *Whitehead v. Wells*, 29 Ark. 99; *Palmer v. Cheney*, 35 Iowa 281; *Dorsey v. Abrams*, 85 Pa. St. 299, 27 Am. Rep. 657. See also, *Anglo-Californian Bank v. Mahoney Mining Co.*, Fed. Cas. No. 392, 5 Sawy. (U. S.) (C. C.) 255, affd. 104 U. S. 192, 26 L. ed. 707; *Union Mutual Life Ins. Co. v. Masten*, 3 Fed. 881; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Toledo Wab. & Wes. R. Co. v. Rodriguez*, 47 Ill. 188; *Toledo & C. R. Co. v. Prince*, 50 Ill. 26; *Darst v. Gale*, 83 Ill. 136; *Wood v. Whelen*, 93 Ill. 153; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Sherman v. Fitch*, 98 Mass. 59; *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Chouteau v. Allen*, 70 Mo. 290; *Hoyt v. Thompson*, 19 N. Y. 207; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Walworth Co. Bank v. Farmers' L. & T. Co.*, 16 Wis. 629.

⁷³ *Zoltman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Williams v. Butler*, 35 Ill. 544; *Indianapolis & C. R. Co. v. Morris*, 67 Ill. 295; *Sentell v. Kennedy*, 29 La. Ann. 679; *Wilson v. Dame*, 58 N. H. 392; *Pollock v. Cohen*, 32 Ohio St. 514. Only one who had power to act in the first instance can make a valid ratification. *Cushman v. Cloverland Coal & C. Co.*, 170 Ind. 402, 84 N. E. 759, 16 L. R. A. (N. S.) 1078, 127 Am. St. 391; *Bullard v.*

De Groff, 59 Nebr. 783, 82 N. W. 4; *Sword v. Reformed Congregation & Co.*, 29 Pa. Super. Ct. 626. If, since the doing of the act to be ratified, the principal has become incapable of doing the act himself or authorizing it to be done, he cannot ratify it. *Cook v. Tullis*, 18 Wall. (U. S.) 332, 21 L. ed. 933. Ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which, by his ratification, he gives validity. *McCracken v. San Francisco*, 16 Cal. 591.

⁷⁴ *Church v. Sterling*, 16 Conn. 388; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252, 7 Am. Dec. 271; *Baker v. Cotter*, 45 Maine 236; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111; *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Planters' Bank v. Sharp*, 4 Sm. & M. (Miss.) 75, 43 Am. Dec. 470; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Peterson v. New York*, 17 N. Y. 449; *Kelsey v. National Bank*, 69 Pa. St. 426; *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338, 5 L. ed. 631; *Whitewell v. Warner*, 20 Vt. 425.

⁷⁵ *Arlington v. Peirce*, 122 Mass. 270; *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 326; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Sherman v. Fitch*, 98 Mass. 59; *Scott v. Methodist Church*, 50 Mich. 528, 15 N. W. 891; *Taymouth v. Koehler*, 35 Mich. 22; *Hoyt v. Thompson*, 19 N. Y. 207; *Scott v. Middletown & C. R. Co.*, 86 N. Y. 200; *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. ed. 648; *Law v. Cross*, 1 Black (U. S.) 533, 17 L. ed. 185. For a detailed discussion of ratification by corporations see 2 *Thomp. Corp.* (2d ed.) § 2000 et seq.

⁷⁶ *Forbes v. Hagman*, 75 Va. 168. See also, *Chouteau v. Goddin*, 39 Mo.

§ 457. **Ratification—What acts may be ratified.**—The next question that presents itself is, What unauthorized acts may be ratified? If the act of an agent is for any reason absolutely void, if the principal or no one else could have lawfully done the act, no subsequent affirmation can give it force and effect.⁷⁷ This is especially true where the contract is contrary to law or against public policy. The performance of an illegal act cannot be delegated to another and then ratified.⁷⁸ There is a conflict of authority as to whether a forged instrument may be ratified. By some authorities it is held that since forgery is a crime and opposed to public policy it cannot, in the absence of estoppel in pais, be ratified so as to bind, as principal, the party whose name was forged.⁷⁹ Other authorities hold that a forged signature may be ratified the same as any other unauthorized act.⁸⁰ Moreover, the assumed agent must have entered into the contract as agent of or for and on behalf of the person who ratifies it.⁸¹ When one con-

229, 90 Am. Dec. 462; *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324.

⁷⁷ *Bird v. Brown*, 4 Ex. 786; *Chapman v. Lee*, 47 Ala. 143; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *State v. State Bank*, 5 Ind. 353; *Decuir v. Lejeune*, 15 La. Ann. 569; *Day v. McAllister*, 15 Gray (Mass.) 433; *Armitage v. Widoe*, 36 Mich. 124; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546.

⁷⁸ *San Diego Water Co. v. San Diego*, 59 Cal. 517; *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Hinsey v. Supreme Lodge K. of P.*, 138 Ill. App. 248; *Highway Comm'rs v. Van Dusan*, 48 Mich. 429; *Turner v. Phoenix Ins. Co.*, 55 Mich. 236, 21 N. W. 326; *Board &c. v. Arrighi*, 54 Miss. 668; *Smith v. Newburgh*, 77 N. Y. 130; *State v. Matthis*, 1 Hill (S. Car.) 37. See also, *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

⁷⁹ *Brook v. Hook*, L. R. 6 Exch. 89; *Williams v. Bayley*, L. R. 1 H. L. 200; *Henry v. Heeb*, 114 Ind. 575, 16 N. E. 606, 5 Am. St. 613; *Woodruff v. Munroe*, 33 Md. 146; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Henry Christian &c. Assn. v. Walton*, 181 Pa. St. 201, 37 Atl.

261, 59 Am. St. 636; *McHugh v. County of Schuylkill*, 67 Pa. St. 391, 5 Am. Rep. 445; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702.

⁸⁰ *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Living v. Wiler*, 32 Ill. 387; *Forsyth v. Bonta*, 5 Bush. (Ky.) 547; *Harper v. Devene*, 10 La. Ann. 724; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Wellington v. Jackson*, 121 Mass. 157; *Cravens v. Gillilan*, 63 Mo. 28; *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Commercial Bank v. Warren*, 15 N. Y. 577; *Howard v. Duncan*, 3 Lans. (N. Y.) 174; *Thorn v. Bell*, *Lalor's Supp.* (N. Y.) 430. The one whose name is forged may also be held liable on the ground of estoppel. *M'Kenzie v. British Linen Co.*, 6 App. Cas. 82; *Union Bank v. Middlebrook*, 33 Conn. 95; *Rudd v. Matthews*, 79 Ky. 479, 3 Ky. L. 286, 42 Am. Rep. 231; *Forsyth v. Day*, 46 Maine 176; *Casco Bank v. Keene*, 53 Maine 103; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Cohen v. Teller*, 93 Pa. 123; *Crout v. DeWolf*, 1 R. I. 393.

⁸¹ *Grund v. Van Vleck*, 69 Ill. 478; *Richardson v. Payne*, 114 Mass. 429; *Herd & Son v. Bank of Buffalo*, 66 Mo. App. 643; *Aldred v. Bray*, 41

tracts in his own name and for himself another cannot adopt the agreement and ratify it as principal.⁸² A fortiori the principal must have been in existence at the time the contract ratified was entered into.⁸³ One apparent exception to this rule is in the case of a corporation subsequently coming into existence when the contracts were made in its behalf and when it is organized with knowledge of the facts, and appropriates and retains the benefits of contracts so made in its behalf.⁸⁴

§ 458. Ratification—What amounts to.—It only remains to determine what amounts to a ratification. As was intimated at the beginning of the section a principal's ratification may be express or implied. Generally speaking, a ratification is equivalent to a prior authority to perform the act; consequently, if the prior authority might have been either written or unwritten, express or implied, a ratification may be accomplished in any one of these ways.⁸⁵ It follows that when the adoption of any par-

Mo. 484, 97 Am. Dec. 283; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315; *Commercial &c. Bank v. Jones*, 18 Tex. 811. There can be no ratification without an agency. *Fish & Hunter Co. v. New England &c. Co.*, (S. Dak.), 130 S. W. 841; *Minder & Jorgenson Land Co. v. Brustuen*, 24 S. Dak. 537, 124 N. W. 723, 26 S. Dak. 38, 127 N. W. 546.

⁸² *Durant v. Roberts* (1900), 1 Q. B. 629; *Keighley v. Durant* (1901), A. C. 240; *Collins v. Waggoner*, Breese (Ill.) 186; *Beveridge v. Rawson*, 51 Ill. 504; *Roby v. Cossitt*, 78 Ill. 638; *Harrison v. Mitchell*, 13 La. Ann. 260; *Allred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283; *Schlesinger v. Forest Products Co.* (N. J.), 76 Atl. 1024, 30 L. R. A. (N. S.) 347; *Brainerd v. Dunning*, 30 N. Y. 211; *Collins v. Suau*, 7 Robt. (N. Y.) 623; *Hamlin v. Sears*, 82 N. Y. 327; *Rawlings v. Neal*, 126 N. Car. 271, 35 S. E. 597; *Pittsburgh &c. R. R. Co. v. Gazzam*, 32 Pa. St. 340; *Virginia &c. Coal Co. v. Lambert*, 107 Va. 368, 58 S. E. 561, 122 Am. St. 860. In the above case the defendant held himself out as plaintiff's agent at the time he pur-

chased certain coal fields. He was not their agent and in fact purchased for himself. Held, the plaintiff could not ratify his act and compel the defendant to convey to it the interest he acquired. See also, *Bachhaus v. Buells*, 43 Ore. 558, 73 Pac. 342, 72 Pac. 976. Ratification is "an agreement to adopt an act performed by another for us." *Bouvier Law Dict.*, vol. 2, p. 411.

⁸³ *Watson v. Swann*, 11 C. B. (N. S.) 756; *Stonisby v. Frazier's Metallic Life Boat Co.*, 3 Daly (N. Y.) 98.

⁸⁴ *New York &c. R. R. Co. v. Ketchum*, 27 Conn. 170; *Western Screw Co. v. Cousley*, 72 Ill. 531; *Rockford &c. R. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Paxton Cattle Co. v. First Nat. Bank*, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852; *Bell's Gap R. R. Co. v. Christy*, 79 Pa. St. 54, 21 Am. Rep. 39. This is, in fact, more properly a new implied contract rather than the ratification of an old one. *Mechem on Agency*, § 125. See post, § 555, *Private Corporations*.

⁸⁵ *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Taylor v. Conner*, 41 Miss. 722, 97 Am. Dec. 419.

ticular form or mode is necessary to confer the authority in the first instance there can be no valid ratification except in the same manner.⁸⁶ Thus, if authority to do the act could only be conferred by an instrument under seal, a sealed ratification must be shown.⁸⁷ The common-law rule has been greatly relaxed, however, in its application to partnerships. It is generally true that one partner may, in the furtherance of the partnership business and for its benefit, execute a deed under seal which will be binding on the other if he has foreknowledge or subsequently ratifies it, and this may be proved by acts and circumstances or by his verbal declarations and admissions.⁸⁸ In Massachusetts the execution of an unauthorized instrument under seal may be ratified by parol.⁸⁹ If written authority is necessary the ratification must

⁸⁶ *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

⁸⁷ *McCracken v. San Francisco*, 16 Cal. 591; *Taylor v. Robinson*, 14 Cal. 396; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Pollard v. Gibbs*, 55 Ga. 45; *Dalton Buggy Co. v. Wood*, 7 Ga. App. 477, 67 S. E. 121; *Ingraham v. Edwards*, 64 Ill. 526; *Bragg v. Fessenden*, 11 Ill. 544; *Stetson v. Patten*, 2 Greenl. (Maine) 358, 11 Am. Dec. 111; *Spofford v. Hobbs*, 29 Maine 148, 48 Am. Dec. 521; *Heath v. Nutter*, 50 Maine 378; *Paine v. Tucker*, 21 Maine 138, 38 Am. Dec. 255; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Grove v. Hodges*, 55 Pa. St. 504; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Bellas v. Hays*, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306. However, if a seal is attached to a contract not required to be so executed the seal will be disregarded as surplusage, and a sealed ratification need not be shown. *Ledbetter v. Walker*, 31 Ala. 175; *Smyth v. Lynch*, 7 Colo. App. 383, 43 Pac. 670, 25 Colo. 103, 54 Pac. 634; *Bates v. Best*, 13 B. Mon. (Ky.) 215; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Adams v. Power*, 52 Miss.

828; *Shuetze v. Bailey*, 40 Mo. 69; *Klostermann v. Loos*, 58 Mo. 290; *State v. Spartanburg & C. R. Co.*, 2 S. Car. 129; *Jenkins v. Mayer*, Fed. Cas. No. 7272, 2 Biss. (U. S.) 303. Contra, *Rowe v. Ware*, 30 Ga. 278; *Pollard v. Gibbs*, 55 Ga. 45; *Dalton Buggy Co. v. J. H. Wood, Son & Bro.*, 7 Ga. App. 477, 67 S. E. 121. "A lease of real estate for less than two years is not required to be by deed, and such lease, though under seal, when made by an agent, may be ratified by parol." *Goldring v. Reid*, 61 Fla. 250, 54 So. 718.

⁸⁸ *Peine v. Weber*, 47 Ill. 41; *Kendall v. Carland*, 5 Cush. (Mass.) 74; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Swan v. Stedman*, 4 Metc. (45 Mass.) 48; *Dillon v. Brown*, 11 Gray (Mass.) 179, 71 Am. Dec. 700; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

⁸⁹ *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690. It must be borne in mind that a seal is not as important as formerly. In many jurisdictions the distinctions between sealed and unsealed instruments have been abolished. Where this is true the technical rule which requires a ratification under seal would no longer obtain.

be made in writing.⁹⁰ In those instances in which an express ratification is given no formal words are essential. If it can be gathered from the words used that an express ratification was intended nothing further is required.⁹¹

§ 459. Implied ratification.—Except when declared necessary by some positive rule of law an express ratification is unnecessary; a subsequent assent to an agent's unauthorized act may be inferred from the circumstances and acts of the principal.⁹² It is manifest that the various forms of ratification by implication may be as varied as are the facts in the several cases. This makes it impossible to state all of them. The various methods of ratification by implication may, however, be grouped and general rules deduced therefrom. Thus it is a rule of general application that, whenever a principal accepts the benefits of his agent's unauthorized act, with knowledge of all the material facts, he ratifies the same.⁹³ Under this rule a principal ratifies an unauthorized loan procured by his agent, when, with knowledge of the facts, the money so obtained is placed in his hands and is retained by him.⁹⁴ The same is true of an unauthorized

⁹⁰ *McCalla v. American &c. Mortg. Co.*, 90 Ga. 113, 15 S. E. 687; *English v. Dyous*, 8 Ky. L. 331; *Palmer v. Williams*, 24 Mich. 328; *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151; *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. 830; *Long v. Poth*, 16 Misc. (N. Y.) 85, 73 N. Y. St. 251, 37 N. Y. S. 670; *Grove v. Hodges*, 55 Pa. St. 504.

⁹¹ See *Garrett v. Josey*, 44 Tex. Civ. App. 1, 97 S. W. 139.

⁹² *Byrne v. Doughty*, 13 Ga. 46; *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58; *Robinson v. Nipp*, 20 Ind. App. 156, 50 N. E. 408; *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382; *Flower v. Jones*, 7 Mart. (N. S.) (La.) 140; *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Codwise v. Hacker*, 1 Caines (N. Y.) 526; *Evans v. Buckner*, 1 Heisk. (Tenn.) 291; *Curry v. Hale*, 15 W. Va. 867.

⁹³ *Pike v. Douglass*, 28 Ark. 59; *Patterson v. Crowell*, 15 Cal. App. 105, 113 Pac. 700; *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 94 C. C. A.

279; *Burch v. M. Schulz Co.*, 8 Ga. App. 555, 69 S. E. 1087; *Cobb v. Sparr*, 153 Ill. App. 92; *Darst v. Gale*, 83 Ill. 136; *Eadie v. Ashbaugh*, 44 Iowa 519; *Alton Mfg. Co. v. Garrett Biblical Inst.*, 243 Ill. 298, 90 N. E. 704; *Zealeuka v. Port Huron Mach. Co.*, 144 Iowa 592, 123 N. W. 332; *Worsley v. Ayres*, 144 Iowa 676, 123 N. W. 353; *Gibson v. Norway Sav. Bank*, 69 Maine 579; *Sartwell v. Frost*, 122 Mass. 184; *Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276; *United States &c. Furniture Co. v. School Dist.*, 56 Nebr. 645, 77 N. W. 62; *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728; *Mundorff v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531; *Gold Mining Co. v. Nat. Bank*, 96 U. S. 640, 24 L. ed. 649; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670; *Brown v. Lacrosse City Gas &c. Co.*, 21 Wis. 51.

⁹⁴ *Kirklin v. Atlas Savings &c. Assn.*, 107 Ga. 313, 33 S. E. 83; *Rosenthal v. Hasberg*, 84 N. Y. S. 290; *Mundorff v. Wickersham*, 63 Pa. 87, 3 Am. Rep. 531. A receipt of the pro-

purchase or exchange of property. If the principal, with knowledge of the facts, accepts, retains or sells the goods so obtained he will be held to have ratified the transaction.⁹⁵ The same principles apply to leases,⁹⁶ representations or contracts of warranty,⁹⁷

ceeds and payment of interest [Fitch v. Lewiston Steam-Mill Co., 80 Maine 34, 12 Atl. 732; Episcopal Charitable Soc. v. Episcopal Church, 1 Pick. (Mass.) 372; Whitney v. Union Trust Co., 65 N. Y. 576], renewal by the principal of a note given by the agent (Ballston Spa Bank v. Marine Bank, 16 Wis. 120), ratifying mortgage given to secure the loan (McAdow v. Black, 4 Mont. 475, 1 Pac. 751), and part payment of the loan (Mohrfeld v. Second German &c. Bldg. Assn., 194 Pa. St. 488, 45 Atl. 335; Prentiss Tool &c. Co. v. Godchaux, 66 Fed. 234, 13 C. C. A. 420), have been held ratification by implication. See ante, § 455, however, where the agent both borrows and expends the money in the principal's business.

⁹⁵ Southern R. Co. v. Raney, 117 Ala. 270, 23 So. 29; Pike v. Douglass, 28 Ark. 59; Blood v. La Serena Land &c. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Moffit-West Drug Co. v. Lyneman, 10 Colo. App. 249, 50 Pac. 736; Duncan v. Kearney, 72 Conn. 585, 45 Atl. 358; Pope v. Meadow Spring Distilling Co., 20 Fed. 35; Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 38 S. E. 761; Ketchum v. Verdell, 42 Ga. 534; McDowell v. McKenzie, 65 Ga. 630; Carlin v. Brown, 80 Ill. App. 541; Campbell v. Millar, 84 Ill. App. 208; Evans v. Chicago &c. R. Co., 26 Ill. 189; Hunt v. Listenberger, 14 Ind. App. 320, 42 N. E. 240; Fouch v. Wilson, 59 Ind. 93; Palmer v. Cheney, 35 Iowa 281; McKnistry v. Citizens' &c. Bank, 57 Kans. 279, 46 Pac. 302; Lathrop v. Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Logan County Nat. Bank v. Townsend, 8 Ky. L. 694, 3 S. W. 122; Georgetown Water Co. v. Central &c. Co., 16 Ky. L. 125; Slocomb v. Cage, 22 La. Ann. 165; Newhall v. Dunlap, 14 Maine 180, 31 Am. Dec. 45; Hastings v. Bangor House, 18 Maine 436; Swindell v. Gilbert, 100 Md. 399, 60 Atl. 102; Bearce v. Bowker, 115 Mass. 129; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; Cooper v. Mulder,

74 Mich. 374, 41 N. W. 1084; Wright v. Vineyard &c. Church, 72 Minn. 78, 74 N. W. 1015; Carson v. Cummings, 69 Mo. 325; Watson v. Bigelow, 47 Mo. 413; Hobkirk v. Green, 26 Misc. (N. Y.) 18, 55 N. Y. S. 605; Moss v. Rossie Lead Min. Co., 5 Hill (N. Y.) 187; Smith v. Tracy, 36 N. Y. 79; Wheeler &c. Mfg. Co. v. Elberson, 84 Hun (N. Y.) 501, 32 N. Y. S. 303; Johnson v. East Carolina Land &c. Co., 116 N. Car. 926, 21 S. E. 28; Williams v. Crosby Lumber Co., 118 N. Car. 928, 24 S. E. 800; Duzan v. Meserve, 24 Ore. 523, 34 Pac. 548; Hall v. White, 123 Pa. 95, 16 Atl. 521; Welch v. Clifton Mfg. Co., 55 S. Car. 568, 33 S. E. 739; Horst v. Lightfoot (Tex.), 132 S. W. 761; Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606; Aultman Co. v. McDonough, 110 Wis. 263, 85 N. W. 980; Fintel v. Cook, 88 Wis. 485, 60 N. W. 788. See also, Hansen v. Rolison, 156 Mich. 83, 120 N. W. 574 (Principal retaining order for goods and notes for price); Goldschmidt v. Wagner (Tex. Civ. App.), 99 S. W. 737 (accepting sale price). See, however, in this connection, Schutz v. Jordan, 32 Fed. 55, affd., 141 U. S. 213, 35 L. ed. 705, 11 Sup. Ct. 906. But if the principal is forced to take the goods and pay the price this does not amount to a ratification. Chaffee v. Barataria Canning Co., 113 La. 215, 36 So. 943. A principal cannot ratify his agent's agreement to sell, after he himself has disposed of the subject-matter of such agreement. McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421.

⁹⁶ Burkhard v. Mitchell, 16 Colo. 376, 26 Pac. 657; Oregon R. Co. v. Oregon &c. Nav. Co., 28 Fed. 505; Bicknell v. Austin Min. Co., 62 Fed. 432; Chamberlaine v. Collinson, 45 Iowa 429. Compare Ehrmanntraut v. Robinson, 52 Minn. 333, 54 N. W. 188; Torrence v. Shedd, 112 Ill. 466.

⁹⁷ Woodford v. McClenahan, 4 Gilm. (Ill.) 85; Du Souchet v. Dutcher, 113 Ind. 249, 15 N. E. 459; Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558; Washburn v. Rainier, 130 App.

accepting services under the contract, and⁸⁸ settlements and compromise agreements.⁸⁹ A second method, and one of the most unequivocal means by which to show a ratification on his part, is for the principal to bring a suit based on his agent's unauthorized act.¹ Silent acquiescence with knowledge of the facts may amount to a ratification² if continued for an unreasonable length of time, and third persons or the assumed agent have acted in re-

Div. (N. Y.) 42, 114 N. Y. S. 424; Lane v. Dudley, 6 N. Car. 119, 5 Am. Dec. 523; Schultheis v. Sellers, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210n; Rutherford v. Montgomery, 14 Tex. Civ. App. 319, 37 S. W. 625.

⁸⁸ Stubbings v. World's Columbian Exposition Co., 110 Ill. App. 210; Ehrsam v. Mahan, 52 Kans. 245, 34 Pac. 800; Coggins v. Higbie, 83 Minn. 83, 85 N. W. 930; People's Nat. Bank v. Geisthardt, 55 Nebr. 232, 75 N. W. 582; Lyle v. Addicks, 62 N. J. Eq. 123, 49 Atl. 1121; Budd v. Howard Thomas Co., 40 Misc. (N. Y.) 52, 81 N. Y. S. 152. Otherwise, where he accepts the services without knowledge of the facts, see Swayne v. Union Mut. Life Ins. Co. (Tex. Civ. App.), 49 S. W. 518. See also, Findlay v. Hildenbrand, 17 Idaho 403, 105 Pac. 790, 29 L. R. A. (N. S.) 400.

⁸⁹ Orvis v. Wells, 73 Fed. 110, 19 C. C. A. 382 (dispute submitted to arbitration); Murray v. Walker, 44 Ga. 58; Hauss v. Niblack, 80 Ind. 407; National Imp. & Co. v. Maiken, 103 Iowa 118, 72 N. W. 431; Payne v. Hackney, 84 Minn. 195, 87 N. W. 608; Houghton v. Dodge, 5 Bosw. (N. Y.) 326; Dowagiac Mfg. Co. v. Hellekson, 13 N. Dak. 257, 100 N. W. 717; Reid v. Hibbard, 6 Wis. 175; Miles v. Ogden, 54 Wis. 573, 12 N. W. 81.

¹ Gaines v. Acre, Minor (Ala.) 141; Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89; Cochran v. Chitwood, 59 Ill. 53; Moore v. Butler Univ., 83 Ind. 376; Aultman Thresh. & Co. v. Knoll, 71 Kans. 109, 79 Pac. 1074; Zino v. Verdelle, 9 La. 51; Partridge v. White, 59 Maine 564; Walker v. Mobile & C. R. Co., 34 Miss. 245; Daugherty v. Burgess, 118 Mo. App. 557, 94 S. W. 594; Osborn v. Jordan, 52 Nebr. 465, 72 N. W. 479; Corser v. Paul, 41 N. H. 24, 77 Am. Dec.

753; Henderhen v. Cook, 66 Barb. (N. Y.) 21; Smith v. Tracy, 36 N. Y. 79; Frank v. Jenkins, 22 Ohio St. 597; McLeod v. Despain, 49 Ore. 536, 90 Pac. 492, 92 Pac. 1088, 124 Am. St. 1066; La Grande Nat. Bank v. Blum, 27 Ore. 215, 41 Pac. 659; Plano Mfg. Co. v. Millage, 14 S. Dak. 331, 85 N. W. 594; Franklin v. Ezell, 1 Sneed (Tenn.) 497; Germantown Farmers' Mut. Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549. Defending an action arising out of a contract may also amount to a ratification. Lathrop v. Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481. See also, Donason v. Barbero, 230 Ill. 138, 82 N. E. 620. It has been held that a discontinuance of the suit before trial does not amount to a ratification. Peters v. Ballistier, 3 Pick. (Mass.) 495. Acts and conduct of a principal, evincing an assent to the act of the agent, are interpreted liberally in favor of the latter. Bishop v. Readsboro Chair Mfg. Co. (Vt.), 81 Atl. 454, 36 L. R. A. (N. S.) 1171.

² Market & C. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; Tennis v. Barnes, 11 Colo. App. 196, 52 Pac. 1038; J. B. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 Atl. 1122; Whitley v. James, 121 Ga. 521, 49 S. E. 600 (delay of fourteen years); Glucose Sugar Refining Co. v. Flinn, 184 Ill. 123, 56 N. E. 400, affg. 85 Ill. App. 131; Singer Mfg. Co. v. Flynn, 63 Minn. 475, 65 N. W. 923 (acquiescence for two years); Lyle v. Addicks, 62 N. J. Eq. 123, 49 Atl. 1121; Ketchum v. Marsland, 18 Misc. (N. Y.) 450, 42 N. Y. S. 7 (delay of over three years); Hanover Nat. Bank v. American & C. Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. 721; Himes v. Herr, 3 Pa. Super. Ct. 124; Auge v. Darlington, 185 Pa. St. 111, 39 Atl. 845 (delay of

liance on and been prejudiced by such acquiescence.³ This would seem to be the rule, even though the party acting as agent was, in fact, a mere stranger without authority, though it is not so readily inferred from mere silence under ordinary circumstances in the latter case.⁴ A valid ratification cannot be retracted.⁵

four years); *Thompson v. Murphy*, 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311. Silence or nonaction after knowledge is evidence of a ratification, but is not conclusive except when the rights of the agent or a third person are prejudiced by such delay. *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800.

³*Lynch v. Smith*, 25 Colo. 103, 54 Pac. 634. The above case lays down the rule that mere silence without prejudice resulting may amount to a ratification. *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861; *Robbins v. Blanding*, 87 Minn. 246, 91 N. W. 844; *Lyle v. Addicks*, 62 N. J. Eq. 123, 49 Atl. 1121; *Russell v. Waterloo Threshing Co.*, 17 N. Dak. 248, 116 N. W. 611; *Reid v. Alaska Packing Co.*, 47 Ore. 215, 83 Pac. 139; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670; *Roundy v. Erspamer*, 112 Wis. 181, 87 N. W. 1087. "A failure to disavow the acts of a mere volunteer, who meddlingly assumes to act without authority, as the agent of another, will not constitute a ratification. But where a person in good faith assumes to act as the agent of another, but without authority in fact, in any particular transaction, the latter, upon being fully informed thereof, must, in cases where his silence might prejudice the assumed agent or innocent third parties, disavow the act within a reasonable time, or he will be held to have ratified it." *Robbins v. Blanding*, 87 Minn. 246, 91 N. W. 844. See also, *Ankeny v. Young*, 52 Wash. 235, 100 Pac. 736. See, however, *Ilfeld v. Zeigler*, 40 Colo. 401, 91 Pac. 825.

⁴*Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *Southern Ex. Co. v. Palmer*, 48 Ga. 85; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861. In this case *Champlin, J.*, says: "Whether silence operates as presumptive proof

of ratification of the act of a mere volunteer must depend upon the particular circumstances of the case. If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to, and relying upon, such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency." *Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445; *Saveland v. Green*, 40 Wis. 431. But ratification by silence will not be as readily inferred where a mere stranger assumes to act for another as where a special agent has exceeded his authority. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148, and note. See also, *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243; *Britt v. Gordon*, 132 Iowa 431, 108 N. W. 319, 11 Ann. Cas. 407; *Lightfoot v. Horst* (Tex. Civ. App.), 122 S. W. 606. See also, cases cited, ante, this note.

⁵*Whitfield v. Riddle*, 78 Ala. 99; *Russ v. Telfener*, 57 Fed. 973; *Perry v. Hudson*, 10 Ga. 362; *Johnson v. Hoover*, 72 Ind. 395; *Coffin v. Gephart*, 18 Iowa 256; *Bell v. Byerson*, 11 Iowa 233, 77 Am. Dec. 142; *Hunter v. Cobe*, 84 Minn. 187, 87 N. W. 612; *Beall v. January*, 62 Mo. 434; *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596; *Glor v. Kelly*, 49 App. Div. (N. Y.) 617, 63 N. Y. S. 339, affd. 166 N. Y. 589, 59 N. E. 1123; *Hazleton v. Batchelder*, 44 N. H. 40; *Brock v. Jones*, 16 Tex. 461; *Richmond & C. R. Co. v. Richmond & C. R. Co.*, 96 Va. 670, 32 S. E. 787. The power of a principal to ratify the unauthorized contract of his agent and thus give rise to a cause of action in his own favor against the adverse party will not be gone into here. It is enough

§ 460. Termination of agent's authority—By lapse of time.—There are many ways in which the relation of principal and agent may be terminated. For convenience they will be grouped under three heads, which are by the original agreement, by act of the parties and by operation of law. If by the terms of the original agreement the agency is to endure only for a specified time, the expiration of that time terminates the agency.⁶ Likewise, the authority of an agent appointed to perform some specific act or acts is necessarily ended the moment the transaction becomes complete.⁷ A special agent's authority may also be terminated by a settlement, before he has acted on the matter he was appointed to adjust, in another way.⁸

§ 461. Revocation by act of the parties.—The relation may be terminated by a revocation of the agency by the principal or its renunciation by the agent. Thus, as between the principal and agent, the authority may be revoked by the principal at any time before the act authorized by him to be done has been accomplished unless the agent has acquired with such authority an interest in the subject-matter.⁹ This principle applies to a power

to say that there is a division of authority on the subject. For a review of the subject, see *Atlanta Buggy Co. v. Hess Spring & Co.*, 124 Ga. 338, 52 S. E. 613, 4 L. R. A. (N. S.) 431, and note; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. 103, and note.

⁶ *Danby v. Coutts*, 54 L. J. Ch. 577, 29 Ch. Div. 500, 52 L. T. 401, 33 W. R. 559. In the above case it appears that an attorney was appointed to act during the principal's absence from England. It was held that the phrase "during my absence from England" limited the exercise of the powers of the attorney to the period of the principal's absence from England. *Gundlach v. Fischer*, 59 Ill. 172. In the above case it appears that the principal agreed to furnish the agent "such number of machines as he may be able to sell as their agent prior to October 1, 1867." This was held to create an agency only until October 1, 1867. See also, *Clements v. Macheboeuf*, 92 U. S. 418, 23 L. ed. 504.

⁷ *Atlanta Sav. Bank v. Spencer*, 107

Ga. 629, 33 S. E. 878; *Short v. Millard*, 68 Ill. 292; *Bragg v. Bamberger*, 23 Ind. 198; *Moore v. Stone*, 40 Iowa 259; *People v. Manistee*, 40 Mich. 585; *Greening v. Steele*, 122 Mo. 287, 26 S. W. 971; *McLeod v. Despain*, 49 Ore. 536, 90 Pac. 492, 92 Pac. 1088, 124 Am. St. 1066; *Denny v. Lyon*, 38 Pa. 98, 80 Am. Dec. 463.

⁸ *Benoit v. Conway*, 10 Allen (Mass.) 528; *Ahern v. Baker*, 34 Minn. 98, 24 N. W. 341. Thus in the above case two agents were appointed to sell a certain piece of real estate. It was held that a sale by one of them terminated the agency of the other. See also, *Clark v. Delano*, 205 Mass. 224, 91 N. E. 299, 29 L. R. A. (N. S.) 595.

⁹ *Brown v. Pforr*, 38 Cal. 550; *Phillips v. Howell*, 60 Ga. 411; *Linder v. Adams*, 95 Ga. 668, 23 S. E. 687; *Attrill v. Patterson*, 58 Md. 226; *Hamilton v. Frothingham*, 59 Mich. 253, 26 N. W. 486; *Simonton v. First National Bank*, 24 Minn. 216; *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67, 138 S. W. 36; *Kolb v. Bennett Land Co.*,

of attorney¹⁰ and contracts with brokers.¹¹ This is true even though the instrument expressly provides that the power is irrevocable.¹² It is otherwise, however, where the agency is coupled with an interest or is given for a valuable consideration.¹³ The principal's revocation may be implied.¹⁴ An agent may himself terminate the relation by a renunciation of it on his part¹⁵ or by his misconduct.¹⁶ The agent may, however, render

74 Miss. 567, 21 So. 233; *Woods v. Hart*, 50 Nebr. 497, 70 N. W. 53; *Hartshorne v. Thomas*, 43 N. J. Eq. 419, 10 Atl. 843; *Hitchcock v. Kelley*, 18 Ohio C. C. 808, 4 Ohio Dec. 180; *Wright v. Fidelity & Co.*, 1 Lack. Leg. N. 111; *Coffin v. Landis*, 46 Pa. 426; *McCallum v. Grier*, 86 S. C. 162, 68 S. E. 466, 138 Am. St. 1037; *Willcox & Co. v. Ewing*, 141 U. S. 627, 35 L. ed. 882, 12 Sup. Ct. 94.

¹⁰ *Evans v. Fearn, Crenshaw & Co.*, 16 Ala. 689, 50 Am. Dec. 197; *Barr v. Schroeder*, 32 Cal. 609; *Darrow v. St. George*, 8 Colo. 592, 9 Pac. 791; *Mansfield v. Mansfield*, 6 Conn. 599, 16 Am. Dec. 76; *Pickler v. State*, 18 Ind. 266; *Spear v. Gardner*, 16 La. Ann. 383; *Jacobs v. Warfield*, 23 La. Ann. 395; *Smith v. Dare*, 89 Md. 47, 42 Atl. 909; *Brookshire v. Von Cannon*, 28 N. Car. 231; *Blackstone v. Buttermore*, 53 Pa. St. 266.

¹¹ *McCallum v. Grier*, 86 S. C. 162, 68 S. E. 466, 138 Am. St. 1037.

¹² *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *McGregor v. Gardener*, 14 Iowa 326; *Attrill v. Patterson*, 58 Md. 226; *Buffalo Land & Co. v. Strong*, 91 Minn. 84, 97 N. W. 575. The common law requires that the revocation of a power of attorney to sell real estate must be brought to the personal notice of the agent. *Best v. Gunther*, 125 Wis. 518, 104 N. W. 82, 1 L. R. A. (N. S.) 577, 110 Am. St. 851. The power to revoke and the right to revoke do not necessarily mean the same thing, as the principal may render himself liable for damages if he terminates the agency without cause prior to the time set for its expiration; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Rowan Co. v. Hull*, 55 W. Va. 335, 47 S. E. 92.

¹³ *Mansfield v. Mansfield*, 6 Conn.

559, 16 Am. Dec. 76; *Big Four Wilmington Coal Co. v. Wren*, 115 Ill. App. 331; *Buffalo Land & Co. v. Strong*, 91 Minn. 84, 97 N. W. 575, aff'd., 203 U. S. 582, 51 L. ed. 327, 27 Sup. Ct. 780; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. 695; *Hunt v. Rousmanier's Admr.*, 8 Wheat. (U. S.) 174, 5 L. ed. 589; *Montague v. McCarroll*, 15 Utah 318, 49 Pac. 418. A contract is not, however, necessarily rendered immortal by the passing of a consideration for its creation. *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67, 138 S. W. 36. See as to liability for damages on revocation where the agency is for a fixed time and time and money are expended by the agent as contemplated by the contract, *Cloe v. Rogers (Okla.)*, 121 Pac. 201, 38 L. R. A. (N. S.) 366 and note.

¹⁴ *Rapier v. Louisiana Equitable Life Ins. Co.*, 57 Ala. 100; *Reed v. Lathan*, 40 Conn. 452; *Wallace v. Goold*, 91 Ill. 15; *Torre v. Thiele*, 25 La. Ann. 418; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273.

¹⁵ *Barrows v. Cushway*, 37 Mich. 481; *Hitchcock v. Kelley*, 18 Ohio C. C. 808, 4 Ohio Dec. 180; *Case v. Jennings*, 17 Tex. 661.

¹⁶ *Walker v. John Hancock Mut. Life Ins. Co.*, 80 N. J. L. 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153n (principal discharged agent because of misconduct on the part of the latter); *Stoddard v. Key*, 62 How. Pr. (N. Y.) 137; *Henderson v. Hydraulic Works*, 9 Phila. (Pa.) 100; *Case v. Jennings*, 17 Tex. 661. See also, *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344. See, however, *Cotton v. Rand*, 93 Tex. 7, 51 S. W. 838, 53 S. W. 343.

himself liable for damages suffered by the principal in case he abandoned the agency in violation of its terms.¹⁷

The relation of principal and agent uncoupled with an interest is terminated by operation of law, by the death of the principal,¹⁸ by the death of the agent,¹⁹ by the insanity of either the principal²⁰ or agent,²¹ by the bankruptcy of the principal except as to property unaffected by such bankruptcy,²² or of the agent except

¹⁷ *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Barrows v. Cushway*, 37 Mich. 481; *Benden v. Manning*, 2 N. H. 289; *White v. Smith*, 6 Lans. (N. Y.) 5; *Thorne v. Deas*, 4 Johns. (N. Y.) 84.

¹⁸ *Saltmarsh v. Smith*, 32 Ala. 404; *Green v. Tuttle*, 5 Ariz. 179, 48 Pac. 1009; *Travers v. Crane*, 15 Cal. 12; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Pacific Bank v. Hannah*, 90 Fed. 72, 32 C. C. A. 522; *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Mecartney v. Carbine's Estate*, 108 Ill. App. 282; *Johnson v. Wilcox*, 25 Ind. 182; *Condon v. Barnum* (Iowa), 106 N. W. 514; *Seibert v. True*, 8 Kans. 52; *Lincoln v. Emerson*, 108 Mass. 87; *Brown v. Cushman*, 173 Mass. 368, 15 N. E. 860; *Clayton v. Merrett*, 52 Miss. 353; *Wash v. Wash*, 189 Mo. 352, 87 S. W. 993, 107 Am. St. 353; *Farmers' Loan & Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. 696; *Duckworth v. Orr*, 126 N. Car. 674, 36 S. E. 150; *Wainright v. Massenberg*, 129 N. Car. 46, 39 S. E. 725; *Brown v. Skotland*, 12 N. Dak. 445, 97 N. W. 543; *In re Kern's Estate*, 176 Pa. St. 373, 35 Atl. 231; *Nehring v. McMurray* (Tex. Civ. App.), 45 S. W. 1032; *Primm v. Stewart*, 7 Tex. 178; *Hunt v. Rousmanier's Admr.*, 8 Wheat. (U. S.) 174, 5 L. ed. 589; *Triplett v. Woodward's Admr.*, 98 Va. 187, 35 S. E. 455. Compare with *Crowley v. McCambridge*, 154 Ill. App. 135, in which the death of the principal was held not to revoke the agency since the agent possessed more than a naked power.

¹⁹ *Judson v. Love*, 35 Cal. 463; *Shiff v. Succession of Lesseps*, 22 La. Ann. 185; *Musson v. United States Bank*, 6 Mart. (O. S.) (La.) 707; *Tyson v. George's Creek Coal & Co.*, 115 Md. 564, 81 Atl. 41; *Adrian v. Ruther-*

ford, 57 Mich. 170, 23 N. W. 718; *People v. Bellando*, 137 App. Div. (N. Y.) 777, 122 N. Y. S. 543, *affd.*, 199 N. Y. 533, 92 N. E. 1095; *In re Merrick's Estate*, 8 Watts. & S. (Pa.) 402; *Gage v. Allison*, 1 Brev. (S. Car.) 495, 2 Am. Dec. 682; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296. Where a joint agency is conferred upon two parties the death of one terminates the agency of the other. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Johnson v. Wilcox*, 25 Ind. 182; *Sample v. Lamb's Curator*, 2 La. 275; *Martine v. International & C. Ins. Soc.*, 62 Barb. (N. Y.) 181, 5 Lans. (N. Y.) 535, 53 N. Y. 339, 13 Am. Rep. 529; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19.

²⁰ *Bunce v. Gallagher*, Fed. Cas. No. 2133; *Davis v. Lane*, 10 N. H. 156; *Matthiessen & Co. v. McMahon's Admr.*, 38 N. J. L. 536; *Hill's Exr. v. Day*, 34 N. J. Eq. 150; *Wallis v. Manhattan Co.*, 2 N. Y. Super. Ct. 495; *Renfro v. City of Waco* (Tex.), 33 S. W. 766. See also, *Motley v. Head*, 43 Vt. 633. In case the agent holds a written authority from the principal and innocent third parties deal with the agent without knowledge that the principal has become insane, the principal or those who claim under him may be precluded from setting up insanity as a revocation. *Davis v. Lane*, 10 N. H. 156. Of course, if the agency is coupled with an interest (*Davis v. Lane*, 10 N. H. 156), the agency is not revoked by the principal's insanity, or if the power is such that it could not have been revoked, if the principal had remained sane. *Spencer v. Reynolds*, 9 Pa. Co. Ct. 249.

²¹ *Lawson on Contracts* (2d ed.) 245; *Mechem on Agency*, 168.

²² *Parker v. Smith*, 16 East 382; *Minett v. Forrester*, 4 Taunt. 541n;

as to the execution of mere formal acts,²³ by the marriage of the principal under certain circumstances,²⁴ by a war which renders the principal and agent alien enemies,²⁵ by the dissolution²⁶ or the admission of a new partner to the firm which the agent represents,²⁷ and by the destruction of or the termination of the principal's authority over the subject-matter of the agency.²⁸

§ 462. Liability of principal.—A principal is liable to third persons on all contracts made by his agent acting as such within the scope of his authority.²⁹ This is based on the legal maxim that he who does an act through the medium of another party is in law considered as doing it himself. This is the foundation upon which rests the entire law of agency. Innumerable cases might be cited illustrating it, but it is considered unnecessary to go more in detail at this point.

In re Daniels, 13 Nat. Bankruptcy Reg. 46. See also, Hall v. Bliss, 118 Mass. 554, 19 Am. Rep. 476.

²³ Scott v. Surman, Willes 400; Hudson v. Granger, 5 B. & Ald. 27; Dixon v. Ewart, 3 Mer. 327, Buck 94; Audenried v. Bettley, 8 Allen (90 Mass.) 302.

²⁴ Thus at common law the subsequent marriage of a feme sole revokes a power of attorney previously executed. Montague v. Carneal, 1 A. K. Marsh. (Ky.) 351; Brown v. Miller, 46 Mo. App. 1; Wamble v. Foote, 2 Dak. 1, 2 N. W. 239. See, however, Reynolds v. Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233. It has also been held that where a single man executed a power of attorney for the sale of his homestead and married before sale thereunder the wife acquired an interest upon marriage which could not be defeated by a subsequent sale under the power. Henderson v. Ford, 46 Tex. 627. See, however, Joseph v. Fisher, 122 Ind. 399, 23 N. E. 856.

²⁵ Howell v. Gordon, 40 Ga. 302; Simonton v. Clark, 65 N. Car. 525, 6 Am. Rep. 752; Blackwell v. Willard, 65 N. Car. 555, 6 Am. Rep. 749; Conley v. Burson, 1 Heisk. (Tenn.) 145; New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 L. ed. 453. See, however, Murrell v. Jones, 40 Miss. 565; Shelby v. Offutt, 51

Miss. 128; Robinson v. International Ins. Co., 42 N. Y. 54, 1 Am. Rep. 490; Maloney v. Stephens, 11 Heisk. (Tenn.) 738; Manhattan Life Ins. Co. v. Warwick, 20 Grat. (Va.) 614, 3 Am. Rep. 218.

²⁶ Schlater v. Winpenny, 75 Pa. St. 321.

²⁷ Callanan & Ingham v. Van Vleck, 36 Barb. (N. Y.) 324. The agency is not terminated by a mere change in the firm's name, however; Billingsley v. Dawson, 47 Iowa 210.

²⁸ Perkins v. Currier, Fed. Cas. No. 10985, 3 Wood & M. (U. S.) 69; Gilbert v. Holmes, 64 Ill. 548; Walker v. Denison, 86 Ill. 142; Barrett v. His Creditors, 12 Rob. (La.) 474; Ahern v. Baker, 34 Minn. 98, 24 N. W. 341; State v. Walker, 88 Mo. 279; Allen v. Clark, 65 Barb. (N. Y.) 563.

²⁹ Waring v. Henry, 30 Ala. 721; Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Russell v. Cady, 15 Ark. 540; Jones v. Marks, 47 Cal. 242; Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322; Frost v. Wood, 2 Conn. 23; Hudson v. Whiting, 17 Conn. 487; Kirkpatrick v. Adams, 20 Fed. 287; City Bank v. Kent, 57 Ga. 283; Wider v. Branch, 12 Ill. App. 358; Marckle v. Haskins, 27 Ill. 382; Evansville & C. R. Co. v. Spellbring, 1 Ind. App. 167, 27 N. E. 239; Blackwell v. Ketcham, 53 Ind. 184; Whiting v. Western Stage Co., 20 Iowa

"Whenever a general agency has been established for any purpose, all persons who have dealt with the agent have a right to assume that his authority to deal with them in behalf of his principal continues, until notice, express or implied, has been conveyed to them that the agency has been revoked."⁸⁰ The principal is also under an obligation to compensate the agent for the services rendered⁸¹ unless he acts gratuitously.⁸² The principal is also liable to indemnify the agent against loss and injury sus-

554; *Markham v. Burlington Ins. Co.*, 69 Iowa 515, 29 N. W. 435; *Lewis v. Bourbon*, 12 Kans. 186; *Vanada's Heirs v. Hopkins' Admr.*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; *Taylor's Heirs v. French*, 1 Bibb (Ky.) 52; *Pellerin v. Dungan*, 2 La. Ann. 383; *Mackey v. De Blanc*, 12 La. Ann. 377; *Dyer v. Burnham*, 25 Maine 9; *Bryant v. Moore*, 26 Maine 84, 45 Am. Dec. 96; *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706; *Swatara R. Co. v. Brune*, 6 Gill (Md.) 41; *Garfield & Co. v. Rockland-Rockport Lime Co.*, 184 Mass. 60, 67 N. E. 863, 61 L. R. A. 946, 100 Am. St. 543; *Caswell v. Cross*, 120 Mass. 545; *Rich v. Crandall*, 142 Mass. 117, 7 N. E. 547; *Atlas Min. Co. v. Johnston*, 23 Mich. 36; *Thompson v. Clay*, 60 Mich. 627, 27 N. W. 699; *Adamson v. Wiggins*, 45 Minn. 448, 48 N. W. 185; *Fox v. Fisk*, 6 How. (Miss.) 328; *Carter v. Taylor*, 6 Sm. & M. (Miss.) 367; *De Baun v. Atchison*, 14 Mo. 543; *Tate v. Evans*, 7 Mo. 419; *Home Fire Ins. Co. v. Kuhlman*, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. 111; *Clement v. Leverett*, 12 N. H. 317; *Boston Iron Co. v. Hale*, 8 N. H. 363; *Kirkpatrick v. Winans*, 16 N. J. Eq. 407; *Camden Safe Deposit & Co. v. Abbott*, 44 N. J. L. 257; *Mills v. Shult*, 2 E. D. Smith (N. Y.) 139; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Lane v. Dudley*, 6 N. Car. 119, 5 Am. Dec. 523; *Williamson v. Canaday*, 3 Ired. (N. Car.) 349; *Lambert v. Carroll*, *Wright (Ohio)* 108; *Ætna Ins. Co. v. Church*, 21 Ohio St. 492; *McKillip v. McIlhenny*, 2 Watts (Pa.) 466; *Mundorff v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531; *Ezell v. Franklin*, 2 Sneed (Tenn.) 236; *Gordon*

v. Buchanan, 5 Yerg. (Tenn.) 71; *Bruce v. Washington*, 80 Tex. 368, 15 S. W. 1104; *Morgan v. Darragh*, 39 Tex. 171; *Lucas v. Brooks*, 18 Wall. (U. S.) 436, 21 L. ed. 779; *Post v. Pearson*, 108 U. S. 418, 27 L. ed. 774, 2 Sup. Ct. 799; *Alexander v. Bank of Rutland*, 24 Vt. 222; *Frisbie v. Felton*, 65 Vt. 138, 26 Atl. 325; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Hopkins v. Blane*, 1 Call (Va.) 361; *Spence v. Rose*, 28 W. Va. 333; *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661; *Dodge v. McDonnell*, 14 Wis. 553. The statement in the text, of course, assumes that the contract is one on which the principal would have been liable if made by him for himself. The knowledge of the agent is, as a general rule, imputed to his principal. *Johnson v. Ætna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. 92.

⁸⁰ *Burch v. Americus Grocery Co.*, 125 Ga. 153, 53 S. E. 1008; *Bazemore v. A. B. Small Co. (Ga.)*, 70 S. E. 261. See further on this subject ante, §§ 452, 453, *Authority of Agents*.

⁸¹ *Dexter v. Campbell*, 137 Mass. 198; *Mangum v. Ball*, 43 Miss. 288, 5 Am. Rep. 488; *Briggs v. Boyd*, 56 N. Y. 289; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327. It is held, however, as a general rule, that when an insurance agent is dismissed for good cause he is not entitled to commissions on renewals. *Walker v. John Hancock Mutual Life Ins. Co.*, 80 N. J. L. 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153n.

⁸² *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329. See also, *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

tained for all acts lawfully done in the execution of his authority.³³

§ 463. **Liability of agent.**—The liability of an agent is also twofold. He is under an obligation to the principal to be loyal to his trust, to obey instructions, not to be negligent and to account for the money or property of the principal which comes into his possession. The agent's liability to his principal will not be further elaborated at this point.

The agent is not personally liable to a third person on a contract entered into in behalf of a disclosed principal, when the terms of the agreement fail to show that he intended to bind himself personally.³⁴ Under these circumstances he is not liable to a third person for the sale of a forged note,³⁵ or for money received for which he has failed to account to his principal,³⁶ or for money which he has in fact paid over to the principal.³⁷ Nor is the known agent of a corporation personally liable on a contract ultra vires as to the corporation when he was authorized by the corporation to make such contract.³⁸ Nor is the agent personally liable to a third person on the contract where he makes known his want of authority, makes no misrepresentation and discloses the name of his principal.³⁹

³³ Moore v. Appleton, 26 Ala. 633, 34 Ala. 147, 73 Am. Dec. 448; Haas v. Ruston, 14 Ind. App. 8, 42 N. E. 298, 56 Am. St. 288; Drummond v. Humphreys, 39 Maine 347; Howe v. Buffalo, N. Y. & E. R. Co., 37 N. Y. 297; White v. Miners' National Bank, 102 U. S. 658, 26 L. ed. 250.

³⁴ Gulf City Construction Co. v. Louisville & N. R. Co., 121 Ala. 621, 25 So. 579; Anderson v. Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. 105; Tevis v. Savage, 130 Cal. 411, 62 Pac. 611; Merrill v. Williams, 63 Cal. 70; Monticello Bank v. Bostwick, 71 Fed. 641; Stevenson v. Mathers, 67 Ill. 123; Lewis v. Harris, 4 Metc. (Ky.) 353; Worthington v. Cowles, 112 Mass. 30; Huston v. Tyler, 140 Mo. 252, 41 S. W. 795, 36 S. W. 654; Sleeper v. Weymouth, 26 N. H. 34; American National Bank v. Wheelock, 82 N. Y. 118; 84 Am. St. 417.

Hall v. Lauderdale, 46 N. Y. 70; Kurzawski v. Schneider, 179 Pa. St. 500, 36 Atl. 319; Baldwin v. Black, 119 U. S. 643, 30 L. ed. 530, 7 Sup. Ct. 326; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Wilson v. Wold, 21 Wash. 398, 58 Pac. 223, 75 Am. St. 846; Johnson v. Welch, 42 W. Va. 18, 24 S. E. 585; Moody & Co. v. Trustees of M. E. Church, 99 Wis. 49, 74 N. W. 572.

³⁵ Bailey v. Galbreath, 100 Tenn. 599, 47 S. W. 84.

³⁶ Huffman v. Newman, 55 Nebr. 713, 76 N. W. 409.

³⁷ Wilson v. Wold, 21 Wash. 398, 58 Pac. 223, 75 Am. St. 846.

³⁸ Thilmany v. Paper Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. 259.

³⁹ Kansas Nat. Bank v. Bay, 62 Kans. 692, 64 Pac. 596, 54 L. R. A. 408,

§ 464. **When personally liable.**—On the other hand, a personal liability attaches to the agent if the agreement is in excess of his powers and the other party thereto is led to believe in good faith that the agent possesses the requisite authority to make the contract.⁴⁰ And this is generally held true, notwithstanding the agent may have acted in good faith and in the exercise of due care⁴¹ on the ground that as between two innocent parties, the loss must be borne by him who caused it. This rule is not, however, universal.⁴² While there are many cases that have not drawn any distinction between those instances in which the agent contracts in his own name for an undisclosed principal, and those in which he either innocently or fraudulently enters into a contract in excess of his authority, and indiscriminately hold the agent bound as principal in either case, a distinction nevertheless exists. In the former case the agent is the only one known to the third party and in the absence of an express agreement to the contrary the agent is bound as principal. In the latter case, both the agent and the third party understand that the agent acts as agent. The third party does not accept the agent as principal but instead the one he purports to represent. Should the law under these circumstances hold the agent as principal, it would in effect make a contract between parties that did not intend to contract.⁴³ The agent's liability rests on breach of warranty where he acts in

⁴⁰ *Frankland v. Johnson*, 147 Ill. 520, 35 N. E. 480, 37 Am. St. 234; *Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404; *Duffy v. Mallinkrodt*, 81 Mo. App. 449; *Patterson v. Lippincott*, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; *Argersinger v. MacNaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. 687; *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. 846; *Bliss v. Tidrick*, 25 S. Dak. 533, 127 N. W. 852; *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555.

⁴¹ *Randell v. Trimen*, 16 C. B. 786; *Collen v. Wright*, 8 E. & B. 647; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427; *Beattie v. Lord Ebury*, L. R. 7 H. L. 102; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Jefts v.*

York, 10 Cush. (Mass.) 392, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; *Bank of Hamburg v. Wray*, 4 Strob. (S. Car.) 87, 51 Am. Dec. 659; *Kroeger v. Pitcairn*, 101 Pa. St. 311, 47 Am. Rep. 718; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468. See also, *McDonald v. Bond*, 195 Ill. 122, 62 N. E. 881. See also the cases cited in the preceding note. However, if the agent's authority has been recently revoked, as by the death of the principal, without the agent's knowledge and when he has not been negligent in ascertaining such fact, he does not render himself personally liable. *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

⁴² See *Newman v. Sylvester*, 42 Ind. 106.

⁴³ See *White v. Madison*, 26 N. Y. 117.

good faith,⁴⁴ and on fraud when he intentionally misrepresents his authority.⁴⁵ He also binds himself personally when he fails to disclose that he is acting as an agent.⁴⁶ The same is true where the agent fails to disclose the identity of his principal.⁴⁷ All that is necessary, however, is that the principal be disclosed before the

⁴⁴ *Collen v. Wright*, 8 El. & Bl. 647, 27 L. J. Q. B. 215, 4 Jur. (N. S.) 357, 6 W. R. 123; *Lander v. Castro*, 43 Cal. 497; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Harper v. Little*, 2 Greenl. (Maine) 14, 11 Am. Dec. 25; *Simpson v. Garland*, 76 Maine 203; *Jefts v. York*, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145; *White v. Madison*, 26 N. Y. 117; *Haupt v. Vint*, 68 W. Va. 657, 70 S. E. 702.

⁴⁵ *Bird v. Daggett*, 97 Mass. 494; *White v. Madison*, 26 N. Y. 117. See also, *Garrett v. Sparks Bros.*, 61 Wash. 397, 112 Pac. 501.

⁴⁶ "An agent can make a valid contract without disclosing his principal, and, if he thus deals with a party who does not know that he is acting in a representative capacity, he can be held individually responsible for the performance of the contract thus made, and liable individually for its breach." *Boynton v. Brannum* (Ark.) 136 S. W. 979. *Murphy v. Helmrich*, 66 Cal. 69, 4 Pac. 958. "An agent contracting in his own name cannot avoid the consequences of his contract by pleading that he was acting as the agent of another." *Stewart & Co. v. Postal Telegraph Cable Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. 205; *Morris v. Malone*, 200 Ill. 132, 65 N. E. 704, 93 Am. St. 180; *Bickford v. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Scaling v. Knollin*, 94 Ill. App. 443; *Fritz v. Kennedy*, 119 Iowa 628, 93 N. W. 603; *Thompson v. Investment Co.*, 114 Iowa 481, 87 N. W. 438; *Lull v. Anamosa National Bank*, 110 Iowa 537, 81 N. W. 784; *Blackmore v. Fairbanks*, 79 Iowa 282, 44 N. W. 548; *Stevenson v. Polk*, 71 Iowa 278, 32 N. W. 340; *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Tutt v. Brown*, 5 Litt. (Ky.) 1, 15 Am. Dec. 33; *Nolan v. Clark*, 91 Maine 38, 39 Atl.

344; *Brighan v. Herrick*, 173 Mass. 460, 53 N. E. 906; *Bartlett v. Raymond*, 139 Mass. 275, 30 N. E. 91; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; *Mitchell v. Beck*, 88 Mich. 342, 50 N. W. 305; *Amans v. Campbell*, 70 Minn. 493, 73 N. W. 506, 68 Am. St. 547; *William Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314 (overruling *Rowell v. Olson*, 32 Minn. 288, 20 N. W. 227; *O'Neil Lumber Co. v. Greffet*, 154 Mo. App. 33, 133 S. W. 113; *Porter v. Merrill*, 138 Mo. 555, 39 S. W. 798; *Jackson v. McNatt*, 4 Nebr. (unof.) 55, 93 N. W. 425; *Elliott v. Bodine*, 59 N. J. L. 567, 36 Atl. 1038; *McClure v. Central Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; *DeRemer v. Brown*, 165 N. Y. 410, 59 N. E. 129; *Argersinger v. Macnaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. 687; *Keokuk Falls Imp. Co. v. Kingsland Mfg. Co.*, 5 Okla. 32, 47 Pac. 484; *Lindsay v. Pettigrew*, 5 S. Dak. 500, 59 N. W. 726; *Royce v. Allen*, 28 Vt. 234; *Poole v. Rice*, 9 W. Va. 73; *Morris v. Clifton Forge Grocery Co.*, 46 W. Va. 197, 32 S. E. 997. The fact that the third party may suspect that the other acts as an agent is not sufficient to relieve the agent from liability as principal. There must be actual knowledge of the other's agency. *Meyer v. Redmond*, 141 App. Div. (N. Y.) 123, 125 N. Y. S. 1052.

⁴⁷ *Horan v. Hughes*, 129 Fed. 248, affd., 129 Fed. 1005, 64 C. C. A. 581; *Lull v. Anamosa Nat. Bank*, 110 Iowa 537, 81 N. W. 784; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516; *Sheehy v. Wollman*, 152 Mo. App. 506, 133 S. W. 852; *Adamson v. Elwell*, 17 Jones & Spen. (N. Y.) 494; *Long v. McKissick*, 50 S. Car. 218, 27 S. E. 636; *Hughes v. Settle* (Tenn. Ch. App.), 36 S. W. 577; *Hoge v. Turner*, 96 Va. 624, 32 S. E. 291.

contract is consummated. It is immaterial that the agent failed to make a disclosure at the first instance.⁴⁸

An agent also renders himself liable in those cases where he assumes to represent a principal who has no legal existence nor status and no legal responsibility.⁴⁹ Thus a committee appointed by a political meeting to provide a free public dinner for the party has been held personally liable for the bill. The court said: "Were they, the committee, to be viewed as the agent of a club we would have something palpable to deal with * * * but a club is a definite association organized for indefinite existence, not an ephemeral meeting, for a particular occasion to be lost in a crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate or furnish a dinner on the credit of a meeting which had vanished into nothing."⁵⁰ In such instances the agent may, however, protect himself by an express provision against personal liability.⁵¹ In cases where the principal is disclosed the contract must be one which the law would enforce against the principal if it had been authorized by him. When a breach of the contract itself, if it had been authorized, would have furnished no ground for an action against the principal, the agent is not bound.⁵² This is merely equivalent to saying that a void contract entered into by an agent on behalf of his principal binds no one.

§ 465. Rights and liabilities of parties where principal is named.—In the absence of ratification by or estoppel on the

⁴⁸ Meyer v. Redmond, 141 App. Div. (N. Y.) 123, 125 N. Y. S. 1052; Brackenridge v. Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593n. But a disclosure after the agreement is entered into does not prevent the agent from being held individually liable. Lull v. Anamosa Nat. Bank, 110 Iowa 537, 81 N. W. 784. To same effect, Hauser v. Layne & Bowler (Tex. Civ. App.), 131 S. W. 1156.

⁴⁹ Blakery v. Benneck, 59 Mo. 193; Queen City Furniture &c. Co. v. Crawford, 127 Mo. 356, 30 S. W. 163; Codding v. Munson, 52 Nebr. 580, 72 N. W. 846, 66 Am. St. 524; Lewis v. Tilton, 64 Ohio 220, 19 N. W. 911, 52 Am. Rep. 436; Winona Lumber Co. v. Church, 6 S. Dak. 498, 62 N. W.

107; Steele v. McElroy, 1 Sneed (33 Tenn.) 341.

⁵⁰ Eichbaum v. Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540. To same effect, Blakery v. Benneck, 59 Mo. 193; Learn v. Upstill, 52 Nebr. 271, 72 N. W. 213.

⁵¹ Comfort v. Graham, 87 Iowa 295, 54 N. W. 242; Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Codding v. Munson, 52 Nebr. 580, 72 N. W. 846, 56 Am. St. 524; Button v. Winslow, 52 Vt. 430.

⁵² Thilmany v. Iowa Paper Bank Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. 259. To same effect, Dung v. Parker, 52 N. Y. 494; Baltzen v. Nicolay, 53 N. Y. 467.

part of the principal, he is bound only in so far as the agent acts within the scope of his authority.⁵³ It has also been seen that the agent binds himself only when he fails to disclose his principal, enters into contracts outside the scope of his authority, or is guilty of fraud or misrepresentation. By a prior discussion of these questions the rights and liabilities of parties where the principal is named has been reduced to a somewhat narrow compass and little more need be said at this point. The purpose which underlies the appointment of an agent is to enable him to act for and in behalf of the principal. It is the former's duty by contract to bind his principal to a third person and at the same time bind such third person to the principal. It follows that in those instances where the agent discloses his principal and does exactly what he is legally authorized to do he mutually binds his principal⁵⁴ and the third party,⁵⁵ and does not render himself liable⁵⁶ at least to the third party. In case the agent discloses his principal but exceeds his authority he may bind only himself.⁵⁷ An immaterial variation from the authority conferred which does not substantially exceed the limits fixed does not vitiate the agent's act.⁵⁸ Likewise, if the authorized and unauthorized portion of the agreement are separable, the authorized portion may be enforced.⁵⁹

⁵³ See ante, §§ 454, 455 et seq., Ratification and Estoppel.

⁵⁴ *Main v. Aukam* 12 App. D. C. 375; *Harvey v. Miles*, 16 Ill. App. 533; *Seery v. Socks*, 29 Ill. 313; *Michael v. Jones*, 84 Mo. 578; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Davis v. Burnett*, 4 Jones (Pa.) 71, 67 Am. Dec. 263; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Oelricks v. Ford*, 23 How. (U. S.) 49, 16 L. ed. 534; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332; *Frazier v. Hendren*, 80 Va. 265.

⁵⁵ This is true even though the name of the principal (*Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359; *Donahoe v. McDonald*, 92 Ky. 123, 13 Ky. L. 413, 17 S. W. 195; *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129) or the fact that he is acting as agent is

not disclosed. *Manker v. Western Union Tel. Co.*, 137 Ala. 292, 34 So. 839; *Powell v. Wade*, 109 Ala. 95, 19 So. 500, 55 Am. St. 915; *Central of Georgia R. Co. v. James* 117 Ga. 832, 45 S. E. 223; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300, revg. 37 S. W. 516; *Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 Pac. 359.

⁵⁶ *Huffman v. Newman*, 55 Nebr. 713, 76 N. W. 409. See ante, § 453.

⁵⁷ See ante, §§ 452, 463, Authority of Agent and Liability of Agent.

⁵⁸ *Parker v. Kett*, 1 Salk. 95; *Huntley v. Mathias*, 90 N. Car. 101, 47 Am. Rep. 516.

⁵⁹ *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Vanada's Heirs v. Hopkins' Admr's.*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; *Dickerman v. Ashton*, 21 Minn. 538; *Smith v. Tracy*, 36 N. Y. 70; *Stowell v. Eldred*, 39 Wis. 614; *Co. Litt.* 258a.

§ 466. **Rights and liabilities of parties where principal is not disclosed—Rights of principal.**—The questions to be discussed under this sub-heading naturally divide themselves into three groups, which are: First, the rights and liabilities of the undisclosed principal; second, the rights and liabilities of the agent; third, the rights and liabilities of third persons. The rights and liabilities of the various persons mentioned will be discussed in the order in which they are named. As a general rule the principal, though undisclosed, is invested by the authorized act of the agent for the benefit and advantage of the principal, with every right and burdened with every liability arising out of or pertaining to the contract as perfectly as if the principal had in his own name and person made the contract.⁶⁰ An undisclosed principal may sue on a contract made by an agent.⁶¹ Likewise, when the agent buys property in his own name, his principal being undisclosed, it immediately becomes the property of the principal and not that of the agent,⁶² the agent being considered as a mere trustee.⁶³ The general rule first stated is said to be subject to an exception in that if the contract involves elements of personal trust and confidence as a consideration moving from the agent of the undisclosed principal contracting in his own name to the other party of the contract, the principal, while the agreement remains executory cannot, against the resistance of the other party, enforce it, either to compel performance by the other party or in damages for a breach,⁶⁴ or to state the same rule in other language an undisclosed principal who sues on a contract made by his agent in the latter's name with some person who

⁶⁰ *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 44 So. 642, 13 L. R. A. (N. S.) 156. Where the agent deals as principal the undisclosed principal in accepting or ratifying the agent's agreement must have given notice of any limitation on the agent's authority of which he seeks to avail himself. *Ohio Pottery &c. Co. v. Talbert*, 87 S. Car. 194, 69 S. E. 211.

⁶¹ *Western Union Telegraph Co. v. Northcutt*, 158 Ala. 539, 48 So. 553, 132 Am. St. 38; *Powell v. Wade*, 109 Ala. 95, 19 So. 500, 55 Am. St. 915; *Oelrichs v. Ford*, 21 Md. 489; *Vir-*

ginia &c. Co. v. Atlantic Coast Line R. R., 155 N. Car. 148, 71 S. E. 71; *Nicholson v. Dover*, 145 N. Car. 18, 58 S. E. 444, 13 L. R. A. (N. S.) 167. See also, ante, § 465, *Rights and Liabilities of Parties Where Principal is named*.

⁶² *Kempner v. Dillard*, 100 Tex. 505, 101 S. W. 437, 123 Am. St. 822. ⁶³ *Virginia Pocahontas Coal Co. v. Lambert*, 107 Va. 368, 58 S. E. 561, 122 Am. St. 860.

⁶⁴ *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 44 So. 642, 13 L. R. A. (N. S.) 156.

has no knowledge of an agency but supposes that the agent dealt for himself, such suit is subject to any defense or set-off acquired by the third party against the agent before he had notice of the principal's rights.⁶⁵ This rule applies not only to the sale of goods, but as well to other contracts when the agent is authorized to collect money for his undisclosed principal.⁶⁶ Another exception exists at common law to the effect that where an agent is contracted with by deed in his own name, his principal cannot sue upon it.⁶⁷

§ 467. **Rights and liabilities of parties when principal not disclosed—Liability of agent.**—The liability of the agent has already been mentioned⁶⁸ and nothing further will be added at this point other than to say that if the agent is to avoid liability he must in the transaction distinctly describe himself as such. Thus in case an agent signs a promissory note and there is nothing on the face of the instrument to connect the undisclosed principal with the transaction or to suggest that the agent was acting as such he will be held personally liable, and the undisclosed principal cannot be held,⁶⁹ and even where the agent signs his own

⁶⁵ *Frazier v. Poindexter*, 78 Ark. 241, 95 S. W. 464, 115 Am. St. 33. See also, *Eldridge v. Finninger*, 25 Okla. 28, 105 Pac. 334, 28 L. R. A. (N. S.) 227, which holds "If the purchaser of property does not know, and has not good reason to know, that he is dealing with the agent of the owner, he is justified as treating the agent as owner, and payment of the purchase-price to him is a good defense to an action of the owner for the amount."

⁶⁶ *Frazier v. Poindexter*, 78 Ark. 241, 95 S. W. 464, 115 Am. St. 33. The above case also contains this statement; "But if the party who dealt with the agent, acting in his own name, knew or had reason to believe that he was dealing with one who was an agent for some third person, he cannot successfully plead such defense or set-off. He must, in order to be protected, be innocent of any knowledge or of facts and circumstances which would put a reasonably prudent person on inquiry that he was dealing with an agent. Where he knows that the party he

is dealing with is an agent, although he does not know who the principal is, he is not protected."

⁶⁷ *Portsmouth Cotton, Oil &c. Corp. v. Oliver Refining Co.*, 109 Va. 513, 64 S. E. 56, 132 Am. St. 924.

⁶⁸ See ante, § 463, *Liability of Agent*.

⁶⁹ *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Graham v. Campbell*, 56 Ga. 258; *New York Life Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045n, 121 Am. St. 362; *Taber v. Cannon*, 8 Metc. (49 Mass.) 456; *Mayhew v. Prince*, 11 Mass. 54; *Webster v. Wray*, 19 Nebr. 558, 27 N. W. 644, 56 Am. Rep. 754, overruling on rehearing 17 Nebr. 579, 24 N. W. 207; *Lewis v. First Nat. Bank*, 1 Nebr. (unof.) 177, 95 N. W. 355; *Farrell v. Reed*, 46 Nebr. 258, 64 N. W. 959; *Chandler v. Coe*, 54 N. H. 561; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173, 63 N. Y. St. 774, 31 N. Y. S. 325; *Ranger v. Thalmann*, 84 App. Div. (N. Y.) 341, 82 N. Y. S. 846, revg., 39 Misc. (N. Y.)

name followed by the word trustee, or agent, these latter words are considered as merely descriptive of the person and the note, *prima facie*, will be considered as his own individual transaction.⁷⁰

§ 468. Rights and liabilities of parties when principal not disclosed—Rights of third persons.—The foregoing principles do not apply where the third party has knowledge of the other's agency and understands that it is the obligation of the principal.⁷¹ The third party may sue the undisclosed principal for the enforcement of the contract when he learns that the agent was acting for another.⁷² This is especially true where the undisclosed

420, 80 N. Y. S. 19, and *affd.* in 178 N. Y. 574, 70 N. E. 1108; *Tarver v. Garlington*, 27 S. Car. 107, 2 S. E. 846, 13 Am. St. 628; *Cragin v. Lowell*, 109 U. S. 194, 27 L. ed. 903, 3 Sup. Ct. 132.

⁷⁰ *Rew v. Pettet*, 1 Ad. & El. 196; *Richmond Locomotive & Machine Works v. Moragne*, 119 Ala. 80, 24 So. 834; *Haskell v. Cornish*, 13 Cal. 45; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *San Bernardino Nat. Bank v. Bank of Anderson (Cal.)*, 32 Pac. 168; *Heaton v. Myers*, 4 Colo. 59; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Burkhalter v. Perry*, 127 Ga. 438, 56 S. E. 631, 119 Am. St. 343; *Coaling & Co. v. Howard*, 130 Ga. 807, 61 S. E. 987, 21 L. R. A. (N. S.) 1051. See also the extended note in 21 L. R. A. (N. S.) 1046. *Cahokia School Trustees v. Rautenberg*, 88 Ill. 219; *Prescott v. Hixon*, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. 291; *New York Life Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045n, and note beginning on page 1046, 121 Am. St. 362; *Burbank v. Posey*, 7 Bush. (Ky.) 372; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Bedford Commercial Ins. Co. v. Covell*, 49 Mass. (8 Metc.) 442; *Leach v. Blow*, 8 Smedes & M. (Miss.) 221; *Farrell v. Reed*, 46 Nebr. 258, 64 N. W. 959; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Chemung Canal Bank v. Chemung County*, 5 Denio (N. Y.) 517; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312;

Manufacturers' & Traders' Bank v. Love, 13 App. Div. (N. Y.) 561, 43 N. Y. S. 812; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173, 63 N. Y. St. 774, 31 N. Y. S. 325; *New York State Bank Co. v. Van Antwerp*, 23 Misc. (N. Y.) 38, 51 N. Y. S. 653; *Campbell v. Porter*, 46 App. Div. (N. Y.) 628, 61 N. Y. S. 712; *Guthrie v. Imbrie*, 12 Ore. 182, 6 Pac. 664, 53 Am. Rep. 331; *Supply Co. v. Brewer*, 14 Lanc. L. Rev. (Pa.) 238; *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Lyons v. Miller*, 6 Grat. (Va.) 427, 52 Am. Dec. 129; *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761. See, however, *Alexander v. Sizer*, L. R. 4 Exch. 102; *Conro v. Port Henry & Co.*, 12 Barb. (N. Y.) 27; *Hicks v. Hinde*, 9 Barb. (N. Y.) 528, 6 How. Pr. (N. Y.) 1; *Green v. Skeel*, 2 Hun (N. Y.) 485; *Weeks v. Fox*, 3 Thomp. & C. (N. Y.) 354.

⁷¹ *Lockwood v. Coley*, 22 Fed. 192; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Hicks v. Hinde*, 9 Barb. (N. Y.) 528, 6 How. Pr. (N. Y.) 1; *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152; *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665. See, however, *Newhall v. Dunlap*, 14 Maine 180, 31 Am. Dec. 45; *Arnold v. Sprague*, 34 Vt. 402.

⁷² *Pope v. Meadow Spring Distilling Co.*, 20 Fed. 35; *Allison v. Sutlive*, 99 Ga. 151, 25 S. E. 11; *Edwards v. Gildemeister*, 61 Kans. 141, 59 Pac. 259; *Tutt v. Brown*, 5 Litt. (Ky.) 1, 15 Am. Dec. 33; *York County Bank v. Stein*, 24 Md. 447; *Smith v. Alex-*

principal seeks to take advantage of the contract.⁷³ However, by the weight of authority an agent who executes a note on behalf of his principal without disclosing his agency, there being nothing on the face of the instrument to show that he is acting as agent, does not bind his undisclosed principal where he has done nothing to ratify or adopt the agent's act.⁷⁴ This would seem to be true of written contracts generally.⁷⁵ A further exception is recognized where the third party with full knowledge of the facts elects to hold the agent liable. After he has made this election he cannot hold the undisclosed principal.⁷⁶ Other

ander, 31 Mo. 193; Higgins v. Dellinger, 22 Mo. 397; Chandler v. Coe, 54 N. H. 561; Yates v. Repetto, 65 N. J. L. 294, 47 Atl. 632; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27; McGraw v. Godfrey, 14 Abb. Pr. (N. S.) (N. Y.) 397; Beebee v. Robert, 12 Wend. N. Y.) 413, 27 Am. Dec. 132; Inglehart v. Thousand Isle Hotel Co., 7 Hun (N. Y.) 547; Jessup v. Steurer, 75 N. Y. 613; Episcopal Church v. Wiley & Rowland, 2 Hill Eq. (S. Car.) 584, Riley Eq. (S. Car.) 156, 30 Am. Dec. 386; Kempner v. Dillard, 100 Tex. 505, 101 S. W. 437, 123 Am. St. 822; Strauss v. Jones' Exrs., 37 Tex. 313.

⁷³Great Lakes Towing Co. v. Mill Transportation Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769n.

⁷⁴See ante, § 467. See, however, in connection with the cases last cited, Coaling & Co. v. Howard, 130 Ga. 807, 61 S. E. 987, 21 L. R. A. (N. S.) 1051.

⁷⁵In re Miley, 187 Fed. 177; Lenney v. Finley, 118 Ga. 718, 45 S. E. 593; Borcheling v. Katz, 37 N. J. Eq. (10 Stewart) 150; Furculi v. Bittner, 69 Misc. (N. Y.) 112, 125 N. Y. S. 36; Briggs v. Patridge, 7 Jones & Spen. (N. Y.) 339, affd. 64 N. Y. 357, 21 Am. Rep. 617; Bourne v. Campbell, 21 R. I. 490, 44 Atl. 806; Hardman v. Kelly, 19 S. Dak. 608, 104 N. W. 272. See, however, Kirshbon v. Bonzel, 67 Wis. 178, 29 N. W. 907.

⁷⁶Thomson v. Davenport, 9 B. & C. 78; Horsfall v. Fauntleroy, 10 B. & C. 755; Smyth v. Anderson, 7 C. B. 21; Irvine v. Watson, L. R. 5 Q. B. Div. 102; Armstrong v. Stokes, L. R. 7 Q. B. 598; Heald v. Kenworthy, 10

Exch. 739; Kymer v. Suwercroft, 1 Camp. 109; Macfarlane v. Giannacopulo, 3 Hurl. & Nor. 860; Paterson v. Gandasequi, 15 East 62; Addison v. Gandasequi, 4 Taunt. 374; Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; Bush v. Devine, 5 Har. (Del.) 375; Hyde v. Wolfe, 4 La. 234, 23 Am. Dec. 484; Homans v. Lambard, 21 Maine 308; Brown v. Bankers & C. Tel. Co., 30 Md. 39; Schepflin v. Dessar, 20 Mo. App. 569; Greenberg v. Palmieri, 71 N. J. L. 83, 58 Atl. 297; Cheever v. Smith, 15 Johns. (N. Y.) 276. See also, Provenchere v. Reiffess, 62 Mo. App. 50; Yates v. Repetto, 65 N. J. L. 394, 47 Atl. 632; Elliott v. Bodine, 59 N. J. L. 567, 36 Atl. 1038. But suing the agent without knowledge of the principal does not amount to an election. Steele-Smith & Co. v. Potthase, 109 Iowa 413, 80 N. W. 517; Greenberg v. Palmieri, 71 N. J. L. 83, 58 Atl. 297; Ranger v. Thalmann, 39 Misc. (N. Y.) 420, 80 N. Y. S. 19. Nor does an assignment of the claim against the agent, together with authority to sue any undisclosed principal, amount to an election to hold either the agent or the principal to the exclusion of the other. Berry v. Chase, 179 Fed. 426, 102 C. C. A. 572. If he elects to hold the principal he cannot thereafter sue the agent. E. J. Codd & Co. v. Parker, 97 Md. 319, 55 Atl. 623; Greenberg v. Palmieri, 71 N. J. L. 83, 58 Atl. 297; Pennsylvania Casualty Co. v. Washington & C. Cement Co., 63 Wash. 689, 116 Pac. 284. See also, Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.), 88 S. W. 449; Weil v. Raymond, 142 Mass. 206, 7 N. E. 860.

authorities recognize a further exception to the effect that if the principal has paid the agent or if the state of accounts between the agent and principal would make it unjust that the seller should call on the principal the fact of payment or such state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. In other words, the undisclosed principal is not liable where he has fully paid and settled with the agent in good faith in regard to the transaction before the third party has intervened with his claim.⁷⁷

§ 469. Rights and remedies of principal.—This subject has been discussed in the preceding section and nothing further will be added at this point. Further consideration of the subject, however, especially with reference to the rights and remedies in particular cases and classes of agency will be found in the chapter on Agency in a subsequent volume.

§ 470. Rights and remedies of agent.—The agent has a right to sue on a contract made in his own name and ostensibly for himself even though it is in fact made for an undisclosed or unnamed principal.⁷⁸ And this has been held true regardless of whether the other party knew of his agency or not.⁷⁹ The agent may also sue in case he has some special right or interest in the contract. To enable an agent to sue in his own name, however, there must be something more than the mere powers of a naked agent.⁸⁰ Thus the mere possession of land as agent does not entitle him to sue for damages sustained by the burning of grass and injury thereby to the land.⁸¹ The agent may sue where he has any beneficial interest in the performance of the contract⁸²

⁷⁷ *Thompson v. Davenport*, 9 Barn. & C. 78; *Thomas v. Atkinson*, 38 Ind. 248; *Rathbone v. Tucker*, 15 Wend. (N. Y.) 498; *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219.

⁷⁸ *Georgia South & F. R. Co. v. Marchman*, 121 Ga. 235, 48 S. E. 961; *Beard v. Sloan*, 38 Ind. 128; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359; *Keown & Co. v. Vogel*, 25 Mo. App. 35; *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835; *Beebee v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec.

132; *Cochran v. Siegfried* (Tex. Civ. App.), 75 S. W. 542.

⁷⁹ *Tustin & Co. Assn. v. Earl Fruit Co.*, 121 Cal. xviii, 53 Pac. 693.

⁸⁰ *Barkley v. Wolfskehl*, 25 Misc. (N. Y.) 422, 54 N. Y. S. 934.

⁸¹ *Galveston, H. & S. A. R. Co. v. Stockton*, 15 Tex. Civ. App. 145, 38 S. W. 647. To same effect, *Chatfield v. Clark*, 123 Ga. 867, 51 S. E. 743.

⁸² *Hearshy v. Hichox*, 12 Ark. 125. To same effect, *Field v. Price*, 50 Ga. 135.

or where the legal title is in the agent.⁸³ It is also apparent that the agent's right to sue is exclusive, where the agent has dealt expressly for himself and the other party has recognized him alone.⁸⁴ When the agent is employed for a special purpose, which agency is terminated by conditions beyond his control he may act for himself in the matter when such conduct is not inconsistent with his former relation to the principal.⁸⁵ The right of the agent to look to the principal for compensation has already been mentioned.

⁸³ *Douglas v. Wolf*, 6 Kans. 88; *La Coste v. De Armas*, 2 La. 263; *Close v. Hodges*, 44 Minn. 204, 46 N. W. 335; *Routh v. Kostachek*, 15 Okla. 234, 81 Pac. 429. In the above case the agent purchased a note with the principal's money and had it indorsed to himself. *Triplett v. Morris*, 18 Tex. Civ. App. 50, 44 S. W. 684. In the above case it was held that the agent might bring an action for the value of goods converted while in his possession.

⁸⁴ *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93.

⁸⁵ *Clark v. Delano*, 205 Mass. 224, 91 N. E. 299, 29 L. R. A. (N. S.) 595. In the above case the defendant was employed to procure a loan on defendant's property to prevent its being sold at foreclosure sale. This

the defendant failed to do. At the sale he bought the property himself and procured a loan on the same in his own name. In the absence of any evidence of bad faith on defendant's part the sale was upheld. An agent to whom is given the power to sell or convey certain property of his principal cannot make a valid sale to himself, either directly or indirectly. *In re Acken's Estate*, 144 Iowa 519, 123 N. W. 187, Ann. Cas. 1912A, 1166 and note, together with numerous cases therein cited. However a sale of property by a principal direct to his agent is not voidable in every case. It will be upheld where the transaction is open, honest and fair. *Crosby v. Dorward*, 248 Ill. 471, 94 N. E. 78, 140 Am. St. 230. See post, ch. 17, *Fiduciaries*.

CHAPTER XVI.

PARTNERS.

- | | |
|---|---|
| § 475. Introductory. | § 482. Limited partnership. |
| 476. Definition and nature of partnership. | 483. Who may be partners. |
| 477. Tests by which to determine existence of partnership—Mutual agency and profit-sharing. | 484. How relation is formed. |
| 478. Profit-sharing abandoned as an exclusive test. | 485. Illustrative cases of partnership. |
| 479. Modified statement of profit sharing test. | 486. Cases in which relation was not created. |
| 480. Question of law or fact—Intention. | 487. Scope of partnership—Purpose and subject-matter generally. |
| 481. Profit sharing evidence of a partnership—Estoppel. | 488. Dealing in real estate—Verbal agreement—Statute of frauds. |
| | 489. Illegal purpose or business. |
| | 490. Scope of partnership and authority of partners. |

§ 475. **Introductory.**—The subject of partnership will be fully treated in another volume; but, as in the case of agents, it seems desirable to consider the subject briefly in this connection in so far as it is necessary to show what a partnership is, the capacity of parties, and the mode of creating the relation. Attention will also be called in this chapter to the subject-matter of partnerships, and the general scope of the ordinary partnership, and of particular contracts of partnership, so far, at least, as to show the relations of the parties thereto.

§ 476. **Definition and nature of partnership.**—A partnership is the relation which results from a contract whereby two or more competent persons, each of whom is thereby given power to act in the double capacity of principal for himself and agent for his associates within the scope of their agreement, combine their property, labor or skill in a lawful enterprise or business, as principals, to share as common owners in the resultant profits.¹

¹ The following are various definitions that have been given of a partnership. "Partnership is the relation subsisting between two or more persons who have contracted together to

share as common owners the profits of a business carried on by all or any of them on behalf of all of them." Schumaker on Partnership (2 ed.) 2. "Partnership is a contract of two or

A partnership is created by a contract, express or implied.² It never is formed by operation of law.³ Thus the relation of father and son,⁴ husband and wife,⁵ attorney and client,⁶ or the joint prosecution of a law suit,⁷ does not give rise to a partner-

more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportion." 3 Kent Comm. 23. The above definition is approved in the following cases: *Goldsmith v. Eichold*, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; *Omaha & C. Refining Co. v. Rucker*, 6 Colo. App. 334, 40 Pac. 853; *Ellison v. Stuart*, 2 Pennw. (Del.) 179, 43 Atl. 836; *Waggoner v. First Nat. Bank*, 43 Nebr. 84, 64 N. W. 112. "Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding, that there shall be a communion of the profits thereof between them." Story on Partnership (6 ed.) § 2. The above definition has been substantially adopted in the following cases: *Stone v. Boone*, 24 Kans. 337; *Post v. Kimberly*, 9 Johns. (N. Y.) 470; *Niagara County v. People*, 7 Hill. (N. Y.) 504; *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; *Galveston & C. R. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301; *Berthold v. Goldsmith*, 24 How. (U. S.) 536, 16 L. ed. 762; *Hunt v. Oliver*, 118 U. S. 211, 30 L. ed 128, 6 Sup. Ct. 1083. In *Steele v. Michigan Buggy Co.* (Ind. App.) 95 N. E. 435, quoting from *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37, it is said: "The ultimate and conclusive test of a partnership is the co-ownership of the profits of the business. If there is community of profits, a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associate. In other words, a property right in them from the start in one associate as much as in the other." See also, the case of *Webster v.*

Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n, for an exhaustive review of the subject. *T. R. Foley Co. v. McKinley*, 114 Minn. 271, 131 N. W. 316. By the Civil Code of Louisiana, art. 2825, a commercial partnership is one formed for the buying and selling of personal property, and the carrying of such property for hire by ships or other vessels. *Shreveport Ice & C. Co. v. Mandel*, 128 La. 314, 54 So. 831. Many other definitions might be given, but it is unnecessary, since they are all about the same.

² *Dunham v. Loverock*, 158 Pa. 197, 27 Atl. 990, 38 Am. St. 838; *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1194. See also, *Lapento v. Lettieri*, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418; *Briggs v. James H. Rice Co.*, 83 Ill. App. 618; *Jones v. Stever*, 154 Mo. App. 640, 136 S. W. 16; *Simmons v. Ingram*, 78 Mo. App. 603; *Martin v. Baird*, 175 Pa. St. 540, 34 Atl. 809.

³ *Bishop v. Georgeson*, 60 Ill. 484; *Metcalfe v. Redmon*, 43 Ill. 264; *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67, 27 N. E. 596; *Phillips v. Phillips*, 49 Ill. 437; *Ingals v. Ferguson*, 59 Mo. App. 299; *Freeman v. Bloomfield*, 43 Mo. 391; *Wilson's Exrs. v. Cobb's Exrs.*, 28 N. J. Eq. 177; *In re Hedge's Appeal*, 63 Pa. St. 273; *In re Gibb's Estate*, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276. The so-called partnership by estoppel is no exception to this rule. A partnership inter se is not formed by estoppel, but persons who have been held out as partners may be liable to third persons as if they were partners.

⁴ *Phillips v. Phillips*, 49 Ill. 437.

⁵ *Ingals v. Ferguson*, 59 Mo. App. 299.

⁶ *Willis v. Crawford*, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904.

⁷ *Wilson's Exr. v. Cobb's Exr.*, 28 N. J. Eq. 177.

ship relation between such parties, in the absence of any agreement to that effect. One cannot be made a member of a partnership without his consent, express or implied.⁸ The formation of a partnership makes the members thereof mutual agents in the conduct of the partnership business, and in many cases this mutual agency is made the test whereby to determine the existence of a partnership.⁹

§ 477. **Tests by which to determine existence of partnership—Mutual agency and profit-sharing.**—But, while mutual agency may be a useful test in many instances, it is not strictly logical nor entirely satisfactory, and it has been pointed out by some of the courts, both of this country and England, that the agency results from the partnership and not the partnership from the agency.¹⁰ In other words, agency is one of the attributes of the partnership and is not the partnership itself. Up until the year 1860 there was one universal test applied by which to determine the existence of a partnership. That test was: if the parties share in the profits of a business or transaction they are partners, at least as to third persons.¹¹

⁸ Coolidge v. Taylor (Vt.), 80 Atl. 1038.

⁹ Cox v. Hickman, 8 H. L. Cas. 268; Culley v. Edwards, 44 Ark. 423, 51 Am. Rep. 614; Lee v. Cravens, 9 Colo. App. 272, 48 Pac. 159; Smith v. Knight, 71 Ill. 148, 22 Am. Rep. 94; Hallet v. Desban, 14 La. Ann. 529; Dutcher v. Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Gibson v. Smith, 31 Nebr. 354, 47 N. W. 1052; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Halenback v. Rogers, 57 N. J. Eq. 199, 40 Atl. 576; Jernee v. Simonson, 58 N. J. Eq. 282, 43 Atl. 370; National Union Bank v. Landon, 66 Barb. (N. Y.) 189; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387; Hart v. Kelley, 83 Pa. St. 286; Boston &c. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; Robinson v. Allen, 85 Va. 721, 8 S. E. 835. A mutual agency exists. Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Brotherton v. Gilchrist, 144

Mich. 274, 107 N. W. 890, 115 Am. St. 397.

¹⁰ Pooley v. Driver, 5 Ch. Div. 458; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972.

¹¹ Waugh v. Carver, 2 H. Bl. 235; Grace v. Smith, 2 W. Bl. 1000; Heyhoe v. Burge, 9 C. B. 431; Hesketh v. Blanchard, 4 East 143; Hawley v. Dixon, 7 U. C. Q. B. 218; Bank of Nova Scotia v. Haliburton, 2 N. S. 350; Emanuel v. Draughn, 14 Ala. 303; Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 320; Citizens' Nat. Bank v. Hine, 49 Conn. 236; Plunkett v. Dillon, 4 Houst. (Del.) 338; Oppenheimer v. Clemmons, 18 Fed. 886; In re Neasmith, 147 Fed. 160, 77 C. C. A. 402; Buckner v. Lee, 8 Ga. 285; Brandon v. Connor, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; Niehoff v. Dudley, 40 Ill. 406; Hubbell v. Woolf, 15 Ind. 204; Price v. Alexander, 2 G. Gr. (Iowa) 427, 52 Am. Dec. 526; Miller v. Hughes, 1 A. K. Marsh (Ky.) 181,

§ 478. **Profit-sharing abandoned as an exclusive test.**—In the year 1860 the House of Lords abandoned profit-sharing as the exclusive test, and substituted therefor mutual agency, as the means by which to determine the existence of a partnership.¹² It is now well recognized that merely because one shares in the profits of a business he is not necessarily a partner for that reason.¹³ Thus, it is well settled that the receipt by one of a share of the profits of a business or venture as compensation for his services in such business or enterprise does not ipso facto constitute him a partner therein.¹⁴ An agreement whereby a ship cap-

10 Am. Dec. 719; *Craig v. Alverson*, 6 J. J. Marsh (Ky.) 609; *Robertson v. DeLizardi*, 4 Rob. (La.) 300; *Bank of Tennessee v. McKeage*, 11 Rob. (La.) 130; *New Orleans v. Gauthreaux*, 32 La. Ann. 1126; *Pratt v. Langdon*, 97 Mass. 97, 93 Am. Dec. 61; *Sager v. Tupper*, 38 Mich. 258; *Connolly v. Davidson*, 15 Gil. (Minn.) 428, 2 Am. Rep. 154; *Tamblyn v. Scott*, 111 Mo. App. 46, 85 S. W. 918; *Mason v. Hackett*, 4 Nev. 420; *Bromley v. Elliot*, 38 N. H. 287, 75 Am. Dec. 182; *Sheridan v. Medara*, 10 N. J. Eq. 469, 64 Am. Dec. 464; *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Dob v. Halsey*, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; *Heimstreet v. Howland*, 5 Denio (N. Y.) 68; *Hodgman v. Smith*, 13 Barb. (N. Y.) 302; *Leggett v. Hyde*, 58 N. Y. 272, 47 How. Pr. (N. Y.) 524, 17 Am. Rep. 244; *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745; *Southern Fertilizer Co. v. Reams*, 105 N. Car. 283, 11 S. E. 467 and note; *Cossack v. Burgwyn*, 112 N. Car. 304, 16 S. E. 900; *Aspinwall v. Williams*, 1 Ohio 84; *Second Nat. Bank v. Second Nat. Bank*, 13 Ohio C. C. 561; *Wood v. Vallette*, 7 Ohio St. 172; *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; *Edwards v. Tracy*, 62 Pa. St. 374; *Bartlett v. Jones*, 2 Strob. (S. Car.) 471, 49 Am. Dec. 606; *Cothran v. Marmaduke*, 60 Tex. 370; *Winship v. Bank of United States*, 5 Pet. (U. S.) 529, 8 L. ed. 216; *Kellogg v. Griswold*, 12 Vt. 291; *Brigham v. Dana*, 29 Vt. 1; *Chapman v. Devereux*, 32 Vt. 616; *Brown's Exr. v. Higginbotham*, 5 Leigh (Va.) 583, 27 Am. Dec. 618. To same effect, see *Cox*

v. Hickman, 8 H. L. Cas. 268; *Bullen v. Sharp*, L. R. 1 C. P. 86; *Cox v. Delano*, 14 N. Car. 89.

¹²*Cox v. Hickman*, 8 H. L. Cas. 268; *Burdick's Cas.* 65, *Mechem Cas.* 70. As has already been pointed out the ruling in this case has been criticized.

¹³*Lacotts v. Pike*, 91 Ark. 26, 120 S. W. 144, 134 Am. St. 48; *T. E. Foley Co. v. McKinley* (Minn.), 131 N. W. 316; *Cudahy Packing Co. v. Hibou* (Miss.), 46 So. 73, 18 L. R. A. (N. S.) 975. See also, cases cited, ante, note 11.

¹⁴*Moore v. Smith*, 19 Ala. 774; *Zuber v. Roberts* (Ala.), 40 So. 319; *Olmstead v. Hill*, 2 Ark. 346; *Gardenhire v. Smith*, 39 Ark. 280; *Hambly v. Bancroft*, 83 Fed. 444; *Gentry v. Singleton*, 128 Fed. 679, 63 C. C. A. 231; *Dawson Nat. Bank v. Ward*, 120 Ga. 861, 48 S. E. 313; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418; *Smythe's Estate v. Evans*, 209 Ill. 376, 70 N. E. 906; *Price v. Alexander*, 2 G. Gr. (Iowa) 427, 52 Am. Dec. 526; *Johnson v. Carter*, 120 Iowa 355, 94 N. W. 850; *Fuqua v. Massie*, 95 Ky. 387, 15 Ky. L. 849, 25 S. W. 875; *Cline v. Caldwell*, 4 La. 137; *McWilliams v. Elder*, 52 La. 995, 27 So. 352; *Holden v. French*, 68 Maine 241; *Sangston v. Hack*, 52 Md. 173; *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Harris v. Threefoot* (Miss.), 12 So. 335; *Ætna Ins. Co. v. Bank of Wilcox*, 48 Nebr. 544, 67 N. W. 449; *Agnew v. Montgomery* (Nebr.), 99 N. W. 820; *Whitney v. Gretna State Bank*, 50 Nebr. 438, 69 N. W. 933; *Atherton v. Tilton*, 44 N. H. 452; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Lewis v. Greider*, 49 Barb.

tain is to be compensated for his services by a share in the profits of the voyage does not make him a partner.¹⁵ Nor does an agreement to accept, for services rendered, part payment from the profits of the business constitute the employé a partner.¹⁶

These principles apply to third persons, as well as the parties to the agreement, when the employé has not been held out as a partner and is not estopped to deny a partnership liability.¹⁷ It must be borne in mind, however, that one who accepts a part of the profits in lieu of a salary may be a partner, and in many cases it is difficult to determine whether such a person is in fact an employé or partner. Each case must be determined by the facts and circumstances peculiar to it.

A further exception to the rule that profit-sharing constitutes a partnership is found where parties agree to a division of fees and commissions. Thus an agreement whereby a real estate agent or broker contracts to divide his commission with another person who finds a purchaser for the property does not consti-

(N. Y.) 606; Grapel v. Hodges, 112 N. Y. 419, 20 N. E. 542; Smith v. Dunn, 44 Misc. (N. Y.) 288, 89 N. Y. S. 881; Lance v. Butler, 135 N. Car. 419, 47 S. E. 488; Ryder v. Jacobs, 182 Pa. 624, 38 Atl. 471; Potter v. Moses, 1 R. I. 430; State v. Hunt, 25 R. I. 69, 54 Atl. 773; Mann v. Taylor, 5 Heisk. (Tenn.) 267; Southworth v. Thompson, 10 Heisk. (Tenn.) 10; Heidenheimer's Exrs. v. Walthew, 2 Tex. Civ. 501, 21 S. W. 981; Altgelt v. Alamo Nat. Bank, 98 Tex. 252, 83 S. W. 6; Morgan v. Stearns, 41 Vt. 398; Wilkinson v. Jett, 7 Leigh (Va.) 115, 30 Am. Dec. 493; Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252; La Flex v. Burss, 77 Wis. 538, 46 N. W. 801; Sohns v. Sloteman, 85 Wis. 113, 55 N. W. 158.

¹⁵ Mair v. Glennie, 4 M. & S. 240. To same effect, Brown v. Hicks, 24 Fed. 811; Baxter v. Rodman, 3 Pick. (Mass.) 435; Groizer v. Atwood, 4 Pick. (Mass.) 234; Rice v. Austin, 17 Mass. 197; Coffin v. Jenkins, 3 Story (U. S.) 108, Fed. Cas. No. 2948; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766. As to when a partnership may exist in such case, see Bulfinch v. Winchenbach, 3 Allen (Mass.) 161.

¹⁶ Porter v. Curtis, 96 Iowa 539, 65 N. W. 824; St. Victor v. Danbert, 9 La. 314, 29 Am. Dec. 447; Stockman v. Mitchell, 109 Mich. 348, 67 N. W. 336; Morrow v. Murphy, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255; Breman Sav. Bank v. Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209; Glore v. Dawson, 106 Mo. App. 107, 80 S. W. 55; Nutting v. Colt, 7 N. J. Eq. 539; Cornell v. Redrow, 60 N. J. Eq. 251, 47 Atl. 56; Miller v. Bartlet, 15 Serg. & R. (Pa.) 137.

¹⁷ Hodges v. Dawes, 6 Ala. 215; Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596; Burton v. Goodspeed, 69 Ill. 237; Bradley v. Ely, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. 251; Macy v. Combs, 15 Ind. 469, 77 Am. Dec. 103; Shepard v. Pratt, 16 Kans. 209; Chaffraix v. Lafitte, 30 La. Ann. 631; Bradley v. White, 10 Met. (Mass.) 303, 43 Am. Dec. 435; Hall v. Edson, 40 Mich. 651; Carpenter v. Leunave, 166 Mich. 610, 132 N. W. 477; Wiggins v. Graham, 51 Mo. 17; Voorhees v. Jones, 29 N. J. L. 270; Fitch v. Hall, 25 Barb. (N. Y.) 13; Edwards v. Tracy, 62 Pa. St. 374; Polk v. Buchanan, 5 Sneed. (Tenn.) 721; Goode v. McCartney, 10 Tex. 193; Bowman v. Bailey, 10 Vt. 170.

tute a partnership, but only an agency.¹⁸ Nor does an agreement whereby lawyers contract to divide their fees with certain persons who bring them business constitute them partners in the general practice of law.¹⁹ Nor does the mere fact that two or more parties undertake the joint performance of a contract with a division of the contract price necessarily constitute them partners.²⁰ Likewise, the mere fact that one receives a part of the profits of a business or enterprise as compensation for property, real or personal, furnished for use in a profit-producing business does not as a general rule make such party a partner or create a partnership liability.²¹ Thus, if a landlord rents his real estate, his buildings or appurtenances to another, and in lieu of a cash rent agrees to accept a per cent. of the tenant's profit, a partnership is not thereby formed unless the landlord has some direct interest as principal in the business conducted by the tenant.²²

¹⁸ *Allen v. Hudson*, 78 Ill. App. 376; *Wass v. Atwater*, 33 Minn. 82, 22 N. W. 8; *Sain v. Rooney*, 125 Mo. App. 176, 101 S. W. 1127; *Brackenridge v. Claridge* (Tex. Civ. App.), 42 S. W. 1005; *Jones v. Murphy*, 93 Va. 214, 24 S. E. 825.

¹⁹ *Heshion v. Julian*, 82 Ind. 576. See generally, to same effect, *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Wheeler v. Lack*, 37 Ore. 238, 61 Pac. 849; *Southworth v. Thompson*, 10 Heisk. (Tenn.) 10; *Logie v. Black*, 24 W. Va. 1.

²⁰ *Matthews v. J. H. Luers Drug Co.*, 110 Iowa 231, 81 N. W. 464; *Herbert v. Callahan*, 35 Mo. App. 498; *Hawkins v. McIntyre*, 45 Vt. 496. See, however, *Brandon v. Connor*, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; *Voorhees v. Jones*, 29 N. J. L. 270. See also, *Burns v. Niagara & C. Power Co.*, 145 App. Div. (N. Y.) 280, 130 N. Y. S. 54.

²¹ *Nelms v. McGraw*, 93 Ala. 245, 9 So. 719; *Gulf City Shingle Mfg. Co. v. Boyles*, 129 Ala. 192, 29 So. 800; *Vanderhurst v. De Witt*, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; *Fougner v. First Nat. Bank*, 141 Ill. 124, 30 N. E. 442; *Pierpont v. Lanphere*, 104 Ill. App. 232; *Robbins v. McKnight*, 1 Hals. (N. J. Eq.) 642, 45 Am. Dec. 406; *American Seeding Mach. Co. v. John Conklin's Sons*

Co., 64 Misc. (N. Y.) 652, 120 N. Y. S. 592; *affd.* 145 App. Div. (N. Y.) 950, 130 N. Y. S. 1104 (money advanced); *England v. England*, 1 Baxt. (Tenn.) 108.

²² *McDonnell v. Battle House Co.*, 67 Ala. 90, 42 Am. Rep. 99; *Randle v. Barnard*, 81 Fed. 682, 26 C. C. A. 568, 53 U. S. App. 377; *May v. International Loan & C. Co.*, 92 Fed. 445, 34 C. C. A. 448, 63 U. S. App. 773; *Webster v. Clark*, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n; *Keiser v. State*, 58 Ind. 379; *Reed v. Murphy*, 2 G. Gr. (Iowa) 574; *Randall v. Ditch*, 123 Iowa 582, 99 N. W. 190; *Russell v. Gray*, 4 Ky. L. 619; *Fuqua v. Massie*, 95 Ky. 387, 15 Ky. L. 849, 25 S. W. 875; *Holmes v. Old Colony R. Corp.*, 5 Gray (Mass.) 58; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; *Thayer v. Augustine*, 55 Mich. 187, 20 N. W. 898, 54 Am. Rep. 361; *Perrine v. Hankinson*, 11 N. J. L. 181; *Austin v. Neil*, 62 N. J. L. 462, 41 Atl. 834, which follows *Wild v. Davenport*, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552, and disapproves *Sheridan v. Medara*, 10 N. J. Eq. 469, 64 Am. Dec. 464; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471; *Dake v. Butler*, 7 Misc. (N. Y.) 302, 58 N. Y. St. 550, 28 N. Y. S. 134; *Dunham v. Rogers*, 1 Pa. St. 255; *Meehan v. Valentine*, 145 U. S. 611,

The same principle applies where a ship,²³ franchise,²⁴ live stock or other property²⁵ is hired or leased to another, payment to be made in profits. The lessor and lessee, or bailor and bailee, are not for that reason alone considered as partners. Even a participation in both losses and profits of a given business has been held not of necessity to make the participants partners.²⁶

§ 479. **Modified statement of profit-sharing test.**—A general realization of the many exceptions which exist to the profit-sharing test and its consequent untrustworthiness has led to its modification. In its modified form the rule is usually stated thus: "Two or more persons who contract together to carry on a business and share in the profits as common owners thereof are partners."²⁷ In other words, in order to constitute one a partner

36 L. ed. 835, 12 Sup. Ct. 972; Bigelow v. Elliot, 1 Cliff. (U. S.) 28, Fed. Cas. No. 1399; Ambler v. Bradley, 6 Vt. 119; Boyer v. Anderson, 2 Leigh (Va.) 550; Z. C. Miles Co. v. Gordon, 8 Wash. 442, 36 Pac. 265; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766.

²³ Thompson v. Snow, 4 Greenl. (Maine) 264, 16 Am. Dec. 263; Bridges v. Sprague & Co. Iron Co., 57 Maine 543, 99 Am. Dec. 788; Holden v. French, 68 Maine 241; Cutler v. Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385; Bowman v. Bailey, 10 Vt. 170; Tobias v. Blin, 21 Vt. 544.

²⁴ Heimstreet v. Howland, 5 Denio (N. Y.) 68; Hanthorn v. Quinn, 42 Ore. 1, 69 Pac. 817; Bowyer v. Anderson, 2 Leigh (Va.) 550.

²⁵ Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Rider v. Hammell, 63 Kans. 733, 66 Pac. 1026; A. N. Kellogg & Co. v. Farrell, 88 Mo. 594; W. D. Wilson Printing & Co. v. Bowker, 27 Abb. New Cas. (N. Y.) 153, 15 N. Y. S. 293; Murray Ginning System Co. v. Exchange Nat. Bank (Tex. Civ. App.), 61 S. W. 508; Emberson v. McKenna, 3 Wills. (Tex. Civ. App. Cas.) § 94. 16 S. W. 409. See, however, Green v. Beesby, 1 Hodges 199; Dalton City Co. v. Dalton Mfg. Co., 33 Ga. 243; Dalton City Co. v. Hawes, 37 Ga. 115; Brandon v. Conner, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; Buckner v. Lee, 8 Ga. 285; Wells v. Babcock,

56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Clinton Bridge & Co. Works v. First Nat. Bank, 103 Wis. 117. 79 N. W. 47.

²⁶ Lee v. Cravens, 9 Colo. App. 272, 48 Pac. 159; Dwinel v. Stone, 30 Maine 384; Musser v. Brink, 68 Mo. 242; McDonald v. Matney, 82 Mo. 358; A. N. Kellogg Newspaper Co. v. Farrell, 88 Mo. 594; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97; Mackie v. Mott, 146 Mo. 230, 47 S. W. 897; State v. Finn, 11 Mo. App. 546; Newberger v. Friede, 23 Mo. App. 631; Rankin v. Fairley, 29 Mo. App. 587; Roper v. Schaefer, 35 Mo. App. 30; Bank of Osceola v. Outhwaite, 50 Mo. App. 124; Martin v. Cropp, 61 Mo. App. 607; Gille Hardw. & Co. v. Harrison, 89 Mo. App. 154; Sain v. Rooney, 125 Mo. App. 176, 101 S. W. 1127; Miller v. Simpson, 107 Va. 476, 59 S. E. 378, 18 L. R. A. (N. S.) 962n. In the above case it was held that an agreement to share the losses was not necessary to constitute a partnership. See, however, Haswell v. Standing, 152 Iowa 291, 132 N. W. 417, holding that in Iowa an essential element of a partnership relation is the obligation to share losses also.

²⁷ See McCrary v. Slaughter, 58 Ala. 230; McGill v. Dowdle, 33 Ark. 311; Wheeler v. Farmer, 38 Cal. 203; Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034; Norwalk v. Ireland, 68 Conn. 1, 35 Atl. 804; Ellison v. Stuart,

his right to share in the profits must result from the fact that he is a part owner of them. If the per cent. of the profits due him is a mere personal obligation owed him by his associate such person is not a partner.²⁸

§ 480. **Question of law or fact—Intention.**—Under the modern theory the existence of a partnership is treated largely as a question of fact.²⁹ But when the terms of the agreement and

2 Pennew. (Del.) 179, 43 Atl. 836; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n; Stubbs v. Fleming, 92 Ga. 354, 17 S. E. 935; State Nat. Bank v. Butler, 149 Ill. 575, 36 N. E. 1000; Bradley v. Ely, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. 251; Steele v. Michigan Buggy Co. (Ind. App.), 95 N. E. 435; Price v. Alexander, 2 G. Gr. (Iowa) 427, 52 Am. Dec. 526; Heard v. Wilder, 81 Iowa 421, 46 N. W. 1075; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354; Tanner v. Hughes (Ky.), 50 S. W. 1099; Woodward v. Cowing, 41 Maine 9, 66 Am. Dec. 211; Staples v. Sprague, 75 Maine 458; Thillman v. Benton, 82 Md. 64; 33 Atl. 485; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Dutcher v. Buck, 96 Mich. 160, 55 N. W. 676. 20 L. R. A. 776; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Herbert v. Callahan, 35 Mo. App. 498; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Gates v. Johnson, 56 Nebr. 808, 77 N. W. 407; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Robbins v. McKnight, 5 N. J. Eq. 642, 45 Am. Dec. 406; Willey v. Renner, 8 N. Mex. 641, 45 Pac. 1132; McGovern v. Robertson, 116 N. Y. 61, 5 S. E. 467, 22 N. E. 398; Southern Fertilizer Co. v. Reams, 105 N. Car. 283, 11 S. E. 467; Braithwaite v. Aiken, 1 N. Dak. 475, 48 N. W. 361; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; Jones v. McMichael, 12 Rich. (S. Car.) 176; Spencer v. Jones (Tex. Civ. App.), 47 S. W. 29; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972; Owen v. Oviatt, 4 Utah 95, 6 Pac. 527; Cook v. Carpenter, 34 Vt. 121, 80 Am. Dec. 670; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Chapline v. Conant,

3 W. Va. 507, 100 Am. Dec. 766; Lathrop v. Knapp, 27 Wis. 214; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1195.

²⁸ Ellsworth v. Tartt, 26 Ala. 733, 62 Am. Dec. 749; Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Allen v. Hudson, 78 Ill. App. 376; Hallett v. Desvan, 14 La. Ann. 529; Thillman v. Benton, 82 Md. 64, 33 Atl. 485; Marsh v. Mueller, 96 Mich. 488, 56 N. W. 71; Fay v. Davidson, 13 Gil. (Minn.) 491; Bruen v. Kansas City & C. Fair Assn., 40 Mo. App. 425; Mason v. Hackett, 4 Nev. 420; Robbins v. McKnight, 5 N. J. Eq. 642, 45 Am. Dec. 406; Wormser v. Lindauer, 9 N. Mex. 23, 49 Pac. 896; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; Stevens v. Gainesville Nat. Bank, 62 Tex. 499; Fish v. Thompson, 68 Vt. 273, 35 Atl. 174; Bowyer v. Anderson, 2 Leigh (Va.) 550; Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252n; Cooper v. Tappan, 9 Wis. 361. In the case of Clark v. Emery, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503n, quoting from Sodiker v. Applegate, 24 W. Va. 411, 29 Am. Rep. 252, it is said: "To constitute a partnership between parties who share in the profits, the interest in the profits must be mutual,—each person must have a specific interest in them as a principal trader; he is not a partner merely because he receives a part of the profits as compensation for his services."

²⁹ Robinson v. Green, 5 Har. (Del.) 115; Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154; Adamson v. Guild, 177 Mass. 331, 58 N. E. 1081; Densmore v. Mathews, 58 Mich. 616, 26 N. W. 146; McDonald v. Matney, 80 Mo. 358 (proved by the best attainable evidence); Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136;

the facts are all admitted the question as to whether or not a partnership exists is a question of law.³⁰ In determining the existence of a partnership it is well settled that the true contract and intention of the parties is looked to at least as between themselves, in order to establish the existence of such relation.³¹ This has led to a general statement that, as between the immediate parties, a partnership is formed and exists only by their intention to form such a relationship,³² but the law looks to the substance and not the form. It is not what the parties call their relation that determines but what they actually agree upon in their contract.³³ It is the intent to do those things which constitute a partnership that should usually determine whether or not that relation exists between the parties.³⁴ But, on the other hand, if

Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870. See also, *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455.

³⁰ *Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; *Schmidt v. Balling*, 91 Ill. App. 388; *Janney v. Springer*, 78 Iowa 67, 16 Am. St. 460, 43 N. W. 461; *Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74; *Farmer's Ins. Co. v. Ross*, 29 Ohio St. 429.

³¹ *Cox v. Hickman*, 8 H. L. Cas. 268; *Mollwo v. Court of Wards*, L. R. 4 P. C. 419; *Badeley v. Consolidated Bank*, 38 Ch. Div. 238; *Earle v. Art Library Pub. Co.*, 95 Fed. 544; *Webster v. Clark*, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217; *Niehoff v. Dudley*, 40 Ill. 406; *National Surety Co. v. T. B. Townsend Brick & Contracting Co.*, 176 Ill. 156, 52 N. E. 938; *Stevens v. Faucet*, 24 Ill. 483; *Lintner v. Millikin*, 47 Ill. 178; *Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. 251; *Cannon v. Brush Elec. Co.*, 96 Md. 446, 54 Atl. 121, 94 Am. St. 584; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, *Mechem's Cases*, 86; *Gray v. Gibson*, 6 Mich. 300; *A. N. Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370; *Central City Sav. Bank v. Walker*, 66 N. Y. 431; *Hayward v. Barron*, 19 N. Y. S. 383, 46 N. Y. St. 665; *Salter v. Ham*, 31 N. Y.

321; *Boston &c. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Polk v. Buchanan*, 5 Sneed (Tenn.) 721, *Burdick's Cases* 62. See also, *Ex parte Hamper*, 17 Ves. 407; *Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Kerr v. Potter*, 6 Gill (Md.) 404; *Wright v. Taylor*, 9 Wend. (N. Y.) 538; *Hazard v. Hazard*, 1 Story (U. S.) 371, Fed. Cas. No. 6279.

³² *Walker v. Hirsch*, L. R. 27 Ch. Div. 460; *Chisholm v. Cowles*, 42 Ala. 179; *Randle v. State*, 49 Ala. 14; *Nelms v. McGraw*, 93 Ala. 245, 9 So. 719; *Gulf City Shingle Mfg. Co. v. Boyles*, 129 Ala. 192, 29 So. 800; *Wheeler v. Farmer*, 38 Cal. 203; *Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; *Hazard v. Hazard*, 1 Story (U. S.) 371, Fed. Cas. No. 6279; *In re Pierson*, 10 Nat. Bankr. Reg. 107, Fed. Cas. No. 11153; *Ellsworth v. Pomeroy*, 26 Ind. 158; *T. E. Foley Co. v. McKinley (Minn.)*, 131 N. W. 316; *Fairly v. Nash*, 70 Miss. 193, 12 So. 149; *Mackie v. Mott*, 146 Mo. 230, 47 S. W. 897; *Hughes v. Ewing*, 162 Mo. 261, 62 S. W. 465; *Smith v. Dunn*, 44 Misc. (N. Y.) 288, 89 N. Y. S. 881; *Willis v. Crawford*, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904; *Cleveland v. Anderson*, 2 Willson Civ. Cas. Ct. App. (Tex.), § 146.

³³ *Martin v. Martin*, 1 N. B. Eq. 515; *Trustees &c. v. Oland*, 35 N. S. 409.

³⁴ *Bestor v. Barker*, 106 Ala. 240, 17 So. 389; *Chapman v. Hughes*, 104

the terms of the contract or the facts are not such as to make the parties partners, or authorize that conclusion, they will not be declared to be partners even though they intended to form a partnership and call themselves partners.³⁵ It is not necessary to adopt a firm name to constitute a partnership,³⁶ nor it is necessary that the relation be called a partnership.³⁷ The law on this branch

Cal. 302, 37 Pac. 1048, 38 Pac. 109; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; Webster v. Clark, 34 Fla. 637, 16 So. 601, 43 Am. St. 217n, 27 L. R. A. 126; Pursley v. Ramsey, 31 Ga. 403; Fougner v. First Nat. Bank, 141 Ill. 124, 30 N. E. 442; Griffen v. Cooper, 50 Ill. App. 257; Hart v. Hiatt, 2 Ind. T. 245, 48 S. W. 1038; Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Halliday v. Bridewell, 36 La. Ann. 238; Thillman v. Benton, 82 Md. 64, 33 Atl. 485; Gunnison v. Langley, 3 Allen (Mass.) 337; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Vaiden v. Hawkins (Miss.), 6 So. 227; Mulhall v. Cheatham, 1 Mo. App. 476; Van Kuren v. Trenton Locomotive & Mfg. Co., 13 N. J. Eq. 302; Sheridan v. Medara, 10 N. J. Eq. (2 Stockton's Ch.) 469, 64 Am. Dec. 464; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Leggett v. Hyde, 58 N. Y. 272, 47 How. Prac. (N. Y.) 524, 17 Am. Rep. 244; Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; Klosterman v. Hayes, 17 Ore. 325, 20 Pac. 426; Righter v. Farrell, 134 Pa. 482, 19 Atl. 687; Boston & Co. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; Burnley v. Rice, 18 Tex. 481; Duryea v. Whitcomb, 31 Vt. 395; Rosenfield v. Haight, 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770.

³⁵ Oliver v. Gray, 4 Ark. 425; Sailors v. Nixon-Jones Printing Co., 20 Ill. App. 509; Dwinel v. Stone, 30 Maine 384; Rose v. Buscher, 80 Md. 225, 30 Atl. 637; Ryder v. Wilcox, 103 Mass. 24; McDonald v. Matney, 82 Mo. 358; Van Kuren v. Trenton Locomotive & Co., 13 N. J. Eq. 302; Burnett v. Snyder, 76 N. Y. 344.

³⁶ Meaher v. Cox, 37 Ala. 201; Howze

v. Patterson, 53 Ala. 205, 25 Am. Rep. 607; Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154; Santiago v. Morgan, Fed. Cas. No. 12331; Hoffm. Ops. 447; Fleming v. Lay, 109 Fed. 952, 48 C. C. A. 748; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Staples v. Sprague, 75 Maine 458; Wadsworth v. Manning, 4 Md. 59; McKasy v. Huber, 65 Minn. 9, 67 N. W. 650; Tharp v. Marsh, 40 Miss. 158; Farnum v. Patch, 60 N. H. 294, 49 Am. Rep. 313; Musier v. Triumphour, 5 Wend. (N. Y.) 274; Orvis v. Curtiss, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. 810; Johnson v. Alexander, 46 App. Div. (N. Y.) 6, 61 N. Y. S. 351, affd. in 167 N. Y. 605, 60 N. E. 1113; Jones v. Walker, 51 Misc. (N. Y.) 624, 101 N. Y. S. 22; Gregg Twp. v. Half-Moon Twp., 2 Watts. (Pa.) 342; Jones v. McMichael, 12 Rich. L. (S. Car.) 176; Griffiths v. Buffum, 22 Vt. 181, 54 Am. Dec. 64; Upham v. Hewitt, 42 Wis. 85; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

³⁷ Northern R. Co. v. Patton, 15 U. C. C. P. 332; Martin v. Martin, 1 N. B. Eq. 515; Trustees & Co. v. Oland, 35 N. S. 409; Plunkett v. Dillon, 4 Houst. (Del.) 338; Fougner v. First Nat. Bank, 41 Ill. App. 202; Griffen v. Cooper, 50 Ill. App. 257; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Webb v. Johnson, 95 Mich. 325, 54 N. W. 947; King v. Remington, 36 Minn. 15, 29 N. W. 352; Fairly v. Nash, 70 Miss. 193, 12 So. 149; Teas v. Woodruff (N. J. Ch.), 10 Atl. 392; Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Cliff v. Barrow, 108 N. Y. 187, 15 N. E. 327; Hawkins v. Campbell, 48 App. Div. (N. Y.) 43, 62 N. Y. S. 678; Fay v. Waldron, 3 N. Y. S. 894; Pell v. Baur, 41 N. Y. St. 99, 16 N. Y. S.

of the subject has been summarized as follows: "The question is one of intention, and a contract of partnership will no more be created by the court against the will of a party than will those of any other character. One may not make a contract of partnership, and, calling it an agency, have it treated as such by the court for when the facts are known the law fixes the legal consequences which flow from them. Neither may one secure the benefits of the relation of a partner and by contract secure immunity from its liabilities as against creditors. But when the contract is susceptible of the construction put upon it by the parties at the time it was made, such construction will be accepted by the courts as the true one."³⁸

§ 481. Profit-sharing evidence of a partnership—Estoppel.—Under the above rule participation in the profits of a business is evidence tending to prove the existence of a partnership.³⁹ In many cases participation in the profits of a business is considered as presumptive,⁴⁰ or *prima facie*⁴¹ evidence of a partner-

258, *affd.* 133 N. Y. 377, 31 N. E. 224; *Wolf v. Lawrence*, 33 Misc. (N. Y.) 481, 67 N. Y. S. 900; *Webb v. Hicks*, 123 N. Car. 244, 31 S. E. 479; *Wood v. Vallette*, 7 Ohio St. 172; *First Nat Bank v. Ballard*, 19 Ohio C. C. 63, 10 Ohio C. D. 298; *Kelley v. Bourne*, 15 Ore. 476, 16 Pac. 40; *Poundstone v. Hamburger*, 139 Pa. 319, 20 Atl. 1054; *Price v. Middleton*, 75 S. Car. 105, 55 S. E. 156; *Boardman v. Keeler*, 2 Vt. 65; *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782; *Spaulding v. Stubbings*, 86 Wis. 255, 56 N. W. 469, 39 Am. St. 888.

³⁸ *Fairly v. Nash*, 70 Miss. 193, 12 So. 149. See also, *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, which holds that every doubt must be resolved in favor of the intent of the parties.

³⁹ *Badeley v. Consolidated Bank, L. R.* 38 Ch. Div. 238; *Ross v. Parkyns*, L. R. 20 Eq. 331; *Ex parte Tennant* L. R. 6 Ch. Div. 303; *Rector v. Robins*, 74 Ark. 437, 86 S. W. 667; *Buford v. Lewis*, 87 Ark. 412, 112 S. W. 963; *In re Neasmith*, 147 Fed. 160, 77 C. C. A. 402; *Boreing v. Wilson*, 33 Ky. L.

14, 108 S. W. 914; *Corey v. Caldwell*, 86 Mich. 570, 49 N. W. 611; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; *McAlpine v. Milten*, 104 Minn. 289, 116 N. W. 583; *Martin v. Cropp*, 61 Mo. App. 607; *Gibson v. Smith*, 31 Nebr. 354, 47 N. W. 1052; *Wild v. Davenport*, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; *Merchants' Nat. Bank v. Standard Wagon Co.*, 6 Ohio (N. P.) 264; *Walker v. Tupper*, 152 Pa. 1, 25 Atl. 172; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; *In re Darling's Estate*, 7 Kulp (Pa.) 323.

⁴⁰ *Pooley v. Driver*, L. R. 5 Ch. Div. 458; *Buford v. Lewis*, 87 Ark. 412, 112 S. W. 963; *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823; *Tamblyn v. Scott*, 111 Mo. App. 46, 85 S. W. 918; *Price v. Middleton*, 75 S. Car. 105, 55 S. E. 156; *Cothran v. Marmaduke*, 60 Tex. 370; *Meehan v. Valentine*, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972; *In re Francis*, 2 Sawy. (U. S.) 286, Fed. Cas. No. 5031; *Bentley v. Brossard*, 33 Utah 396, 94 Pac. 736.

⁴¹ *Walker v. Hirsch*, L. R. 27 Ch. Div. 460; *Blair v. Shaeffer*, 33 Fed. 218, *revd.* 149 U. S. 248, 37 L. ed.

ship.⁴² A great deal of confusion has arisen on this branch of the subject through a careless use of language on the part of the courts. They frequently state that two or more persons may be partners as to third persons and not as to each other; this is incorrect. If not partners inter se they are not partners at all. What is meant is that they have made themselves liable as if they were partners. This happens when one holds himself out as a partner or is with his knowledge or consent held out as such to the knowledge of the one who seeks to take advantage of it. The liability of such a person rests upon the doctrine of estoppel.⁴³

721, 13 Sup. Ct. 856; *Philips v. Samuel*, 76 Mo. 657; *Fourth Nat. Bank v. Altheimer*, 91 Mo. 190, 3 S. W. 858; *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823; *Roper v. Schaefer*, 35 Mo. App. 30; *Goddard-Peck Grocery Co. v. Berry*, 58 Mo. App. 665; *Glore v. Dawson*, 106 Mo. App. 107, 80 S. W. 55; *Waggoner v. First Nat. Bank*, 43 Nebr. 84, 61 N. W. 112; *Lefevre v. Silo*, 112 App. Div. (N. Y.) 464, 98 N. Y. S. 321; *Kootz v. Tuvian*, 118 N. Car. 393, 24 S. E. 776; *Boston & C. Smelting Co. v. Smith*, 13 R. I. 31, 43 Am. Rep. 3; *In re Ward*, 2 Flip. (U. S.) 462, Fed. Cas. No. 17144; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835.

⁴² When it is said that there must be a joint ownership of the profits of a business this must not be confused with a joint ownership of the capital used in the business. Thus joint ownership of the property may merely create a tenancy in common but not a partnership. *La Cotts v. Pike*, 91 Ark. 26, 120 S. W. 144, 134 Am. St. 48. See also, *Clark v. Sidway*, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. 327; *Thorndike v. De Wolf*, 6 Pick. (Mass.) 120; *Murphy v. Craig*, 76 Mich. 155, 42 N. W. 1097; *Baldwin v. Burrows*, 47 N. Y. 199; *Parkhurst v. Kinsman*, 1 Blatch. (U. S.) 488, Fed. Cas. No. 10757. One distinction between joint tenants and partners is that as between the latter there is no right of survivorship. *Cowles v. Garrett*, 30 Ala. 341; *Bradley v. Harkness*, 26 Cal. 69; *La So-*

ciete Francaise v. Weidmann, 97 Cal. 507, 32 Pac. 583; *Simms v. Dame*, 113 Ind. 127, 15 N. E. 217; *Goell v. Morse*, 126 Mass. 480; *Putnam v. Wise*, 1 Hill. (N. Y.) 234, 37 Am. Dec. 309; *Farrand v. Gleason*, 56 Vt. 633; *Hungerford v. Cushing*, 8 Wis. 332. The difference between a co-tenancy and a partnership is found mainly in the termination of their relation and the methods by which a partner and a co-tenant may dispose of their separate interests.

⁴³ *Alabama Fertilizer Co. v. Reynolds*, 85 Ala. 19, 4 So. 639; *Jowers v. Phelps*, 33 Ark. 465; *Omaha & C. Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 Pac. 853; *Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; *Ellison v. Stuart*, 2 Pennw. (Del.) 179, 43 Atl. 836; *Fechteler v. Palm*, 133 Fed. 462, 66 C. C. A. 336; *Webster v. Clark*, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n; *Barnett Line Steamers v. Blackmar*, 53 Ga. 98; *Reynolds v. Radke*, 112 Ill. App. 575; *Strecker v. Conn*, 90 Ind. 469; *Sherrod v. Langdon*, 21 Iowa 518; *Rider v. Hammell*, 63 Kans. 733, 66 Pac. 1026; *Green v. Taylor*, 98 Ky. 330, 17 Ky. L. 897, 32 S. W. 945, 56 Am. St. 375; *Grieff v. Boudousquie*, 18 La. Ann. 631, 89 Am. Dec. 698; *Rice v. Barrett*, 116 Mass. 312; *Bissell v. Warde*, 129 Mo. 439, 31 S. W. 928; *Parchen v. Anderson*, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; *Sargent v. Collins*, 3 Nev. 260; *Seabury v. Bolles*, 51 N. J. L. 103, 16 Atl. 54, 52 N. J. L. 413, 21 Atl.

§ 482. **Limited partnership.**—In many states statutory provision is made for the formation of limited partnerships. A limited partnership is one where the firm consists of one or more general partners and one or several special partners, the latter being liable for the debts or losses of the firm only to the amount of their several contributions in cash to the firm capital.⁴⁴ Provision is made by such statutes for the method in which the limited partnership must be formed and for the publication of notice of the limited liability of certain members. Should there be a failure to comply with these statutory regulations the resulting partnership will be general, and not limited.⁴⁵ In some jurisdictions it is provided or held that substantial compliance with the statutory provision is sufficient.⁴⁶ Other cases hold that such statute must be strictly complied with.⁴⁷ Thus, where there was an omission of a required publication giving notice of the formation of such limited partnership⁴⁸ or where the affidavit which stated that the special partner's contribution to the firm capital has been actually paid in was false,⁴⁹ it has been held that there was a general part-

952, 11 L. R. A. 136; *Vibbard v. Roderrick*, 51 Barb. (N. Y.) 616; *Heye v. Tilford*, 2 App. Div. (N. Y.) 346, 73 N. Y. St. 428, 37 N. Y. S. 751; *Clark v. Rumsey*, 59 App. Div. (N. Y.) 435, 69 N. Y. S. 102, appeal dismissed in 178 N. Y. 592, 70 N. E. 1097; *W. D. Wilson Printing Ink Co. v. Bowker*, 27 Abb. N. Cas. (N. Y.) 153, 39 N. Y. St. 690, 15 N. Y. S. 293; *Shafer v. Randolph*, 99 Pa. 250; *Polk v. Buchanan*, 5 Sneed. (Tenn.) 721; *Grabenheimer v. Rinkskoff*, 64 Tex. 49; *Cottrill v. Van Duzen*, 2 Vt. 511.

⁴⁴ *Black's Law Dictionary*, 874; *Robbins Electric Co. v. Webber*, 172 Pa. St. 635, 34 Atl. 116.

⁴⁵ *Hutchins v. Page*, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 656; *Vanhorn v. Corcoran*, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386; *Ussery v. Crusman* (Tenn. Ch. App.), 47 S. W. 567. "A limited partnership that has not complied with the law of its creation is not a limited partnership at all. It is, however, a partnership in which all the members are liable as at common law." *Blumenthal v. Whitaker*, 170 Pa. St. 309, 33 Atl. 103.

⁴⁶ *Cummings v. Hayes*, 100 Ill. App. 347; *Manhattan Co. v. Laimbeer*, 108 N. Y. 578, 15 N. E. 712; *Spencer Optical Mfg. Co. v. Johnson*, 53 S. Car. 533, 31 S. E. 392; *Deckert v. Chesapeake Western Co.*, 101 Va. 804, 45 S. E. 799. See also, *Buckle v. Iler*, 40 Misc. (N. Y.) 214, 81 N. Y. S. 631; *Patterson v. Youngs*, 129 N. Y. S. 673.

⁴⁷ *Holliday v. Union Bag & Paper Co.*, 3 Colo. 342; *In re Thayer*, 23 Fed. Cases No. 13867, 7 Am. L. Rev. 177; *Pierce v. Bryant*, 5 Allen (Mass.) 91; *Haggerty v. Foster*, 103 Mass. 17; *Matter of Allen*, 41 Minn. 430, 43 N. W. 382.

⁴⁸ *Davis v. Sanderlin*, 119 N. Car. 84, 25 S. E. 815.

⁴⁹ *Myers v. Edison General Electric Co.*, 59 N. J. L. 153, 35 Atl. 1069. In the above case the certificate stated that the special partner had paid in his contribution, when it was not paid in fact till about a week later. Held this rendered the special partner liable generally. To same effect, *Patterson v. Youngs*, 129 N. Y. S. 673. See in this connection *Chick v. Robinson*, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833. In the above case the affidavit

nership. A limited partnership may also become general when upon renewal the assets of the firm are substantially less than they were at the time of its formation.⁵⁰ A limited partnership also becomes general if it continues in business after the time for which it was created has expired.⁵¹ The statutory provision for the renewal and continuance of a limited partnership must be complied with.⁵²

§ 483. Who may be partners.—Any person who has capacity to contract may make a valid contract of partnership. Alien friends may be partners, but if war breaks out between their respective countries they become alien enemies, and the partnership is dissolved or suspended.⁵³ Since the contracts of an infant are voidable, and not void, he may enter into a partnership agreement,⁵⁴ but he may usually rescind his contract and thus escape liability.⁵⁵ On the same principle it would seem that a partnership agreement entered into in good faith with an insane person, not under guardianship and in ignorance of such person's condition is valid until disaffirmed.⁵⁶ At common law the contracts

was filed stating that the amount of the special partner's contribution to the capital stock had been paid in. The special partner's check for the amount had actually been received, but was not presented until after the affidavit was made. It was held that the receipt of the check justified the affidavit. For other cases in which it was held that there had not been a sufficient compliance with the statute see *Spencer Optical Mfg. Co. v. Johnson*, 53 S. Car. 533, 31 S. E. 392; *Blumenthal v. Whitaker*, 170 Pa. St. 305, 33 Atl. 103; *First Nat. Bank v. Crevline*, 177 Pa. St. 270, 35 Atl. 595.

⁵⁰ *Durgin v. Colburn*, 176 Mass. 110, 57 N. E. 213. See also, *Lee v. Burnley*, 195 Pa. St. 58, 45 Atl. 668; *Fourth Street Nat. Bank v. Whitaker*, 170 Pa. St. 297, 33 Atl. 100.

⁵¹ *Sarmiento v. The Catharine C.*, 110 Mich. 120, 67 N. W. 1085; *Columbia Bank v. Berolzheimer*, 33 App. Div. (N. Y.) 235, 53 N. Y. S. 417.

⁵² *Strang v. Thomas*, 114 Wis. 599, 91 N. W. 237.

⁵³ *McAdams v. Hawes*, 9 Bush (Ky.)

15; *Kershaw v. Kelsey*, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; *Woods v. Wilder*, 43 N. Y. 164; *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

⁵⁴ *Mehlhop v. Rae*, 90 Iowa 30, 57 N. W. 650; *Vinsen v. Lockard*, 7 Bush (70 Ky.) 458; *Bush v. Linthicum*, 59 Md. 344; *Dana v. Stearns*, 3 Cush. (Mass.) 372; *Osborn v. Farr*, 42 Mich. 134, 3 N. W. 299; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798; *Kerr v. Bell*, 44 Mo. 120; *Gay v. Johnson*, 32 N. H. 167; *Continental Nat. Bank v. Strauss*, 137 N. Y. 148, 32 N. E. 1066; *Bixler v. Kresge*, 169 Pa. 405, 32 Atl. 414, 47 Am. St. Rep. 920; *Miller v. Sims*, 2 Hill. (S. Car.) 479; *Penn v. Whitehead*, 17 Grat. (Va.) 503, 94 Am. Dec. 478.

⁵⁵ See ante, *Infants*, ch. 11.

⁵⁶ See *Menkins v. Lightner*, 18 Ill. 282; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Behrens v. McKenzie*, 23 Iowa 333, 92 Am. Dec. 428 (none of which are partnership cases).

of a feme covert were void,⁵⁷ therefore she could not become the member of a partnership⁵⁸ except perhaps in those instances where she could contract as a feme sole, as in reference to her separate estate, or where her husband was an alien enemy.⁵⁹ The disabilities of coverture have, in the main been removed, and where this is true married women may form a copartnership.⁶⁰ The disabilities of coverture may not be entirely removed, consequently in some jurisdictions it is held that she cannot enter into a partnership agreement with her husband.⁶¹ In other jurisdictions it is held she may.⁶² One firm of partners may form a partnership agreement with another firm. In other words two or more partnerships may form a partnership.⁶³ Ordinarily a contract is considered as *ultra vires*⁶⁴ where by it a corporation seeks to enter into a partnership with either another corporation or a natural

⁵⁷ See ante, chap. 13, Married Women.

⁵⁸ *Brown v. Jewett*, 18 N. H. 230; *Carey & Co. v. Burrwess*, 20 W. Va. 571, 43 Am. Rep. 790.

⁵⁹ See ante, chap. 13, Married Women.

⁶⁰ *Abbott v. Jackson*, 43 Ark. 212; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *Dupuy v. Sheak*, 57 Iowa 361, 10 N. W. 731; *Plumer v. Lord*, 5 Allen (Mass.) 460; *Vail v. Winterstein*, 94 Mich. 230, 53 N. W. 932, 18 L. R. A. 515, 34 Am. St. 334; *Merritt v. Day*, 38 N. J. L. 32, 20 Am. Rep. 362; *Zimmerman v. Erhard*, 8 Daly (N. Y.) 311; *Little v. Hazlett*, 197 Pa. 591, 47 Atl. 855.

⁶¹ *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 526, 35 Am. Rep. 105; *Mayer v. Soyster*, 30 Md. 402; *Bowker v. Bradford*, 140 Mass. 521, 5 N. E. 480; *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919; *Fuller v. McHenry*, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512.

⁶² *Dressel v. Lonsdale*, 46 Ill. App. 454; *Hoaglin v. Henderson*, 119 Iowa 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. 335; *Louisville & Co. v. Alexander*, 16 Ky. L. 306, 27 S. W. 981; *Zimmerman v. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396; *Suau v. Caffé*,

122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593n.

⁶³ *Mayrant v. Marston*, 67 Ala. 453; *Bullock v. Hubbard*, 23 Cal. 495, 83 Am. Dec. 130; *Butler v. American Toy Co.*, 46 Conn. 136; *In re Hamilton*, 1 Fed. 800; *Wilson v. Morse*, 117 Iowa 581, 91 N. W. 823; *Meador v. Hughes*, 14 Bush (Ky.) 652; *Simonton v. McLain*, 37 La. Ann. 663; *Gage v. Rollins*, 10 Metc. (Mass.) 348; *Gulick v. Gulick*, 14 N. J. L. 578; *Willey v. Renner*, 8 N. Mex. 641, 45 Pac. 1132; *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812.

⁶⁴ *Central R. & B. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Fechteler v. Palm Bros. & Co.*, 66 C. C. A. 336, 133 Fed. 462; *Stephens v. Gall*, 179 Fed. 938; *Gunn v. Central R. Co.*, 74 Ga. 509; *Ledsinger v. Central Line Steamers*, 75 Ga. 567; *Marine Bank v. Ogden*, 29 Ill. 248; *Mestier & Co. v. Chevalier P. Co.*, 108 La. Ann. 562, 32 So. 520; *Conkling v. Washington University*, 2 Md. Ch. 497; *Commonwealth v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Hanson v. Paige*, 3 Gray (Mass.) 239; *Wittenton Mills v. Upton*, 10 Gray (Mass.) 582, 71 Am. Dec. 681; *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *Aurora Bank v. Oliver*, 62 Mo. App. 390; *Franz v. Barr Dry Goods Co. (Mo.)*, 111 S. W. 636; *Burke v. Concord R.*

person. This power must be expressly given them,⁶⁵ although there are cases which lay down the rule that a corporation may, under certain circumstances be justified in entering into a partnership arrangement for the purpose of better conserving its objects and for the protection of its property.⁶⁶ The corporation may, in a proper case, be held liable as if it were a partner, where necessary to prevent injustice,⁶⁷ or the corporation itself be permitted to recover on a partnership agreement.⁶⁸ Tenants in common may be partners in conducting business on the land without affecting the legal status of the land.⁶⁹

§ 484. How relation is formed.—As has already been pointed out a partnership is formed by a voluntary agreement of the parties, and not by operation of law.⁷⁰ It is not essential to

Co., 61 N. H. 160, 8 Am. & Eng. R. Cas. 552; Van Kuren v. Trenton L. & M. Mfg. Co., 13 N. J. Eq. 302; New York & C. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Bissell v. Michigan & C. R. Co., 22 N. Y. 258; People v. North River & C. Co., 121 N. Y. 582, 24 N. E. 834, 18 Am. St. Rep. 843, 9 L. R. A. 33; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541; Geurinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714; Boyd v. American Carbon Blank Co., 182 Pa. St. 206, 37 Atl. 937; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173; Mallory v. Hananer Oil Works, 86 Tenn. 598, 88 S. W. 396; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Lamoille V. R. Co. v. Bixby, 55 Vt. 235. "It is familiar law that a corporation cannot enter into a partnership." Williams v. Johnson, 208 Mass. 544, 95 N. E. 90. See, however, Catskill Bank v. Gray, 14 Barb. (N. Y.) 471.

⁶⁶ Fechteler v. Palm Bros. & Co., 66 C. C. A. 336, 133 Fed. 462; Butler v. American Toy Co., 46 Conn. 136; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837. It can only exist by virtue of an express grant of power or from necessary implication from such a grant, so that it may be said that it must be expressly given in any event. Indeed, it is so

inconsistent with the ordinary powers and duties of such bodies that it could very seldom, if ever, arise from mere implication in any sense.

⁶⁷ See, generally, Mullins v. Miller, 1 Low. Can. Jur. 121; Mallon v. Craig, 3 Ont. 541; Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130; In re Hamilton, 1 Fed. 800; In re Warner, 7 Nat. Bank Reg. 47; Raymond v. Putnam, 44 N. H. 160; Smith v. Wright, 5 Sandf. (N. Y.) 113.

⁶⁸ Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556; French v. Donohue, 29 Minn. 111, 12 N. W. 354; Johnson v. Weed & C. Mfg. Co., 103 Wis. 291, 79 N. W. 236. See also, Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. 467; Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Allen v. Woonsocket Co., 11 R. I. 288.

⁶⁹ Cameron v. First Nat. Bank (Tex.), 34 S. W. 178. See also, Hackett v. Multnomah R. Co., 12 Ore. 124, 6 Pac. 659, 53 Am. Rep. 327; Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. 249.

⁷⁰ Holton v. Guinn, 76 Fed. 96.

⁷¹ See, ante, §§ 476, 480. See also, Causler v. Wharton, 62 Ala. 358; Haycock v. Williams, 54 Ark. 384, 16 S. W. 3; Morgan v. Farrell, 58 Conn. 413, 20

the existence of a partnership that such agreement should be in writing,⁷¹ and may be either express or implied.⁷² The intent of the parties usually governs.⁷³ As in the case of all contracts, there must be a consideration for the contract whereby the partnership relation is formed. This element may, however, be supplied by the mutual promises of the respective parties or their contributions of either property, labor or skill toward the partnership business.⁷⁴

§ 485. Illustrative cases of partnership.—As a general rule where two or more persons enter into a business arrangement whereby they have a community interest in the property used in such business, and also in the profits arising therefrom, they are regarded as partners.⁷⁵ Thus, where the parties agree that one

Atl. 614, 18 Am. St. 282; *Bushnell v. Consolidated Ice M. Co.*, 138 Ill. 67, 27 N. E. 596; *Miller v. Hughes*, 1 A. K. Marsh (Ky.) 181, 10 Am. Dec. 719; *Halliday v. Bridewell*, 36 La. Ann. 238; *Ingals v. Ferguson*, 59 Mo. App. 299; *Groves v. Tallman*, 8 Nev. 178; *Wilson's Exrs. v. Cobb's Exrs.*, 28 N. J. Eq. 177; *Dawson v. Pogue*, 18 Ore. 94, 22 Pac. 637, 6 L. R. A. 176; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; *Cocke v. Evans' Heirs*, 9 Yerg. (Tenn.) 287; *Setzer v. Beale*, 19 W. Va. 274; *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918. It will not arise by operation of law. *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *Heye v. Tilford*, 2 App. Div. (N. Y.) 346, 73 N. Y. St. 428, 37 N. Y. S. 751; *Dunham v. Loverock*, 158 Pa. St. 197, 27 Atl. 990, 38 Am. St. 838; *Butler's Sav. Bank v. Osborne*, 159 Pa. St. 10, 28 Atl. 163, 39 Am. St. 665. See also, cases cited, ante, §§ 476, 480.

⁷¹ *Simmons v. Ingram*, 78 Mo. App. 603; *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782. See also, *Ruggles v. Buckley*, 153 Fed. 950, 86 C. C. A. 154; *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759; *Jones v. Davies*, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354.

⁷² *Holme v. Hammond*, L. R. 7 Ex. 218; *Savannah Rail &c. Co. v. Sabel* (Ala.), 40 So. 88; *Plunkett v. Dillon*, 4 Houst. (Del.) 338; *Bowen v. Ruth-*

erford, 60 Ill. 41, 14 Am. Rep. 25; *Phillips v. Phillips*, 49 Ill. 437; *Halliday v. Bridewell*, 36 La. Ann. 238; *Sargent v. Collins*, 3 Nev. 260; *Chase v. Barrett*, 4 Paige (N. Y.) 148; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *In re Gibb's Estate*, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; *Dunham v. Loverock*, 158 Pa. St. 197, 27 Atl. 990, 38 Am. St. 838; *Providence Mach. Co. v. Browning*, 72 S. Car. 424, 52 S. E. 117.

⁷³ See, ante, § 476, *Nature of partnership*.

⁷⁴ *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Trayes v. Johns*, 11 Colo. App. 219, 52 Pac. 1113; *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530; *Mitchell v. O'Neal*, 4 Nev. 504; *Coleman v. Eyre*, 45 N. Y. 38; *Emery v. Wilson*, 79 N. Y. 78; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Belcher v. Conner*, 1 S. Car. 88; *Kimmins v. Wilson*, 8 W. Va. 584; *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918.

⁷⁵ *Webster v. Clark*, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n; *Lockwood v. Doane*, 107 Ill. 235; *Ryder v. Wilcox*, 103 Mass. 24; *Southern Fertilizer Co. v. Reames*, 105 N. Car. 283, 11 S. E. 467; *Jones v. McMichael*, 12 Rich. L. (S. Car.) 176; *Cothran v. Marmaduke*, 60 Tex. 370; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355.

shall furnish the capital and the building, the other manage the purchases and sales for a drug department, such department to be charged with rent and the other expenses of conducting it and the net profits or losses to be divided among the parties in certain proportions, this has been held to constitute a partnership.⁷⁶

Acts whereby the parties seek to avoid partnership liability, such as concealing the fact that a partnership exists or obscuring the purposes for which the parties associate themselves together, are of no avail when the fact that a partnership does exist is once established. Thus, where parties associated themselves together to deal in lumber land, one to furnish the capital and the other to render services in conducting such business, the profits to be divided between them after paying interest on the money advanced by the first party, it was held that a partnership was created, notwithstanding the parties did not make public the fact of their business connection, but instead concealed it.⁷⁷ It has been held that an agreement between landowners to sell timber off their land,⁷⁸ to sell land,⁷⁹ or an agreement by one to furnish money necessary for the manufacture of an article patented by the other,⁸⁰ an agreement whereby one party is to make estimates and furnish iron for bridges, and the other to supply additional material and work and solicit orders,⁸¹ or an agreement whereby two attorneys take certain designated cases together, and agree to pay the costs and divide the profits,⁸² constitutes a partnership when the essential elements are present. It has also been held that where the testimony showed that the defendant was to furnish money to buy mules, and that the plaintiff was to furnish the feed and care for them and help sell them, and that they were then to divide the profits, it was sufficient to uphold a finding that a partnership existed.⁸³ It must constantly be borne in mind that a "partnership is a fact—a fact sometimes made out like other

⁷⁶ *Leber v. Dietz*, 22 Misc. (N. Y.) 524, 49 N. Y. S. 1002.

⁷⁷ *Ruggles v. Buckley*, 158 Fed. 950, 86 C. C. A. 154.

⁷⁸ *Tanner v. Hughes* (Ky.), 50 S. W. 1099.

⁷⁹ *Cronkrite v. Trexler*, 187 Pa. St. 100, 41 Atl. 22.

⁸⁰ *Illinois Malleable Iron Co. v. Reed*, 102 Iowa 538, 71 N. W. 423.

⁸¹ *Clinton &c. Iron Works v. First Nat. Bank*, 103 Wis. 117, 79 N. W. 47.

⁸² *Southworth v. People*, 183 Ill. 621, 56 N. E. 407.

⁸³ *Jones v. Stever*, 154 Mo. App. 640, 136 S. W. 16.

facts, from circumstances as well as by direct evidence."⁸⁴ If it appears to have been the purpose of the parties to enter into the relation of partners, all subterfuges of either, resorted to in order to evade liability for possible losses while securing certainty of the advantages to be derived from the relation, must be disregarded.⁸⁵

§ 486. Cases in which relation was not created.—Since the existence of a partnership is a question of fact to be proven there must be evidence which establishes a partnership relation. In the absence of evidence to establish this fact the parties cannot be held as partners.⁸⁶ All the elements necessary to constitute a partnership contract must be present. Thus, where one merely hired the use of another hotel from day to day and agreed to pay therefor a sum equal to one-third of the gross receipts and gross earnings, it was held that no partnership existed since the parties were not mutual agents. The one who owned the building had nothing whatever to do with the business conducted in it.⁸⁷

It has also been held that where there is a total lack of evidence to show that there was an agreement between the parties by which they would share in the profits, or that there was any understanding as to the proportion in which such profits should be shared, and where the evidence of the party to the agreement who sought to establish the partnership indicated that he himself had no idea, much less an intention, of bearing any loss, no partnership was shown.⁸⁸ Neither does the fact that one looks to the profits of a business, in which he has no interest and under an-

⁸⁴ *Fechteler v. Palm*, 133 Fed. 462, 66 C. C. A. 336; *In re Neasmith*, 147 Fed. 160, 77 C. C. A. 402; *Ruggles v. Buckley*, 158 Fed. 950, 86 C. C. A. 154. The foregoing has special reference to those cases in which there is no agreed statement of facts.

⁸⁵ *Johnson v. Carter*, 120 Iowa 355, 94 N. W. 850.

⁸⁶ See *Harris v. Sessler*, 67 Tex. 383, 3 S. W. 316.

⁸⁷ *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. To the effect that there must be a mutual agency, see *Norton v. Brink*, 75 Nebr.

566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822. See also, ante, § 476, *Nature of partnerships*.

⁸⁸ *La Cotts v. Pike*, 91 Ark. 26, 120 S. W. 144, 134 Am. St. 48. In the above case the instrument relied on to show the partnership agreement was a deed. This deed was held to make the parties tenants in common, and not partners. The case holds that there must be something more than a joint ownership of property to constitute a partnership.

other's management, for payment of a personal debt make the former a partner with the latter. The amount due is merely a personal debt, and remains such if not paid out of the profits.⁸⁹ An agreement whereby two attorneys agree to conduct a certain litigation for a client, the client to pay the attorney's fees and other necessary costs, the attorneys to divide the fees, does not constitute the attorneys partners.⁹⁰ Nor does an association of dredgers whereby they fix prices and divide up work constitute a partnership.⁹¹ It has also been held that no partnership was in fact formed, notwithstanding the parties agreed to purchase a tract of land "in partnership" when one of the parties did nothing on her part, contributed nothing, and risked nothing, since there was no consideration to support the contract.⁹²

§ 487. Scope of partnership—Purposes and subject-matter generally.—This subject may be considered in two aspects, which are: first, the purposes for which a partnership may be formed in general; and, second, the scope of a particular partnership agreement. These two phases of the subject will be briefly treated in the order named. As is made apparent by the section in this chapter on the nature of a partnership the fundamental idea of a partnership *inter se* is that it is formed for the purpose of trade or gain in business, and that each partner has the right of common ownership in the profits, and to participate in a division of them.⁹³ As a result, associations, the objects of

⁸⁹ *Cudahy Packing Co. v. Hibou* (Miss.), 46 So. 73, 18 L. R. A. (N. S.) 975. See, however, *Webb v. Hicks*, 123 N. Car. 244, 31 S. E. 479.

⁹⁰ *Willis v. Crawford*, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904.

⁹¹ *Potter v. Morris & C. Dredging Co.*, 59 N. J. Eq. 422, 46 Atl. 537.

⁹² *Norton v. Brink*, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822. See also, ante, on this subject, § 476, Nature of partnership. It must be understood that the two preceding sections have nothing to do with estoppel. One may be estopped to deny the partnership and be held liable as if he were a partner. See ante, § 481. The mere fact that one is estopped to

deny the partnership does not make him a partner *inter se*.

⁹³ See ante, § 476, Nature of partnership. "A partnership is a creature of the law merchant, and its origin is founded in that law which is the custom of merchants, recognized and enforced by the courts. One essential feature which must be always present to constitute a partnership is that it is formed for business purposes. It is a voluntary association, arising out of contract, for the purpose of carrying on a joint undertaking, with the object of making a profit to be shared among the partners. Every definition of a partnership includes the purpose of business and profit. It is a com-

which are social, literary or merely to further the public good or mental advancement of their members, and not for pecuniary gain, are not generally considered partnerships.⁹⁴ The same is true of a social and religious organization, the members of which put their property in common and live together as one family and have everything in common, there being no profit-sharing and no business.⁹⁵ An agreement whereby several persons keep house together in order to diminish expenses, one to pay certain designated bills and the other to pay all other bills, has been held not to constitute a partnership.⁹⁶ Nor does a mere agreement to hold land in common constitute a partnership.⁹⁷

On the other hand, voluntary associations for mutual relief in times of sickness or want, by means of funds raised by initiation fees, dues and the like, are often considered as partnerships.⁹⁸ A partnership may exist merely for the consummation of a single transaction, venture or undertaking.⁹⁹ It may exist for the purpose of buying, dealing or speculating in land.¹ Thus it has been

bination of two or more persons of capital, or labor, or skill, or some or all of these, for the purpose of business for the common benefit." *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044; *Missouri Bottlers' Assn. v. Fennerty*, 81 Mo. App. 525.

⁹⁴ *Lewis v. Tilton*, 64 Iowa 220, 19 S. W. 911, 52 Am. Rep. 436; *Burt v. Lathrop*, 52 Mich. 106, 17 N. W. 716; *McMahon v. Rauhr*, 47 N. Y. 67; *Lafond v. Deems*, 81 N. Y. 507, 8 Abb. N. Cas. (N. Y.) 344; *Ostrom v. Greene*, 161 N. Y. 353, 55 N. E. 919; *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818; *Winona Lumber Co. v. Church*, 6 S. Dak. 498, 62 N. W. 107.

⁹⁵ *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044 (where it was more in the nature of a tenancy in common).

⁹⁶ *Austin v. Thomson*, 45 N. H. 113.

⁹⁷ *Huckabee v. Nelson*, 54 Ala. 12; *Gilmore v. Black*, 11 Maine 485; *Trieber v. Lanahan*, 23 Md. 116; *Sikes v. Work*, 6 Gray (Mass.) 433; *Ballou v. Spencer*, 4 Cow. (N. Y.) 163; *White v. Fitzgerald*, 19 Wis. 504.

⁹⁸ *Pearce v. Piper*, 17 Ves. 1; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Gorman v. Russell*, 14 Cal. 531; *Babb v. Reed*, 5 Rawle (Pa.) 151, 28 Am. Dec. 650.

⁹⁹ *Harris v. Umsted*, 79 Ark. 499, 96 S. W. 146; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 605, 29 Am. St. 133; *Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754; *Plunkett v. Dillon*, 4 Houst. (Del.) 338; *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628; *Jones v. Davies*, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354; *Cochran v. Anderson County Nat. Bank*, 83 Ky. 36; *Ripley v. Colby*, 23 N. H. 438; *Clark v. Rumsey*, 59 App. Div. (N. Y.) 435, 69 N. Y. S. 102; *Demarest v. Koch*, 129 N. Y. 218, 29 N. E. 296; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Yeoman v. Lasley*, 40 Ohio St. 190; *Flower v. Barnekoff*, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; *Pierson v. Steinmyer*, 4 Rich. (S. Car.) 309; *Spencer v. Jones*, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870; *Williamson v. Nigh*, 58 W. Va. 629, 53 S. E. 124.

¹ *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 605, 29 Am. St. 133; *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; *Richards v. Grinnell*, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; *Simpson v. Tenney*, 41 Kans. 561, 21 Pac. 634; *Jones v. Davies*, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354; *Dudley v. Littlefield*, 21

held that an agreement whereby the parties are to co-operate in the sale of lands, on which one of them holds an option, and share in the profits, constitutes a partnership agreement.² On the other hand it has been held that advance of money to purchase and erect buildings in consideration of interest on the money advanced and one-half the profits of the sale, which profits are guaranteed to be equal at least to a certain sum, the advances and profits being secured by a mortgage, does not constitute the party advancing a partner with the other.³ A partnership may be formed for the purpose of one transaction in real estate.⁴

§ 488. Dealing in real estate—Verbal agreement—Statute of frauds.—By the great weight of authority a parol partnership agreement to deal in real estate is valid and not void as within the statute of frauds,⁵ although in a number of jurisdic-

Maine 418; Winslow v. Young, 94 Maine 145, 47 Atl. 149; Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070; Corey v. Cadwell, 86 Mich. 570, 49 N. W. 611; Menage v. Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. 235; Hunter v. Whitehead, 42 Mo. 524; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Williams v. Gillies, 75 N. Y. 197; Mitchell v. Tonkin, 109 App. Div. (N. Y.) 165, 95 N. Y. S. 669; Ludlow v. Cooper, 4 Ohio St. 1; Hulett v. Fairbanks, 40 Ohio St. 233; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870.

² Frazer v. Linton, 183 Pa. St. 186, 38 Atl. 589. See also, Clark v. Emery, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503, for a case somewhat similar, in which it was held that no partnership was formed.

³ Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343.

⁴ Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354; Yeoman v. Lasley, 40 Ohio St. 190; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870, revg. (Tex. Civ. App.), 47 S. W. 29. See also, Bank of Monroe v. Drew, 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255; Clark v.

Sidway, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. 327. See, however, Gottschalk v. Smith, 156 Ill. 377, 40 N. E. 937, affg. 54 Ill. App. 341, to the contrary.

⁵ Dale v. Hamilton, 5 Hare 369, 16 L. J. Ch. 126, 11 Jur. 163; Archibald v. McNeerhanie, 29 Can. Sup. Ct. 564; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Meagher v. Reed, 14 Colo. 385, 24 Pac. 681, 9 L. R. A. 455; McElroy v. Swope, 47 Fed. 380; Speyer v. Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. 473; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169, affg. 79 Ill. App. 139; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Richards v. Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354; Garth v. Davis, 120 Ky. 106, 27 Ky. L. 505, 85 S. W. 692, 117 Am. St. 571; Fountain v. Menard, 53 Minn. 443, 55 N. W. 601, 39 Am. St. 617; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; Hirbour v. Reeding, 3 Mont. 15; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Am. & Eng. Ann. Cas. 263; Babcock v. Read, 99 N. Y. 609, 1 N. E. 141; Traphagen v. Burt, 67 N. Y. 30; Larkin v. Martin, 46 Misc. (N. Y.) 179, 93 N. Y. S. 198; Ostrander v. Snyder, 73 Hun (N. Y.)

tions such an agreement is held void under the statute of frauds.⁶ Many of the cases, including several of those cited in the first note to this section, hold or concede that an interest in the land itself cannot be established by parol,⁷ but that a right to share in the profits resulting from such transaction may be established by parol.⁸ It is believed that these last cases give expression to the true rule, and that the conflict in the decisions holding that a parol partnership agreement can or cannot be entered into to deal in real estate is more apparent than real, for it may well be that an interest in the land itself cannot be established by parol; and yet at the same time a partnership agreement relating to the profits or dealing in land for profit can be shown without violating this rule.⁹ It is also held as a general rule that a contract whereby two or more persons agree to prospect for and locate mining claims to be held in joint ownership by the parties is not within the statute, and need not be in writing.¹⁰

378, 57 N. Y. St. 289, 26 N. Y. S. 263; *Bailey v. Weed*, 36 App. Div. (N. Y.) 611, 55 N. Y. S. 253; *Falkner v. Hunt*, 73 N. Car. 571; *Flower v. Barnekoff*, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; *Case v. Seger*, 4 Wash. 492, 30 Pac. 646. See also, *Floyd v. Duffy*, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883.

⁶*Smith v. Burnham*, 3 Sumn. (U. S.) 435, Fed. Cas. No. 13019. To same effect, *Rowland v. Boozer*, 10 Ala. 690; *Gray v. Palmer*, 9 Cal. 639, disapproved in *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; *Young v. Wheeler*, 34 Fed. 98, from C. C. Dist. Colo. (contra *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455); *Roub v. Smith*, 61 Mich. 543, 28 N. W. 676, 1 Am. St. 619; *Nester v. Sullivan*, 147 Mich. 493, 111 N. W. 85, 9 L. R. A. (N. S.) 1106 (modified in 147 Mich. 508, 111 N. W. 1033); *Bird v. Morrison*, 12 Wis. 138; *Scheuer v. Cochem*, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427; *Langley v. Sanborn*, 135 Wis. 178, 114 N. W. 787. Under the civil code of Louisiana such agreement must be in writing. *Pecot v. Armelin*, 21 La. Ann. 667. See also, *Norton v. Brink*, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822 (with

which compare, however, *Rice v. Parrott*, 76 Nebr. 501, 107 N. W. 840, 111 N. W. 583). And see *Dunphy v. Ryan*, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. 486.

⁷*Morton v. Nelson*, 145 Fed. 586, 72 N. E. 916; *McKinley v. Lloyd*, 128 Fed. 519.

⁸*Wright v. Smith*, 105 Fed. 841, 45 C. C. A. 87; *Jones v. Patrick*, 140 Fed. 403; *Eaton v. Graham*, 104 Ill. App. 296; *In re Everhart's Appeal*, 106 Pa. St. 349.

⁹See *Beebe v. Olentine*, 97 Ark. 390, 134 S. W. 936; *Coward v. Clauton*, 79 Cal. 23, 21 Pac. 359; *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. (N. S.) 455; *Norton v. Brink*, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822; *Rice v. Parrott*, 76 Nebr. 501, 107 N. W. 840, 76 Nebr. 505, 111 N. W. 583; note in 102 Am. St. 238, 239.

¹⁰*Gore v. McBrayer*, 18 Cal. 582; *Settenbre v. Putnam*, 30 Cal. 490; *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803, 11 Am. St. 229; *Murley v. Ennis*, 2 Colo. 300; *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; *Meylett v. Brennan*, 20 Colo. 242, 38 Pac. 75; *Shea v. Nilima*, 133 Fed. 209, 66 C. C. A. 263; *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195; *Hirbour v.*

§ 489. **Illegal purpose or business.**—A partnership which is formed for the purpose of carrying on an illegal business or one which is contrary to public policy is void.¹¹ Thus, where a partnership is formed for the purpose of illegally acquiring public coal lands, neither the partnership nor the party with whom it contracts can obtain relief under a contract made in furtherance of the original illegal agreement.¹² It must be made to plainly appear, however, that the purposes for which the partnership is formed are illegal.¹³ If a partnership is formed for several purposes, one or more of which is illegal, the partnership may be sustained as to the legal part if the legal may be separated from the illegal objects of the partnership agreement.¹⁴

§ 490. **Scope of partnership and authority of partners.**—The second aspect of the subject under consideration has to do with the duty of the partners to conform to the partnership articles. It is well settled and definitely understood that partners sustain a relation of trust and confidence one to the other. Each must adhere to the partnership agreement and confine his acts within the scope of the partnership business. If any one of the partners fails to do this, and the other member or members of

Reeding, 3 Mont. 15. See also, *Cascaden v. Dunbar*, 157 Fed. 62, 84 C. C. A. 566; *Jones v. Patrick*, 140 Fed. 403. *Contra*, *Craw v. Wilson*, 22 Nev. 385, 40 Pac. 1076.

¹¹ *Powell v. Maguire*, 43 Cal. 11; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Tenney v. Foote*, 95 Ill. 99; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124; *Spaulding v. Nathan*, 21 Ind. App. 122, 51 N. E. 742; *Anderson's Admr. v. Whitlock*, 2 Bush. (Ky.) 398, 92 Am. Dec. 489; *Stewart v. McIntosh*, 4 Har. & J. (Md.) 233; *Spies v. Rosenstock*, 87 Md. 14, 39 Atl. 268; *Sampson v. Shaw*, 101 Mass. 145, 3 Am. Rep. 327; *Dunham v. Presby*, 120 Mass. 285; *McGunn v. Hanlin*, 29 Mich. 476; *Durant v. Rhenier*, 26 Minn. 362, 4 N. W. 610; *Shriver v. McCloud*, 20 Nebr. 474, 30 N. W. 534; *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Tucker v. Adams*, 63 N. H. 361; *Watson v. Murray*, 23 N. J. Eq. 257; *Kelly v. Devlin*, 58 How. Pr. (N. Y.) 487; *Warner v. Griswold*, 8 Wend. (N.

Y.) 665; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *King v. Winants*, 71 N. Car. 469, 17 Am. Rep. 11; *Dudley v. Little*, 2 Ohio 504, 15 Am. Dec. 575; *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N. E. 593; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Jackson v. Akron Brick Assn.*, 53 Ohio St. 303, 41 N. E. 257, 35 L. R. A. 287, 53 Am. St. 638; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159; *Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637, 71 Am. St. 837; *Watson v. Fletcher*, 7 Grat. (Va.) 1; *Fairbank v. Newton*, 50 Wis. 628, 7 N. W. 543.

¹² *Kennedy v. Tonabough* (Wyo.), 117 Pac. 1079.

¹³ *Thwaites v. Coulthwaite* (1896), 1 Ch. 496; *Delamour v. Roger*, 7 La. Ann. 152; *Williams v. Connor*, 14 S. Car. 621; *Whitcher v. Morey*, 39 Vt. 459; *Fairbank v. Leary*, 40 Wis. 637.

¹⁴ *Northrup v. Phillips*, 99 Ill. 449; *Anderson v. Powell*, 44 Iowa 20; *Dunham v. Presby*, 120 Mass. 285; *Willson v. Owen*, 30 Mich. 474; *Todd*

the firm sustain a loss by reason of their copartner's default, he must indemnify them.¹⁶ Thus, one member of a partnership has no implied authority to dispose of the property of the partnership in satisfaction of his individual debt or for his individual benefit.¹⁶ Nor can he as a general rule bind the partnership on a contract of guaranty or suretyship, the reason being that such contract is usually without the scope of the partnership business, and the partner who makes such a contract acts outside the scope of his implied authority as agent of the firm.¹⁷ As a general rule one partner in a firm cannot take a new lease, or a renewal of an ex-

v. Rafferty's Admr., 30 N. J. Eq. 254; Lane v. Thomas, 37 Tex. 157; Whitcher v. Morey, 39 Vt. 459. As to the right of persons to form a partnership to carry on a business in which it is necessary that the person conducting that business be legally qualified to do so, see ante, § 267, note 65. Compare Hittson v. Brown, 3 Colo. 304. For a case holding that both partners need not possess the legal qualifications, in case one of them has such qualifications and the business is to be carried on by him, see Harland v. Lilienthal, 53 N. Y. 438.

¹⁶Campbell v. Campbell, 7 Clark & F. 116; Givens v. Berry, 21 Ky. L. 680, 52 S. W. 942; Murphy v. Crafts, 13 La. Ann. 519, 71 Am. Dec. 519; Mechem's Cases 227; Forney v. Adams, 74 Mo. 138; Marsh's Appeal, 69 Pa. St. 30.

¹⁸Eady v. Newton Coal & Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Carter v. Gallo-way, 36 La. Ann. 473; Johnson v. Crichton, 56 Md. 108; Farwell v. St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. 742; Buck v. Mosley, 24 Miss. 170; Clift v. Moses, 112 N. Y. 426, 20 N. E. 392; Hartness v. Wallace, 106 N. Car. 427, 11 S. E. 259; Pepper v. Peck, 17 R. I. 55, 20 Atl. 16; Rogers v. Betterton, 93 Tenn. 630, 27 S. W. 1017; Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Wolson v. Fuller, 71 Vt. 335, 45 Atl. 753; Cotzhausen v. Judd, 43 Wis. 213, 28 Am. Rep. 539. "Each member of a firm is the general agent of the firm

in relation to all the business of the firm, and can bind the firm in what he says and does in such business. But, when one partner has a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declarations or acts in the transaction." Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293. Negotiable paper made in the name of one partner, when his name is not also that of the firm, is not ordinarily binding upon the firm, and is *prima facie* the individual obligation of the maker; yet such paper, taken when the obligation was incurred by the partnership and upon its credit, will be regarded as merely collateral, and the other partner will be held liable on the original consideration. Mills v. Riggle, 83 Kans. 703, 112 Pac. 617, Ann. Cas. 1912A, 616, and note.

¹⁷Hollister v. Bluthenthal, 9 Ga. App. 176, 70 S. E. 970. In the above case it is said: "A contract of this character although executed in the name of the firm, is *prima facie* the individual contract of the partner who made it, and the burden of proof is upon the holder of the contract to show that it is in fact a firm transaction. This can be done by evidence that the contract was in fact within the scope of the partnership business, or that it was authorized by the other members of the firm, or that it was entered into in the name of the firm by the individual member with the knowledge of all the other members, or was subsequently ratified by them." See also, Seufert v. Gille,

isting one of the firm, in his own name or for his own benefit, and if he attempts to do so it inures to the benefit of the firm.¹⁸

It is apparent, however, that contracts entered into by a member of a copartnership, within the scope of his authority, are binding upon all the partners as a firm.¹⁹ Not only this, but third persons have the right to place a good-faith reliance in the apparent scope of the partner's authority.²⁰ Thus, a partnership formed to operate a tobacco warehouse has been held liable for tobacco bought by one of the partners upon private speculation in the profits of which the firm is not to share, where the partners permitted him to enter into the speculation because it would increase the business of the warehouse to the benefit of the firm, and the transaction was within the apparent scope of the partner's authority.²¹ Nor is a third person bound by a secret agreement between the partners whereby the authority of one or more of them is restricted, where such third person deals with the partner whose authority has been restricted without notice of such restriction.²² It is not,

230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471n.

¹⁸ *Clegg v. Edmondson*, 22 Beav. 125, 2 Jur. (N. S.) 824; *Clegg v. Fishwick*, 1 Macn. & G. 294, 1 Hall & Tw. 396, 19 L. J. Ch. 49, 13 Jur. 993; *Featherstonbaugh v. Fenwick*, 17 Ves. 298, 11 Revised Rep. 77; *Alder v. Fouracre*, 3 Swanst. 489, 19 Revised Rep. 256; *Clements v. Hall*, 2 DeG. & J. 173, revg. 24 Beav. 333; *Hawkins v. Hawkins*, 4 Jur. (N. S.) 1044; *Sneed v. Deal*, 53 Ark. 152, 13 S. W. 703; *Knapp v. Reed*, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869; *Speiss v. Rosswog*, 96 N. Y. 651; *Struthers v. Pearce*, 51 N. Y. 357; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252, revg. 61 Barb. (N. Y.) 310, later appeal, 84 N. Y. 556; *Betts v. June*, 51 N. Y. 274; *Chamberlin v. Chamberlin*, 12 Jones & S. (N. Y.) 116; *In re Johnson's Appeal*, 115 Pa. St. 129, 8 Atl. 36, 2 Am. St. 539; *Lacy v. Hall*, 37 Pa. St. 360. See *Keech v. Sandford*, 1 White & T. Lead. Cas. in Eq. 44. However, if the lease is owned by one the partner solely to the exclusion of the firm he may renew for his benefit. *Phillips v. Reeder*, 18 N. J. Eq. 95.

¹⁹ *Clark v. Ball*, 34 Colo. 223, 82 Pac.

529, 2 L. R. A. (N. S.) 100, 114 Am. St. 154.

²⁰ *Green v. Ervin*, 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015. See also, *Irwin v. Willer*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. 160; *Winship v. Bank of United States*, 5 Pet. (U. S.) 529, 8 L. ed. 216. See also, *Woodruff v. Scaife*, 83 Ala. 152, 3 So. 311; *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715; *Eastman v. Cooper*, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459, 12 N. W. 655; *Hoskinson v. Eliot*, 52 Pa. St. 393; *Brooke v. Washington*, 5 Grat. (Va.) 248, 56 Am. Dec. 142.

²¹ *Green v. Ervin*, 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015. See, however, *Maurin v. Lyon*, 69 Minn. 257, 72 N. W. 72, 65 Am. St. 568.

²² *Cox v. Hickman*, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47, 30 L. J. C. P. 125, 7 Jur. (N. S.) 105, 3 L. T. 185, 8 W. R. 754; *Leavitt v. Peck*, 3 Conn. 124, 8 Am. Dec. 157; *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715; *Hotchin v. Kent*, 8 Mich. 526; *Vance v. Blair*, 18 Ohio 532, 51 Am. Dec. 467; *Hoskinson v. Eliot*, 62 Pa. St. 393; *Edwards v. Tracy*, 62 Pa. St. 374; *Irwin v. Willier*, 110 U. S. 499, 28 L. ed. 225,

and has not been, the purpose here, however, to consider the rights and liabilities of partners as to third persons, nor even as between themselves, further than to show who may be partners, when and how they may form the contract, and the general nature of the relation created or resulting therefrom. Their rights, liabilities and the remedies, both as between themselves and as to third persons, will be treated in another volume.

4 Sup. Ct. 160; *Winship v. Bank of United States*, 5 Pet. (U. S.) 529, 8 L. ed. 216. "A mercantile instrument given in the partnership name binds all the partners, unless the person who took it knew, or had reason to believe, that the partner who made it, was improperly using his authority for his own benefit, to the prejudice, or in a way that might be to the prejudice of his associates." *Cotton v. Evans*, 21 N. Car. 284.

CHAPTER XVII.

FIDUCIARIES.

- | | |
|--|---|
| <p>§ 500. Introductory.</p> <p>501. Trustees generally.</p> <p>502. Creation of trusts.</p> <p>503. When trust must be in writing.</p> <p>504. Constructive implied trusts.</p> <p>505. Resulting implied trusts.</p> <p>506. Rights, powers and liabilities of trustees.</p> <p>507. Rule against personal gain given a strict construction.</p> <p>508. Trustee entitled to recover money advanced and to a reasonable compensation.</p> <p>509. Powers of trustee.</p> <p>510. Personal liabilities of trustee.</p> <p>510a. When trustee's contract binds estate or cestui que trust.</p> <p>511. When trustee is personally liable.</p> <p>512. Executors and administrators—Authority generally.</p> <p>513. Power to bind the estate by contract—Illustrative cases.</p> <p>514. Order of court—When it adds nothing to power of administrator.</p> <p>515. Ratifications of administrators' acts—Duties of administrator.</p> <p>516. Statutory authority.</p> <p>517. Powers given by will.</p> | <p>§ 518. Liability where estate is benefited.</p> <p>519. Personal liability.</p> <p>520. Joint liability of two or more executors or administrators.</p> <p>521. When relieved from personal liability.</p> <p>522. Guardians—Authority generally.</p> <p>523. When and how guardians may bind estates.</p> <p>524. Personal liability of guardian.</p> <p>525. When not personally liable.</p> <p>526. Statutory authority to bind estate.</p> <p>527. Receivers—Authority generally.</p> <p>528. Receivers' contracts under order of court.</p> <p>529. Receiver's certificates.</p> <p>530. Personal liability of receiver.</p> <p>531. Other persons occupying fiduciary relations, as parties to contracts, trustees in bankruptcy.</p> <p>532. Other persons occupying fiduciary relations—Promoters.</p> <p>533. Personal liability of promoter—Right to compensation.</p> <p>534. Other persons occupying fiduciary relations—Directors of corporation.</p> |
|--|---|

§ 500. **Fiduciaries—Introductory.**—Where contracts are made by fiduciaries or persons occupying a relation of trust and confidence questions frequently arise not only as to their power or authority, but also as to the rights and liabilities growing out of the relation; and special rules or considerations sometimes obtain in such cases that would not be applied in the absence of such a relation. It follows, therefore, that, in treating of parties to contracts, fiduciaries constitute a class to which a chapter may well be devoted.¹

¹“In its technical sense, a trust is to the beneficial enjoyment of property the right, enforceable solely in equity, the legal title of which is vested in

§ 501. **Trustees generally.**—A trustee is one in whom an interest, power or legal estate is vested under an express or implied agreement to administer or exercise it for the benefit or to the use of another.² In other words, he is one who holds property in trust.

§ 502. **Creation of trusts.**—In order to create a valid trust there must concur sufficient words or acts to show an unequivocal intention to devote the subject-matter to the object of the trust; the subject-matter must be definite in character and so at the disposal of the settler as to enable him to devote it to the object of the trust; and this object must be one that is lawful, certain, and ascertained.³ Considered as to the methods of its crea-

another. It implies the separate co-existence of the legal and the equitable title. In a sense, the perfect ownership is segregated into its constituent parts with the legal title and the equitable vested in different persons at the same time. Bispham's *Principles of Equity* (6th ed.), p. 52, par. 49. In its more comprehensive sense it embraces every bailment, every transaction by an agent or factor, every deposit, and, indeed, every matter in which the slightest trust or confidence is reposed." *Bowes v. Cannon*, 50 Colo. 262, 116 Pac. 336.

²Black's Law Dictionary 1192. "A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." *Ogden City St. R. Co. v. Wright*, 31 Ore. 150, 49 Pac. 975. "A trust in technical sense is defined as 'an obligation upon a person arising out of confidence reposed in him to apply property faithfully and according to such confidence.' 1 *Perry on Trust*, § 2." *Weltner v. Thurmond*, 17 Wyo. 268, 98 Pac. 590, 99 Pac. 1128 129 Am. St. 1113.

³*Malim v. Keighley*, 2 Ves. Jr. 529; *Cruwys v. Colman*, 9 Ves. Jr. 319; *Knight v. Boughton*, 11 Cl. & F. 513; *In re Brooke* (1898), 1 Ch. 651; *Lines v. Darden*, 5 Fla. 51; *Sinking Fund Comrs. v. Walker*, 6 How. (Miss.) 143; *In re Soulard*, 141 Mo. 642, 43 S. W. 617; *In re*

Smith's Estate, 144 Pa. St. 428, 22 Atl. 916, 27 Am. St. 641. A trust in real estate must be declared by a deed or conveyance in writing and must have existed at the time of the grant to the trustee. *Ludlow v. Rector &c. St. John's Church*, 144 App. Div. (N. Y.) 207, 130 N. Y. S. 679. There must exist trust property, trust objects, and a trust term. *Kahn v. Tierney*, 135 App. Div. (N. Y.) 897, 120 N. Y. S. 663, *affd.* 94 N. E. 1095. The above case holds that a trust cannot survive the purpose of its creation. "There are four essential elements of a valid trust of personal property; (1) a designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and, (4) the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee." *Brown v. Spohr*, 87 App. Div. (N. Y.) 522, 84 N. Y. S. 995, *affd.* 180 N. Y. 801, 73 N. E. 14. See also, *Eldridge v. See Yup Co.*, 17 Cal. 44; *Carter v. Gibson*, 29 Nebr. 324, 45 N. W. 634, 26 Am. St. 381; *Ludlow v. Rector &c. St. John's Church*, 144 App. Div. (N. Y.) 207, 130 N. Y. S. 679, *revd.* 68 Misc. (N. Y.) 400, 124 N. Y. S. 75.

tion a trust may be either express or implied.⁴ Express trusts are those created and manifested by a direct and positive agreement of the parties.⁵ An implied trust is founded on the presumable, though unexpressed intention of the party who creates it.⁶ In the creation of a trust it is unnecessary to employ certain specific words or a prescribed form. It may be couched in any language which is sufficiently expressive of the intention to create the trust.⁷ Even precatory words may be sufficient.⁸

§ 503. **When trust must be in writing.**—By the statutes of most states an express or direct trust in land must be in writing.⁹ In certain jurisdictions this includes not only trusts concerning lands but also trusts in any manner relating to land.¹⁰ In a few

⁴Rice v. Dougherty, 148 Ill. App. 368.

⁵Black's Law Dict. 1191; Learned v. Tritch, 6 Colo. 432; Oberlender v. Butcher, 67 Nebr. 410, 93 N. W. 764. An express trust need not be in any particular form of words. Fox v. Fox, 250 Ill. 384, 95 N. E. 498. In re Schwartz, 145 App. Div. (N. Y.) 285, 130 N. Y. S. 74.

⁶Black's Law Dict. 1191; 28 Am. & Eng. Ency. of Law 859; Lehrling v. Lehrling, 84 Kans. 766, 115 Pac. 556.

⁷McCarthy v. McCarthy, 74 Ala. 546; Carr v. Carr (Cal. App.), 115 Pac. 261; McCreary v. Gewinner, 103 Ga. 528, 29 S. E. 960; McCrary v. Clements, 95 Ga. 778, 22 S. E. 675; Colton v. Colton, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. 1164; Taber v. Zehner, 47 Ind. App. 167, 93 N. E. 1035. In the above case it is said: "Each case usually depends upon its own facts and circumstances from which the intention of the parties to create a trust is to be determined." Ruhe v. Ruhe, 113 Md. 595, 77 Atl. 797; Norman v. Burnett, 25 Miss. 183; Wadd v. Hazelton, 137 N. Y. 215, 33 N. E. 143, 21 L. R. A. 693n, 33 Am. St. 707; In re Schwartz, 145 App. Div. (N. Y.) 285, 130 N. Y. S. 74; In re Helfenstein's Estate, 77 Pa. St. 328, 18 Am. Rep. 449; In re Smith's Estate, 144 Pa. St. 428, 22 Atl. 916, 27 Am. St. 641. "If the writing makes clear the existence of a trust, the terms may be supplied aliunde." Fox v. Fox, 250 Ill. 384, 95 N. E. 498.

⁸Lines v. Darden, 5 Fla. 51; Maxwell v. Hoppie, 70 Ga. 152; Mills v. Newberry, 112 Ill. 123, 1 N. E. 156, 54 Am. Rep. 213; Handley v. Wrightson, 60 Md. 198; Barrett v. Marsh, 126 Mass. 213.

⁹Oden v. Lockwood, 136 Ala. 514, 33 So. 895; Coleman v. Coleman (Ala.), 55 So. 827; Salyers v. Smith, 67 Ark. 526, 55 S. W. 936; Gray v. Walker, 157 Cal. 381, 108 Pac. 278; Kinley v. Kinley, 37 Colo. 35, 86 Pac. 105, 119 Am. St. 261; Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883; In re Wilson's Appeal, 84 Conn. 560, 80 Atl. 718; Hayden v. Denslow, 27 Conn. 335; Walker v. Brown, 104 Ga. 357, 30 S. E. 867; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. 322; Brown v. White, 32 Ind. App. 100, 67 N. E. 273; Gregory v. Bowlsby, 115 Iowa 327, 88 N. W. 822; Wright v. King, Har. Ch. (Mich.) 12; Wolfskill v. Wells, 154 Mo. App. 302, 134 S. W. 51; Watson v. Payne, 143 Mo. App. 721, 128 S. W. 238; Cameron v. Nelson, 57 Nebr. 381, 77 N. W. 771; Elder v. Webber, 3 Nebr. (Unof.) 534, 92 N. W. 126; Eaton v. Eaton, 35 N. J. L. 290; Sturtevant v. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Wheeler v. Reynolds, 66 N. Y. 227. The rule that an express trust must be in writing does not apply where the agreement has been executed. McKnight v. Kingsley (Ind. App.), 92 N. E. 743.

¹⁰Shafter v. Huntington, 53 Mich. 310, 19 N. W. 11; Randall v. Constans,

states there is no statutory provision which requires a trust in land to be evidenced by a writing. Where this is true an express simple trust in land may be created by an oral declaration of trust made at the time of the execution and delivery of a conveyance of real estate absolute on its face or when made in contemplation and anticipation of such conveyance, and will be enforced in equity aside from the rights of creditors of the original vendor or when the rights of an innocent purchaser from the transferee have not intervened.¹¹ A parol agreement independent of a transfer of the legal title to the land, notwithstanding it is made for a valuable consideration, cannot create an express trust in land.¹² Thus an agreement to hold land in trust for another after the deal has been consummated cannot be enforced.¹³ A trust in personal property may be created by parol and need not be expressly declared in writing.¹⁴

§ 504. Constructive implied trusts.—Implied trusts are divided into two classes; they are: constructive trusts and resulting trusts.¹⁵ A constructive trust is implied by equity for the purpose of working out right and justice. The essential element to create such a trust is that fraud either actual or constructive must have

33 Minn. 329, 23 N. W. 530; Pollard v. McKenney, 68 Nebr. 742, 96 N. W. 679, 101 N. W. 9; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696.

¹¹ Cohn v. Chapman, 62 N. Car. 92, 93 Am. Dec. 600; Pittman v. Pittman, 107 N. Car. 159, 12 S. E. 61, 11 L. R. A. 456; Dover v. Rhea, 108 N. Car. 88, 13 S. E. 614; Cobb v. Edwards, 117 N. Car. 244, 23 S. E. 241; Owens v. Williams, 130 N. Car. 165, 41 S. E. 93; Sykes v. Boone, 132 N. Car. 199, 43 S. E. 645, 95 Am. St. 619; Insurance Co. of Tennessee v. Waller, 116 Tenn. 1, 95 S. W. 811, 115 Am. St. 763; Haywood v. Ensley, 8 Humph. (Tenn.) 460; Thompson v. Thompson (Tenn. Ch.), 54 S. W. 145; Woodfin v. Marks, 104 Tenn. 512, 58 S. W. 227; Renshaw v. First Nat. Bank (Tenn.), 63 S. W. 194; Smalley v. Paine (Tex. Civ. App.), 130 S. W. 739; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743; Mead v. Randolph, 8 Tex. 191; Bailey v. Harris, 19 Tex. 108; Leakey v. Gunter, 25 Tex. 400; Gardner v. Randall, 70 Tex. 453, 7 S.

W. 781. In order to establish a trust of this character, in contravention of the terms of a written deed, the evidence must be clear, strong and convincing. Hendren v. Hendren, 153 N. Car. 505, 69 S. E. 506, 138 Am. St. 680.

¹² Frey v. Ramsour, 66 N. Car. 466; Blount v. Carroway, 67 N. Car. 396; Dover v. Rhea, 108 N. Car. 88, 13 S. E. 614; Hamilton v. Buchanan, 112 N. Car. 463, 17 S. E. 159; Cobb v. Edwards, 117 N. Car. 244, 23 S. E. 241; Kelly v. McNeill, 118 N. Car. 349, 24 S. E. 738.

¹³ Hamilton v. Buchanan, 112 N. Car. 463, 17 S. E. 159; Kelly v. McNeill, 118 N. Car. 349, 24 S. E. 738.

¹⁴ Taber v. Zehner, 47 Ind. App. 165, 93 N. E. 1035; Jones v. Nicholas, 151 Iowa 362, 130 N. W. 125; Watson v. Payne, 143 Mo. App. 721, 128 S. W. 238; In re Kaupper, 141 App. Div. (N. Y.) 54, 125 N. Y. S. 878.

¹⁵ Rice v. Dougherty, 148 Ill. App. 368.

intervened. Such trusts are raised by courts of chancery only in cases where it becomes necessary to prevent a failure of justice and in most cases where there is no intention or agreement of the parties to create such a relation.¹⁶ A constructive trust in real estate is excepted from the operation of the statute of frauds and need not be manifested by a writing.¹⁷

¹⁶ *Yuster v. Keefe*, 46 Ind. App. 460, 90 N. E. 920; *Norris v. Kendall* (Ind. App.), 93 N. E. 1087; *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608; *Alexander v. Spaulding*, 160 Ind. 176, 66 N. E. 694; *Acker v. Priest*, 92 Iowa 610, 61 N. W. 235; *Gebhard v. Sattler*, 40 Iowa 152; *Graham v. King*, 96 Ky. 339, 16 Ky. L. 440, 24 S. W. 430; *Baxter v. Moses*, 77 Maine 465, 1 Atl. 350, 52 Am. Rep. 783; *Pierce v. Pierce*, 55 Mich. 629, 22 N. W. 81; *Harmon v. Harmon* (S. Car.), 71 S. E. 815; *Henyan v. Trevino* (Tex. Civ. App.), 137 S. W. 458. If a testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee, that he will devote the legacy to a certain lawful purpose, a trust *ex maleficio* is created and equity will compel the legatee to apply the property thus obtained in accordance with his promise. *Winder v. Scholey*, 83 Ohio St. 204, 93 N. E. 1098, 33 L. R. A. (N. S.) 995, and note. Whenever a fiduciary relation is shown to exist, either by actual agreement or by the statement of relations, during the continuance of which confidence is necessarily reposed by one or a corresponding influence possessed by the other, the person availing himself of his position to obtain an advantage becomes in equity a trustee. *Huffman v. Huffman*, 35 Ind. App. 643, 73 N. E. 1096; *Taber v. Zehner*, 47 Ind. App. 165, 93 N. E. 1035. It has been held that the relation between brokers and their customers is, in the absence of special circumstances, merely that of debtor and creditor, and not a fiduciary relation and that a constructive trust did not arise by reason of the fact that the broker was financially embarrassed at the time he undertook the commission when it appeared that no real fraud was practiced on the customer and it did not affirmatively appear that the broker

knew he was insolvent at the time of the transaction. *Furber v. Dane*, 204 Mass. 412, 90 N. E. 859, 27 L. R. A. (N. S.) 808, and note. In connection with this case, see, however, *Whitcomb v. Jacob*, 1 Salk. 160; *Taylor v. Plumer*, 3 Maule & S. 562; *Waters v. Marrin*, 12 Daly (N. Y.) 445; *Veil v. Mitchell*, 4 Wash. C. C. 105, Fed. Cas. No. 16908.

¹⁷ *Patton v. Beecher*, 62 Ala. 579; *White v. Farley*, 81 Ala. 563, 8 So. 215; *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Church v. Sterling*, 16 Conn. 388; *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852; *Peterson v. Boswell*, 137 Ind. 211, 36 N. E. 845; *Patterson v. Mills*, 69 Iowa 755, 28 N. W. 53; *Lehrling v. Lehrling*, 84 Kans. 766, 115 Pac. 556; *Ware v. Bennett*, 143 Ky. 743, 137 S. W. 532; *Dorsey v. Clarke*, 4 Har. & J. (Md.) 551; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Pollard v. McKenney*, 69 Nebr. 742, 96 N. W. 679, 101 N. W. 9; *Graves v. Graves*, 29 N. H. 129; *Farrington v. Barr*, 36 N. H. 86; *Moore v. Moore*, 38 N. H. 382; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Salter v. Bird*, 103 Pa. St. 436; *Henyan v. Trevino* (Tex. Civ. App.), 137 S. W. 458; *Buckner v. Carter* (Tex. Civ. App.), 137 S. W. 442. "It is not easy to ascertain from the adjudged cases the exact scope of the exception in the Stat. Car. 11, of trusts arising by 'implication or construction of law,' or of the equivalent exception in our statute of trusts arising by 'implication or operation of law.' It is not difficult to name trusts which unequivocally are trusts arising by implication or operation of law. Trusts arising from the presumed in-

§ 505. Resulting implied trusts.—A resulting trust arises by implication of law, and does not grow out of a contract. It results from the conduct, relation and supposed intention of the parties independent of any agreement whatsoever between them.¹⁸ The term implied trusts also includes constructive trusts, which, though often treated as resulting trusts may be considered as a second class of implied trusts.

§ 506. Rights, powers and liabilities of trustees.—A trustee is not permitted to derive personal gain from his management of the trust estate. All profits made by him in its management must

tention of the parties, indicated by their acts, although not expressly declared, and those arising from the application of some settled principle of equity to the situation, furnish many instances of implied or constructive trusts. Resulting trusts at common law arising from the payment of purchase-money, or where the trust is not declared, or is declared only in part, or for any reason fails, are illustrations of the former class, and those arising by equitable construction independently of intention from dealings by trustees or quasi trustees with trust property furnish many examples of the latter. But there is a large class of so-called constructive trusts, or trusts *ex maleficio*, where courts of equity treat the holder of the legal title to land as a trustee, and, through the medium of an assumed trust, makes that title subservient to the circumvention of fraud and the attainment of justice. Trusts of this character are not, I assume, within the exception in the statute. If they were so considered, then wherever a court of equity acting upon its own principles, would independently of the statute of frauds, separate the legal title and the beneficial interest, and fasten a trust upon the property to subserve the purposes of justice no question under the statute would arise, for the obvious reason that the case was by its terms excepted from its operation, and the statute would never be an obstacle to relief." *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640, 642.

¹⁸ *Learned v. Tritch*, 6 Colo. 432;

Dean v. Dean, 6 Conn. 285; *Fox v. Fox*, 250 Ill. 384, 95 N. E. 498; *Bruce v. Roney*, 18 Ill. 67; *Sheldon v. Harding*, 44 Ill. 68; *Remington v. Campbell*, 60 Ill. 516; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120, 42 N. E. 164; *Burkhardt v. Burkhardt*, 107 Iowa 369, 77 N. W. 1069; *Wright v. Yates*, 140 Ky. 283, 130 S. W. 1111; *Dime Sav. Bank v. Fletcher*, 158 Mich. 162, 122 N. W. 540, 35 L. R. A. (N. S.) 858, holding that under the circumstances a corporation which sold stock in another corporation held the sale price for the use of the one who had loaned money to the purchaser with which to make the purchase. *Knapp v. Reed* 88 Nebr. 754, 130 N. W. 430, Ann. Cas. 1912B, 1095, and note, holding that where a partnership lease is renewed by one of the partners in his own name it inures to the benefit of both partners. "A resulting trust in real estate may be proven by parol." *Johnston v. Sherehouse*, 61 Fla. 647, 54 So. 892. See also, *Breitbucher v. Oppenheim*, 160 Cal. 98, 116 Pac. 555; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 94 Am. St. Rep. 322; *Lehrling v. Lehrling*, 84 Kans. 766, 115 Pac. 556. The evidence to establish it must be clear, strong, unequivocal and unmistakable. *Wells v. Messenger*, 249 Ill. 72, 94 N. E. 87. To same effect, *Eisenberg v. Goldsmith* (Mont.), 113 Pac. 1127. The above case also contains definitions and a discussion of constructive and resulting trusts. Where there is an express trust, there cannot be a resulting or implied trust. *Stevenson v. Crapnell*, 114 Ill. 19, 28

be accounted for to the trust estate.¹⁹ Moreover, all profits made in transactions in which a trust fund or property is used, notwithstanding such transaction is conducted with the individual name of the trustee, belong to the trust estate.²⁰ His purchase or lease of the trust property is voidable and will generally be set aside at the instance of the cestui que trust or some one standing in his shoes.²¹

N. E. 379. To same effect, *Coleman v. Parran*, 43 W. Va. 737, 28 S. E. 769. A resulting trust cannot arise or spring into being when the transactions on which the supposed trust is bottomed appear to have had their origin in any fraudulent purpose. *Sell v. West*, 125 Mo. 621, 46 Am. St. 508, 28 S. W. 969.

¹⁹ *Crosskell v. Bower*, 32 Beav. 86; *Bowes v. Toronto*, 11 Moo. P. C. 463; *Bate v. Scales*, 12 Ves. 402; *Vandebend v. Livingston*, 3 Swanst. 625; *Shallcross v. Oldham*, 2 John. & H. 609; *Green v. Folgham*, 1 Sim. & St. 398; *Anonymous*, 1 P. Wms. 648; *Hewson v. Smith*, 17 Grant. Ch. (U. C.) 407; *Robinson v. Coyne*, 14 Grant Ch. (U. C.) 561; *Smith v. McGehee*, 14 Ala. 404; *Williamson v. Krohn*, 66 Fed. 655, 13 C. C. A. 668; *De Chambrun v. Cox*, 60 Fed. 471, 9 C. C. A. 86; *Hazard v. Dillon*, 34 Fed. 485; *Mansfield v. Alwood*, 84 Ill. 497; *Lyon v. Taylor*, 49 Ill. App. 639; *Voorhees v. Stoothoff*, 11 N. J. L. 171; *Hayes v. Kerr*, 40 App. Div. (N. Y.) 348, 57 N. Y. S. 1114; *Penman v. Slocum*, 41 N. Y. 53; *New York Life Ins. Co. v. Cuthbert*, 31 App. Div. (N. Y.) 191, 52 N. Y. S. 653; *Averell v. Barber*, 24 App. Div. (N. Y.) 53, 49 N. Y. S. 123; *Forker v. Brown* (C. Pl. Gen. T.), 10 Misc. (N. Y.) 161, 62 N. Y. St. 480, 30 N. Y. S. 827; *Johnstone v. O'Connor*, 66 Hun (N. Y.) 632, 50 N. Y. St. 635, 21 N. Y. S. 487; *People v. Merchants' Bank*, 35 Hun (N. Y.) 97, affd. 99 N. Y. 642; *In re Oakley*, 2 Edw. (N. Y.) 478; *Woodruff v. Boyden* (N. Y. Super. Ct. Spec. T.), 3 Abb. N. C. (N. Y.) 29; *Owens v. Williams*, 130 N. Car. 165, 41 S. E. 93; *In re Dickey's appeal*, 73 Pa. St. 218; *McFall v. McFall*, 35 S. Car. 559, 14 S. E. 985; *Whitman v. Bowden*, 27 S. Car. 53, 2 S. E. 630; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571.

"One occupying a trust relation cannot place himself in a position which would subject him to conflicting duties or expose him to the temptation of acting contrary to the interests of the party to whom he owes a duty." *City of Chicago v. Tribune Co. (Ill.)*, 93 N. E. 757.

²⁰ *Robinson v. Robinson*, 11 Beav. 371; *Stroud v. Gwyer*, 28 Beav. 130; *In re Norrington*, 13 Ch. D. 654; *Whitney v. Smith*, L. R. 4 Ch. 513; *Vyse v. Foster*, L. R. 8 Ch. 309; *Docker v. Somes*, 2 Myl. & K. 655; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Robinson v. Robinson*, 1 DeG. M. & G. 247; *Robinson v. Coyne*, 14 Grant Ch. (U. C.) 561; *Mosely v. Lane*, 27 Ala. 62, 62 Am. Dec. 752; *In re Thompson*, 101 Cal. 349, 35 Pac. 991; *Hecksher v. Blanton*, 111 Va. 648, 69 S. E. 1045. See *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822; *Pugh v. Pugh*, 9 Ind. 132; *Deegan v. Capner*, 44 N. J. Eq. 339, 15 Atl. 819; *Durling v. Hammar*, 20 N. J. Eq. 220; *In re Baker's Appeal*, 120 Pa. St. 33; *In re Frank's Appeal*, 59 Pa. St. 190; *In re Mueller's Estate*, 8 Pa. Dis. Ct. 70, affd. 190 Pa. St. 601; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

²¹ *Campbell v. Walker*, 5 Ves. Jr. 678, 5 R. R. 135; *Whichcote v. Lawrence*, 3 Ves. Jr. 740; *Fox v. Mackreth*, 2 Brown Ch. 400, is a leading case on the subject. Here it is said, "To show the universality and extent of the principle now contended for, there needs but to observe that particular law among the Romans by which magistrates and others in the provinces were disabled from making purchases at sales under their own authority, and the heavy penalty inflicted if they attempted it." *Lamont v. Lamont*, 7 Grant Ch. (U. C.) 258; *Foster v. Mc-*

§ 507. Rule against personal gain given a strict construction.—This rule is given a strict construction or application. In certain states, however, a trustee may purchase the trust property when it has passed out of his hands into the custody of the court and is sold at public auction under the orders of such court.²²

Kinnon, 5 Grant Ch. (U. C.) 510; Charles v. Dubose, 29 Ala. 367; Andrews v. Hobson's Admr., 23 Ala. 219; McNeil v. Gates, 41 Ark. 264; Page v. Neglee, 6 Cal. 241; Bellamy v. Sheriff, 6 Fla. 62; Renew v. Butler, 30 Ga. 954; Sypher v. McHenry, 18 Iowa 232; Old Dominion Bank v. Dubuque &c. R. Co., 8 Iowa 277, 74 Am. Dec. 302; Faucett v. Faucett, 1 Bush (Ky.) 511, 89 Am. Dec. 639; Hoffman Steam Coal Co. v. Cumberland Coal &c. Co., 16 Md. 456, 77 Am. Dec. 311; Davis v. Simpson, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. ed. 1076. (The above case states that the above rule of equity "is in every code of jurisprudence with which we are acquainted.") Wormley v. Wormley, 8 Wheat. (U. S.) 421, 5 L. ed. 651; Lennox v. Notrebe, Hempst. (U. S.) 251, Fed. Cas. No. 8246c; Piatt v. Oliver, 2 McLean (U. S.) 267, Fed. Cas. No. 11115; Price v. Morris, 5 McLean (U. S.) 4, Fed. Cas. 11414. See Kuykendall v. Devecmon, 82 Md. 643, 33 Atl. 717; St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256; King v. Remington, 36 Minn. 15, 29 N. W. 352; Schwarz v. Wendell, Walk. (Mich.) 267; Darling v. Potts, 118 Mo. 506, 24 S. W. 461; Tuggles v. Callison, 143 Mo. 527, 45 S. W. 291; Newton v. Rebenack, 90 Mo. App. 650; Shelby v. Creighton, 65 Neb. 485, 91 N. W. 369; Bassett v. Shoemaker, 46 N. J. Eq. 538, 20 Atl. 52, 19 Am. St. 435; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Colgate v. Colgate, 23 N. J. Eq. 372; Staats v. Bergen, 17 N. J. Eq. 554; Huston v. Cassedy, 13 N. J. Eq. 228; Scott v. Gamble, 9 N. J. Eq. 218; Conger v. Ring, 11 Barb. (N. Y.) 356; De Caters v. LeRay DeChaumont, 3 Paige (N. Y.) 178; Ames v. Downing, 1 Bradf. Surr. (N. Y.) 321; Brothers v. Brothers, 7 Ired Eq. (42 N. Car.) 150; Mathews v. Dragaud, 3 Desaus. (S.

Car.) 25; Coffee v. Ruffin, 4 Coldw. (Tenn.) 487; Armstrong v. Campbell, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 556; Collins v. Smith, 1 Head (Tenn.) 251; Hamilton v. Dooly, 15 Utah 280, 49 Pac. 769; Smith v. Miller, 98 Va. 535, 37 S. E. 10; Puzey v. Senior, 9 Wis. 370. See also, In re Acken, 144 Iowa 519, 123 N. W. 187, Ann. Cas. 1912A, 1166 and note. "The law will not permit a trustee to become a purchaser at his own sale, and if a resort to deceit was had to effect the sale, then the sale became fraudulent in fact, and in either case a court of equity will set aside the sale." Mettler v. Warner, 249 Ill. 341, 94 N. E. 522. "The purchase by a trustee of trust property is not void, but only voidable at the instance of the injured party or some one standing in his shoes." Guy v. Mayes, 235 Mo. 390, 138 S. W. 510.

²² Where the debt for which the property in such cases is taken in execution, is just, and the property liable to the payment of it, and the trustee without funds in his hands, or power to pay it, so as to relieve the property, what can he do? He is certainly not required to advance moneys out of his own pocket for the purpose of redeeming it; and it being taken out of his possession, as it were, and certainly out of his power, by the authority of the law, which is paramount to any that he has as trustee, and placed in the hands of the officer of the law, to whom full power is given to sell and dispose of the same, it is perfectly manifest that he thereby becomes divested of his trusteeship in regard to it; that all his power and control over it cease; so that he has no duty whatever to perform in respect to it in the slightest degree incompatible with his buying at the lowest price for which it may be obtained; and as to the sale to be made by the sheriff, it is impossible to conceive how the trustee can exercise

After the relation of trustee and cestui que trust has been terminated the former trustee may purchase the trust property,²³ but even then a court will closely scrutinize such a transaction for evidence of fraud, bad faith or undue influence on the part of the former trustee, especially when such relation has been but recently terminated.²⁴ A trustee before he attempts to purchase the trust property should obtain the consent of the proper court.²⁵

§ 508. Trustee entitled to recover money advanced and to a reasonable compensation.—As a general rule, he has the right to charge the trust estate with money advanced by him in

any control or influence over it to the prejudice of those whose interest it is to have the property sold for the highest possible price, that any other individual disposed to buy may not exert." *Fisk v. Sarber*, 6 Watts & S. (Pa.) 18. See also, *Clark v. Holland*, 72 Iowa 34, 33 N. W. 350, 2 Am. St. 230; *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684; *Dillinger v. Kelley*, 84 Mo. 561; *Glemser v. Glemser*, 5 Ohio Dec. 267; *English v. Monypeny*, 3 Ohio Cir. Dec. 582, 6 Ohio C. C. 554; *Bruner v. Finley*, 187 Pa. St. 389, 41 Atl. 334; *Lusk's Appeal*, 108 Pa. St. 152; *Cherpenning's Appeal*, 32 Pa. St. 315, 72 Am. Dec. 789; *Meanor v. Hamilton*, 27 Pa. St. 137; *Hallman's Estate*, 13 Phila. (Pa.) 562, 34 Leg. Int. (Pa.) 169; *Fisk v. Sarber*, 6 Watts & S. (Pa.) 18; *Anderson v. Butler*, 31 S. Car. 183, 9 S. E. 797, 5 L. R. A. 166; *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. 1331; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *Prevost v. Gratz, Pet.* (U. S.) 364, Fed. Cas. 11406 (revd. 6 Wheat. (U. S.) 481, 5 L. ed. 311). But see *Hopper v. Hopper*, 79 Md. 400, 29 Atl. 611; *Callis v. Ridout*, 7 Gill & J. (Md.) 1; *Bell v. Webb*, 2 Gill (Md.) 163; *Chapin v. Weed, Clarke* (N. Y.) 464; *Newcomb v. Brooks*, 16 W. Va. 32.

²³In *re Boles* (1902), 1 Ch. 244; *Chatham Nat. Bank v. McKeen*, 24 Can. Sup. Ct. 348; *In re Mabou Coal & Co.*, 27 N. S. 305; *Wright v. Campbell*, 27 Ark. 637; *Bush v. Sherman*, 80 Ill. 160; *Munn v. Burges*, 70 Ill. 604; *Boynton v. Brastow*, 53 Maine 362; *Wortman v. Skinner*, 12

N. J. Eq. 358; *Debevoise v. Sandford*, 1 Hoffm. (N. Y.) 192; *Bruner v. Finley*, 187 Pa. St. 389, 41 Atl. 334; *Painter v. Henderson*, 7 Pa. St. 48; *Hallman's Estate*, 13 Phila. (Pa.) 562, 34 Leg. Int. (Pa.) 169; *Britton v. Lewis*, 8 Rich. Eq. (S. Car.) 271; *Stephen v. Beall*, 22 Wall. (U. S.) 329, 22 L. ed. 786.

²⁴See ante, chapters 4 and 7, Fraud, and also Duress and Undue Influence. See also, *Bowes v. Toronto*, 11 Moo. P. C. 463; *Cook v. Collinridge*, 27 Beav. 456; *Bush v. Sherman*, 80 Ill. 160; *Munn v. Burges*, 70 Ill. 604; *Walker v. Carrington*, 74 Ill. 446; *Boehlert v. McBride*, 48 Mo. 505; *Stephens v. Beall*, 22 Wall. (U. S.) 329, 22 L. ed. 786; *Oberlin College v. Blair*, 45 W. Va. 812, 32 S. E. 203.

²⁵*Campbell v. Walker*, 5 Ves. Jr. 678, 5 R. R. 135. See *Rice v. Clegghorn*, 21 Ind. 80; *Frazier v. Jeakins*, 64 Kans. 615, 68 Pac. 24, 57 L. R. A. 575; *Prichard v. Farrar*, 116 Mass. 213; *Morse v. Hill*, 136 Mass. 60; *Scott v. Gamble*, 9 N. J. Eq. 218; *Scholle v. Scholle*, 101 N. Y. 167, 4 N. E. 334; *Corbin v. Baker*, 56 App. Div. (N. Y.) 35, 67 N. Y. S. 249, 8 N. Y. Ann. Cas. 435, affd. 167 N. Y. 128, 60 N. E. 332; *Patterson v. Lennig*, 118 Pa. St. 571, 12 Atl. 679; *Hallman's Estate*, 13 Phila. (Pa.) 562; *Felkner v. Dooly*, 27 Utah 350, 75 Pac. 854. The cestui que trust may ratify the purchase by the trustee of the trust property if he is sui juris and is fully apprised of his rights and has knowledge of all the material facts relating to the transaction.

good faith for furtherance of the trust.²⁶ Thus, he is entitled to be allowed attorney's fees, under proper circumstances, when it is necessary to protect the trust fund.²⁷ It is also proper that he be reimbursed for whatever legitimate expenses he has incurred in executing the trust.²⁸ By a rule prevalent in the majority of the states a trustee who has faithfully performed his duties is allowed a reasonable compensation for his services, notwithstanding the instrument creating the trust makes no provision for compensation and there is no statute regulating or providing for it.²⁹

Walker v. Symonds, 3 Swanst. 1; Newton v. Rebanack, 90 Mo. App. 650; Boerum v. Schenck, 41 N. Y. 182; Beeson v. Beeson, 9 Pa. St. 279.

²⁶In re Leslie, 23 Ch. Div. 552; In re Pumfrey, 22 Ch. Div. 255; Hughes-Hallett v. Indian Mammouth Gold Mines Co., 22 Ch. Div. 561; In re Winchilsea, 39 Ch. Div. 168; Re Exhall Coal Co., 35 Beav. 449; Darke v. Williamson, 25 Beav. 622; Balsh v. Hyham, 2 P. Wms. 453; Ellig v. Naglee, 9 Cal. 683; Stewart v. Lellows, 128 Ill. 480, 20 N. E. 657; Bradford v. Clayton, 18 Ky. L. 1043, 39 S. W. 40; McCall v. Burk, 76 S. W. 177, 25 Ky. L. 643; Winslow v. Young, 94 Maine 145, 47 Atl. 149; Pratt v. Thornton, 28 Maine 355, 48 Am. Dec. 492; Wilson v. Welles, 79 Minn. 53, 81 N. W. 549; Haydel v. Hurck, 72 Mo. 253; Olson v. Lamb, 56 Nebr. 104, 76 N. W. 433, 71 Am. St. 670; Mathews v. Draguad, 3 Desaus. (S. Car.) 25; Case v. Kelly, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. 216; Dickel v. Smith, 42 W. Va. 126, 24 S. E. 564; Fuller v. Abbe, 105 Wis. 235, 81 N. W. 401.

²⁷Fox v. Fox, 250 Ill. 384, 95 N. E. 498.

²⁸Jones v. Dawson, 19 Ala. 672; Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118; Balloch v. Hooper, 6 Mackey (17 D. C.) 421, affd. 146 U. S. 363, 26 L. ed. 1008, 13 Sup. Ct. 128; Johnston v. Fletcher, 32 Ill. App. 589; State v. Windle, 156 Ind. 648, 59 N. E. 276; Adams v. La Rose, 75 Ind. 471; Smith v. Walker, 49 Iowa 289; Bradford v. Clayton, 18 Ky. L. 1043, 39 S. W. 40; Second Unitarian Society v. Woodbury, 14 Maine 281; Spindler v. Atkinson, 3 Md. 409, 56 Am. Dec. 755; Thomas v. Goodwin, 12

Mass. 140; Truesdale v. Philadelphia Trust & Co., 63 Minn. 49, 65 N. W. 133; Haydel v. Hurck, 72 Mo. 253; Fearn v. Mayers, 53 Miss. 458; Mulford v. Minch, 11 N. J. Eq. 16; Matter of Nesmith, 140 N. Y. 609; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Matthews v. McPherson, 65 N. Car. 189; Mannix v. Purcell, 46 Ohio St. 102, 19 N. E. 572, 2 L. R. A. 753, 15 Am. St. Rep. 562; Harper's Appeal, 64 Pa. St. 315; Myers v. Myers, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648; Rensselear & Co. v. Miller, 47 Vt. 146; Harrison v. Manson, 95 Va. 593, 29 S. E. 420.

²⁹Harris v. Martin, 9 Ala. 895; Muscogee Lumber Co. v. Hyer, 18 Fla. 698, 43 Am. Rep. 332; Premier Steel Co. v. Yandes, 139 Ind. 307, 38 N. E. 849; Hendrix's Exrs. v. Hardin, 5 Ky. L. 333; Phillips' Admr. v. Bustard, 1 B. Mon. (Ky.) 348; Northern Cent. R. Co. v. Keighler, 29 Md. 572; Bentley v. Shreve, 2 Md. Ch. 215; Winder v. Difenderffer, 2 Bland (Md.) 166; Urann v. Coates, 117 Mass. 41; Longley v. Hall, 11 Pick. (Mass.) 120; Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. 400; Niolon v. McDonald, 71 Miss. 337, 13 So. 870, 42 Am. St. 466; Maginn v. Green, 67 Mo. App. 616; Olson v. Lamb, 56 Nebr. 104, 76 N. W. 433, 71 Am. St. 670; Warbass v. Armstrong, 10 N. J. Eq. 263; Ingram v. Kirkpatrick, 8 Ired. Eq. (43 N. Car.) 62; Sherrill v. Shuford, 6 Ired. Eq. (41 N. Car.) 228; Boyd v. Hawkins, 17 N. Car. 329; Hanna v. Clark, 204 Pa. St. 145, 53 Atl. 757; In re Dorrance, 186 Pa. St. 64, 40 Atl. 149; In re Heckert's Appeal, 24 Pa. St. 482; Barney v.

By the English rule, which has been adopted in some states of the Union, trustees can recover compensation for services rendered only when such compensation is provided for in the trust instrument or by special agreement.³⁰

§ 509. Powers of trustee.—The powers of a trustee are either general or special. The general powers of a trustee are those such as are deemed by law incident to the office of trustee. Special powers are those conferred by the settler himself by the express provisions of the instrument whereby he creates such trust.³¹ A trustee is bound by the directions contained in the trust instrument. His powers do not depend on a rule of law but on the interpretation of the trust instrument with the settler's intention.³² The power so conferred is strictly construed. Consequently a power to sell does not include a power to mortgage.³³ Generally speaking a trustee has such powers over the subject-matter of a trust as will enable him to carry out the legal purposes and intent of the settler as indicated by the directions, nature and purpose of the settlement.³⁴

Saunders, 16 How. (U. S.) 535, 14 L. ed. 1047; Hubbard v. Fisher, 25 Vt. 539; Miller v. Beverly, 4 Hen. & M. (Va.) 415; Granberry's Exr. v. Granberry, 1 Wash. (Va.) 246, 1 Am. Dec. 455. See also, *In re Coubourg Town Trust*, 22 Grant Ch. (U. C.) 377; *Bald v. Thompson*, 17 Grant Ch. (U. C.) 154; *In re Toronto Harbour Comrs.*, 28 Grant Ch. (U. C.) 195; *Southern R. Co. v. Glenn's Admr.*, 98 Va. 309, 36 S. E. 395.

³⁰ *In re Ormsby*, 1 Ball. & C. 189; *Brocksope v. Barnes*, 5 Madd. 90; *Robinson v. Pett*, 3 P. Wms. 249; *In re Bignell* (1892), 1 Ch. 59; *Douglas v. Archbutt*, 2 DeG. & J. 148; *Nicholson v. Tutin*, 3 Jur. (N. S.) 235; *Bainbridge v. Blair*, 3 Beav. 421; *Barney v. Saunders*, 16 How. (U. S.) 535, 14 L. ed. 1047; *Biscoe v. State*, 23 Ark. 592; *Kendall v. New England Carpet Co.*, 13 Conn. 383; *State v. Platt*, 4 Harr. (Del.) 154; *Fox v. Fox*, 250 Ill. 384, 95 N. E. 498; *Lehman v. Rothbarth*, 159 Ill. 270, 42 N. E. 777; *Buckingham v. Morrison*, 136 Ill. 437, 27 N. E. 65; *Cook v. Gilmore*, 133 Ill. 139, 24 N. E. 524; *Payson v. Ross*, 77 Ill. App. 635; *Hough v.*

Harvey, 71 Ill. 72; *Heffron v. Gage*, 44 Ill. App. 147, *affd.*, in 149 Ill. 182, 36 N. E. 569; *Huggins v. Rider*, 77 Ill. 360; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Warbass v. Armstrong*, 10 N. J. Eq. 263; *State Bank v. Marsh*, 1 N. J. Eq. 288; *Gilbert v. Sutliff*, 3 Ohio St. 129; *Charleston College v. Willingham*, 13 Rich. Eq. (S. Car.) 195.

³¹ *Am. & Eng. Ency. of Law*, vol. 28, p. 981.

³² *Merchants' Loan & Co. v. Northern Trust Co.*, 250 Ill. 86, 95 N. E. 59.

³³ *Hamilton v. Hamilton*, 149 Iowa 321, 128 N. W. 380.

³⁴ See *Thomas v. Davis*, 6 Ala. 113; *Murphy v. Delano*, 95 Maine 229, 49 Atl. 1053, 55 L. R. A. 727; *In re Reynolds*, 2 Ohio Dec. 11. "Where a trustee conforms with the provisions of the trust in their true spirit and meaning, he has authority 'to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual.'" *Kipp v. O'Melveny*, 2 Cal. App. 142, 83 Pac.

§ 510. **Personal liability of trustee.**—It may be said generally of the trustee's personal liability that a trustee is not an insurer of trust funds against the possibility of loss. His undertaking is personal, requiring of him good faith and reasonable diligence, and if these requirements be met he is not liable for losses which may be sustained. The law requires a trustee to act with fidelity in relation to the trust and to exercise the same measure of diligence that a man of ordinary prudence may be expected to exercise in the care of his property under the same circumstances.⁸⁵ Numerous cases might be cited which in effect state the rule as above set out, but it is believed that it is so general in its nature as to be of little value when applied to the specific case.⁸⁶

264. See further on this subject in the two succeeding sections of this chapter.

⁸⁵ *Charitable Corp. v. Sutton*, 2 Atk. 400; *Bell v. Turner*, 2 Ch. D. 409; *Taylor v. Magrath*, 10 Ont. 669; *Stewart v. Snyder*, 27 Ont. App. 423; *Hill v. Jones*, 65 Ala. 214; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Pettyjohn v. Liebscher*, 92 Ga. 149, 17 S. E. 1007; *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; *Morrow v. Saline County*, 21 Kans. 484; *Cromie v. Bull*, 81 Ky. 646, 5 Ky. L. 735; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Norris v. Lantz*, 18 Md. 260; *Barrell v. Joy*, 16 Mass. 221; *Parsons v. Winslow*, 16 Mass. 361; *Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449; *Barr v. Lewis*, 71 Miss. 727, 15 So. 796; *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298; *Sherwood v. Saxton*, 63 Mo. 78; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Hamburgh Mfg. Co. v. Edsall*, 12 N. J. Eq. 392; *Childs v. Jones*, 41 N. J. Eq. 74, 3 Atl. 86; *Litchfield v. White*, 7 N. Y. 438, 3 Sandf. Ch. (N. Y.) 545, 57 Am. Dec. 534; *Hun v. Carey*, 82 N. Y. 65, 59 How. Pr. (N. Y.) 439, 37 Am. Rep. 546; *Purdy v. Lynch*, 145 N. Y. 462, 40 N. E. 232; *Whitford v. Foy*, 65 N. Car. 265; *Bason v. Harden*, 72 N. Car. 287; *In re Adam's Estate*, 221 Pa. 77, 70 Atl. 436, 128

Am. St. 727; *In re Old's Estate*, 176 Pa. St. 150, 34 Atl. 1022; *In re Hart's Estate*, 203 Pa. St. 488, 53 Atl. 367; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260; *State v. McAuley*, 4 Heisk. (Tenn.) 424; *Finlay v. Merriman*, 39 Tex. 56; *Elliott v. Carter*, 9 Gratt. (Va.) 541; *Lovett v. Thomas*, 81 Va. 245; *Key v. Hughes' Exrs.*, 32 W. Va. 184, 9 S. E. 77; *Dickel v. Smith*, 42 W. Va. 126, 24 S. E. 564; *Wilcox v. Bates*, 45 Wis. 138; *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708.

⁸⁶ "There is little authority to show that a trustee may excuse himself by showing that he has conducted the business of investing his trust funds in the same manner that an ordinarily prudent man of business might do with his own property. The trustee must conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety, of the capital invested. A business man of more than average caution may, and often does, assume intentional risks in the investment of his own property; for the sake of obtaining a greater than an ordinary

§ 510a. **When trustee's contract binds estate or cestui que trust.**—Unless such power is given him by the instrument creating the trust a trustee has no authority to bind the trust estate by his executory contract.³⁷ Thus it has been held that a trustee has no authority to bind the estate or subject the property or assets thereon to execution by giving a judgment bond in a matter in which the trust estate is not interested.³⁸ The general rule has its exception, however; thus it has been said that when a trustee is authorized to make an expenditure and he has no trust funds, and the expenditure is necessary for the protection, reparation or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement, make the expenditure a charge upon the trust estate.³⁹ It thus appears that when the agreement is for the benefit or the preservation of the estate, it may be binding thereon.⁴⁰ When the instrument for which the trust is created gives the trustee the power to bind the estate, his contracts made in conformity with such provision will be binding.⁴¹ Thus, if he is given power to

income, he will often invest in such a manner that the risk of ultimate loss is considerable, and such speculative use of his property will not be regarded as illegitimate, nor as deserving of any censure. No such risk is permitted to the trustee." *Indiana Trust Co. v. Griffith (Ind.)*, 95 N. E. 573. See also, *Merchants' Loan & Co. v. Northern Trust Co.*, 250 Ill. 86, 95 N. E. 59. It has been held that the direction of the testatrix to use "their best skill and discretion" did not enlarge the powers or discretion of the trustees. *Michigan Home & C. Soc. v. Corning*, 164 Mich. 395, 129 N. W. 686. See further as to the trustee's personal liability in the next section of this chapter.

³⁷ *Sanders v. Houston Guano & Warehouse Co.*, 107 Ga. 49, 32 S. E. 610; *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. 63; *Flournoy v. Johnson & Tingley*, 7 B. Mon. (Ky.) 693; *Hines v. Potts*, 56 Miss. 346; *Taylor v. Davis*, 110 U. S. 330, 28 L. ed. 163. "The general rule undoubtedly is that a trustee cannot charge the trust estate

by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable and the remedy is against him personally." *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111.

³⁸ *Williams v. Tozer*, 185 Pa. St. 302, 39 Atl. 947, 64 Am. St. 650.

³⁹ *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111. See also, *Johnson v. Leman*, 30 Ill. App. 370, *affd.*, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. 63.

⁴⁰ See *Sanders v. Houston Guano & Warehouse Co.*, 107 Ga. 49, 32 S. E. 610. "Whenever any law, statutory or other, imposes a personal duty upon a guardian, executor or trustee to pay money of his own for the benefit of the estate in his care, it follows under the general principles of jurisprudence, without special statutory provision, that the money so paid will be chargeable to the estate and that in equity, at least, reimbursement will be enforced." *City of Bangor v. Peirce*, 106 Maine 527, 76 Atl. 945, 138 Am. St. 363.

⁴¹ *Wagon v. Pease*, 104 Ga. 417, 30

carry on a particular business he may bind the estate for the necessary debts incurred in the conduct of such business.⁴² It has also been held that the power to mortgage confers upon a trustee the right to bind the trust estate for a building and loan association contract.⁴³ The contract executed cannot, however, exceed the power expressly or impliedly conferred upon the trustee. Thus he may be given authority to execute a lease, but in the absence of an express power from the instrument itself the trustee cannot lease the property for a period beyond the life of the trust estate.⁴⁴

The trustee does not have the power to impose a personal liability upon the cestui que trust,⁴⁵ such as liability for the fees of an attorney employed by the trustee.⁴⁶ Even when authorized to do so, if he borrows money and gives a note as trustee, the note is his individual note.⁴⁷ The cestui que trust may, however, be liable where he gives the trustees special authority to contract in his behalf.⁴⁸ This liability rests, however, on the ground that the principal is liable for the acts of his agent and does not arise from the relation of trustee and cestui que trust, or on the ground that he has made a valid ratification of the trustee's unauthorized act.⁴⁹

S. E. 895; *Riggins v. Adair*, 105 Ga. 727, 31 S. E. 743; *Bailie v. Carolina &c. Loan Assn.*, 100 Ga. 20, 28 S. E. 274; *Judge v. Pfaff*, 171 Mass. 195, 50 N. E. 524; *Packard v. Kingman*, 109 Mich. 497, 67 N. W. 551; *United States Trust Co. v. Roche*, 116 N. Y. 120, 22 N. E. 265.

⁴² *Wadsworth, Holland & Co. v. Arnold*, 24 R. I. 32, 51 Atl. 1041. See also, *Sanders v. Houston Guano & Warehouse Co.*, 107 Ga. 49, 32 S. E. 610.

⁴³ *Cottingham v. Equitable &c. Loan Assn.*, 114 Ga. 944, 41 S. E. 72.

⁴⁴ *Hubbell v. Hubbell*, 135 Iowa 637, 113 N. W. 512, 13 L. R. A. (N. S.) 496n. In the above case it was held that the trustee did not have the power to execute a lease for ninety-nine years. The above case is a valuable one on the subject, reviewing most of the authorities. *Griffen v. Ford*, 14 N. Y. Super. Ct. 123; *In re 110th Street*, 81 App. Div. (N. Y.) 27, 81 N. Y. S. 32. It has been held

that a trustee of real estate for a life tenant and remainderman, with power to manage, lease, and control it for the purpose of paying taxes, expenses and necessary repairs and pay the profits to the life tenant, was not thereby authorized to grant the right to take gas and oil from the property where no wells were upon it at the time the trust was created. *Ohio Oil Co. v. Daughetee*, 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108.

⁴⁵ *Hartley v. Phillips*, 198 Pa. St. 9, 47 Atl. 929.

⁴⁶ *Truesdale v. Philadelphia Trust, Safe &c. Co.*, 63 Minn. 49, 65 N. W. 133.

⁴⁷ *Dunham v. Blood* (Mass.), 93 N. E. 804.

⁴⁸ *Hanover Nat. Bank v. Cocke*, 127 N. Car. 467, 47 S. E. 507.

⁴⁹ *Newell v. Hadley*, 206 Mass. 335, 92 N. E. 507; *Ungrich v. Ungrich*, 141 App. Div. (N. Y.) 485, 126 N. Y. S. 419.

§ 511. **When trustee is personally liable.**—It has already been seen that the law requires a trustee to exercise good faith and reasonable diligence, and the degree of diligence usually required is that exercised by a man of ordinary prudence in the care of his own property under the same circumstances.⁵⁰ A trustee will not, however, be permitted to shield himself by pleading that he acted in good faith when it appears that his mistake was due to gross ignorance and that it might have been avoided by the exercise of ordinary intelligence.⁵¹ A trustee is not surety for his cotrustee, and in the absence of negligence on his part will not be liable for trust funds received by his cotrustee.⁵² He is, however, required to exercise a general superintendence and care over the trust, and if he learns of any facts tending to call to his attention the mismanagement or misapplication of the trust funds by his cotrustee it is his duty to intervene and prevent a devastavit.⁵³ A trustee is also liable if he transcends the powers conferred upon him by the instrument creating the trust or those given him by law, notwithstanding he may have acted in perfect good faith.⁵⁴ Thus should the trustee invest the trust funds in a manner prohibited by statute he will be liable for any loss which may result notwithstanding he may have acted in good faith.⁵⁵ It is necessary for a trustee to get an order from the court before investing the funds of the ward only when he is required to do so by statute.⁵⁶ But when such investments are made without

⁵⁰ See ante, § 506, Rights, Powers and Liabilities of Trustees.

⁵¹ Hun v. Cary, 82 N. Y. 65, 59 How. Pr. (N. Y.) 439, 37 Am. Rep. 546; Gilbert v. Sutliff, 3 Ohio St. 129.

⁵² Bruen v. Gillet, 115 N. Y. 10, 21 N. E. 676, 4 L. R. A. 529, 12 Am. St. 764; Adams Estate, 221 Pa. 77, 70 Atl. 436, 128 Am. St. Rep. 727; Estate of Fesmire, 134 Pa. St. 67, 19 Atl. 502, 19 Am. St. 676.

⁵³ In re Adams' Estate, 221 Pa. 77, 70 Atl. 436, 128 Am. St. 727. The above case holds that the innocent trustee is not excused by the fact that he informed the cestui que trust of misconduct on the part of his co-trustee; after acquiring knowledge

of such misconduct he should have taken steps to prevent loss.

⁵⁴ Wightwick v. Lord, 6 H. L. Cas. 217; Hogg v. Hoag, 107 Fed. 807; Green v. Putney, 1 Md. Ch. 262; Loud v. Winchester, 64 Mich. 23, 30 N. W. 896; Vernon v. Tippah County Board of Police, 47 Miss. 181; Hun v. Cary, 82 N. Y. 65, 59 How. Pr. (N. Y.) 439, 37 Am. Rep. 546; Atkinson v. Beckett, 34 W. Va. 584, 12 S. E. 717. See also, Atty-Gen. v. Greenfield Library Assn., 135 Mass. 563.

⁵⁵ Robertson v. Robertson's Trustees, 130 Ky. 293, 113 S. W. 138, 132 Am. St. 368n.

⁵⁶ Indiana Trust Co. v. Griffith (Ind.), 95 N. E. 573.

the sanction of a court of competent jurisdiction the risk is with the guardian.⁵⁷

Unless a contrary intention is clearly manifested a trustee will render himself personally liable on contracts made in his own name. He is individually liable⁵⁸ notwithstanding he may refer to himself as trustee in the body of the agreement⁵⁹ or adds the word "trustee" to his name.⁶⁰ Thus he has been held liable on his contract of indorsement.⁶¹ Even though the instrument creating the trust provides that the trustee shall have power to bind the estate he will be held liable unless the contract provides against such liability.⁶² Nor does the fact that the trust deed provides that the trustee shall be free from personal liability,

⁵⁷ *Indiana Trust Co. v. Griffith* (Ind.), 95 N. E. 573. In the above case the statute provided that the directors of any corporation acting as trustee should have discretionary power to invest all moneys received in any such personal securities as are not hereinafter expressly prohibited. The court held that the use of "discretionary power" did not render the guardian any the less liable on failure to properly invest and manage the trust, and said: "Indeed the care to be exercised must be commensurate with the freedom given." See also, the case of *In re Hirsch's Estate*, 116 App. Div. (N. Y.) 367, 101 N. Y. S. 893, in which the trustees were held liable for stock speculation, notwithstanding the instrument creating the trust gave them power to invest the trust funds in any securities or other form of investment which they might in their discretion deem proper and advisable, irrespective of the law governing investments by executors and trustees.

⁵⁸ *Bloom v. Wolfe*, 50 Iowa 286; *Farmer's and Trader's Bank v. Fidelity Deposit Co.*, 108 Ky. 384, 22 Ky. L. 22, 56 S. W. 671; *Gill v. Carmine*, 55 Md. 339; *Odd Fellows' Hall Association v. McAllister*, 153 Mass. 292, 26 N. E. 862, 11 L. R. A. 172; *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083; *Mitchell v. Whitlock*, 121 N. Car. 166, 28 S. E. 292; *Wells-Stone Mercantile Co. v. Grover*, 7 N. Dak. 460, 75 N. W. 911, 41 L. R. A. 252; *Ogden City St. Ry. Co. v.*

Wright, 31 Ore. 150, 49 Pac. 975; *Fehlinger v. Wood*, 134 Pa. St. 517, 19 Atl. 746; *McDowall v. Reed*, 28 S. Car. 466, 6 S. E. 300; *Taylor v. Davis*, 110 U. S. 330, 28 L. ed. 163; *Hewitt v. Phelps*, 105 U. S. 393, 26 L. ed. 1072; *Duvall v. Craig*, 2 Wheat. (U. S.) 45, 4 L. ed. 180; *McIntyre v. Williamson*, 72 Vt. 183, 47 Atl. 786, 82 Am. St. 929. "When a trustee contracts as such, unless he is bound no one else is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee." *Taylor v. Davis' Admrs.*, 110 U. S. 330, 335, 28 L. ed. 163, quoted *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286, 54 Am. St. 653.

⁵⁹ *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922.

⁶⁰ Individually liable notwithstanding the note was signed, "*Estate of William R. Clark*, by *William R. Clark, Jr., Trustee*." *Dunham v. Blood*, 207 Mass. 512, 93 N. E. 804; *Ogden City St. R. Co. v. Wright*, 31 Ore. 150, 49 Pac. 975; *McIntyre v. Williamson*, 72 Vt. 183, 47 Atl. 786, 82 Am. St. 929. *Contra*, *Printup v. Trammel*, 25 Ga. 240.

⁶¹ *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. 830. In the above case it appears that he indorsed as trustee negotiable paper payable to himself as trustee.

⁶² *Connally v. Lyons*, 82 Tex. 664, 18 S. W. 799, 27 Am. St. 935.

i. e. under the deed, limit such trustee's authority to contract personally if he sees fit.⁶³ This provision against immunity must be made at the time the contract was entered into. A subsequent agreement not to hold the trustee liable is unenforceable when without consideration.⁶⁴ A trustee is not, however, held personally liable on obligations incurred by his predecessor for the benefit of the estate.⁶⁵ Other cases hold that while the trustee cannot create a debt against the trust estate, yet the creditors have the right to subject the rents or profits of such estate to the payment of their claims to the extent that they were beneficial to the trust,⁶⁶ or be subrogated to the trustee's claim against the estate.⁶⁷ This latter is especially true where the trustee is insolvent⁶⁸ or a nonresident.⁶⁹

⁶³ *American &c. Smelting Co. v. Converse*, 175 Mass. 449, 56 N. E. 594.

⁶⁴ *New v. Nicoll*, 73 N. Y. 127, 79 Am. Rep. 111.

⁶⁵ *Baxter v. McDonnell*, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670.

⁶⁶ *Neal v. Bleckley*, 51 S. Car. 506, 29 S. E. 249. To same effect, *Sanders v. Warehouse Guano & Co.*, 107 Ga. 49, 32 S. E. 610; *Kupferman v. McGehee*, 63 Ga. 250.

⁶⁷ *Mosely v. Norman*, 74 Ala. 422; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15.

⁶⁸ *Clapton v. Gholson*, 53 Miss. 466.

⁶⁹ *Norton v. Phelps*, 54 Miss. 467.

In a note to *Johnson v. Leman*, 19 Am. St. 71, Mr. Freeman states the general rule in regard to the rights and duties of trustees in this class of cases as follows: "In addition to what has already been incidentally said, it may be stated as a well-established doctrine, universally applied, that a trustee has a right to make advances or necessary repairs or improvements for the benefit of the trust estate against which he has a lien for reimbursement of such advances, or costs and expenses, which he may enforce before he can be compelled to surrender the estate, unless prohibited either expressly or by necessary implication from incurring such expenses by the terms of the instrument creating the trust. * * * Trustees invested with general powers of

control and management are not bound to strict limitations; they are justified in making ordinary repairs and improvements and insuring the property, and are allowed to hold the estate until reimbursed; nor does the right of reimbursement depend upon the knowledge or consent of the cestui que trust." So in 2 *Pomeroy's Equity Jurisprudence*, § 1085, it is stated as the law, both in England and in this country, that a trustee will be allowed "all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in the absence of any such directions, all expenses reasonably necessary for the security, protection and preservation of the trust property, or for the prevention of a failure of the trust. * * * Where a trustee properly advances money for any of the above mentioned objects, so that he is entitled to reimbursement, he also has a lien as security for the claim, either upon the corpus of the trust property or upon the income, according as the advancement is for the benefit of the life tenant, or for both the life tenant and remainderman: *Hill on Trustees* 647, and notes; 2 *Perry on Trusts*, § 913, and notes." *Shirkey v. Kirby*, 110 Va. 455, 56 S. E. 40, 135 Am. St. 949. As to the right of a trustee to a lien on trust property for expenditures made for him, see *Johnson v. Leman*, 30 Ill.

§ 512. **Executors and administrators—Authority generally.**—The definition given of a trustee at the beginning of the chapter would also include executors and administrators; their rights, duties and obligations are very similar to those of a trustee. In all essential respects they are regarded in courts of equity as trustees and are frequently called trustees and held to the responsibilities and duties of trustees by the courts.⁷⁰ Under the common-law rule the power and authority of an administrator or executor is confined within the jurisdiction of the sovereignty by virtue of whose law he is appointed.⁷¹ An executor or administrator is invested with the legal title to the personal property of the estate but he holds that title charged with the duty of managing and disposing of the same in accordance with the provisions of the will or the law. His duties are trust duties.⁷² An administrator has only such powers as are conferred upon him by statutory enactment; an executor only such as are expressed in or implied from the will creating him executor. It is a general rule, however, subject to but few exceptions, that a personal representative cannot charge the estate by contracts originating with himself, although for the benefit and in the interest and on behalf of the estate, and that for such contracts and claims the remedy is against the executor or administrator in his private capacity.⁷³

App. 370; *affd.* in 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. 63.

⁷⁰ *McKeigue v. Chicago & N. W. R. Co.*, 130 Wis. 543, 110 N. W. 384, 11 L. R. A. (N. S.) 148n, 118 Am. St. 1038. See also, *Reeder v. Meredith*, 78 Ark. 111, 93 S. W. 558, 115 Am. St. 22; *Flowers v. Flowers*, 84 Ark. 557, 106 S. W. 949, 120 Am. St. 84. "The purpose and object of requiring administration to be had upon the estates of persons dying intestate is to provide for and insure, first, the conservation of all the personal assets of the estate, including the collection of all debts due the decedent; second, the payment of all the debts of the decedent; and, third, the proper distribution of the residue among heirs at law, according to the statute of descent." *Cotterell v. Coen*, 246 Ill. 410, 92 N. E. 911.

⁷¹ *Brown v. Smith*, 101 Maine 545, 64 Atl. 915, 115 Am. St. 339. The statutes of the various states usually provide for the granting of ancillary administration on the estate of a non-resident. See cases above cited and statutes of the various states.

⁷² *McKeigue v. Chicago & C. R. Co.*, 130 Wis. 543, 110 N. W. 384, 11 L. R. A. (N. S.) 148n, 118 Am. St. 1038. An executor does not take title to his decedent's real estate unless expressly or impliedly given him by the will. *Emmerson v. Merritt* (Ill.), 94 N. E. 955. To same effect, *Coles' Heirs v. Jamerson* (Va.), 71 S. E. 618. See also, *post*, § 522, *Guardians*.

⁷³ *Thompson v. Mann*, 65 W. Va. 648, 64 S. E. 920, 22 L. R. A. (N. S.) 1094n, 131 Am. St. 987. "Aside from the powers conferred by the probate court, executors have such powers only as are given by the will."

§ 513. **Power to bind the estate by contract—Illustrative cases.**—Thus, they do not have the power to change the form or character of a valid and pre-existing liability or to incur any additional liability,⁷⁴ notwithstanding such contract might be beneficial to the estate. This rule prohibits the executor or administrator from giving⁷⁵ or indorsing notes of the estate⁷⁶ to pay the debt of the estate. He cannot, it has been held, create a debt against the estate by accepting a draft⁷⁷ nor by giving a promissory note in payment of an obligation barred by the statute of limitation.⁷⁸ Contracts of an executor or administrator to pay for services rendered by an attorney for the benefit of the estate are personal and do not bind the estate.⁷⁹ Thus the estate is not bound

Wisdom v. Wilson (Tex. Civ. App.), 127 S. W. 1128. A personal representative may, however, be required to perform a valid subsisting contract entered into by his decedent before his death. *Macdonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912A, 417 and note.

⁷⁴ *Taylor v. Crook*, 136 Ala. 354, 34 So. 905, 96 Am. St. 26; *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, 54 Am. St. 292; *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695; *Schlicker v. Hemenway*, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. 116; *Taylor v. Mygatt*, 26 Conn. 184; *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 49 Am. St. 162; *Clark v. Ross*, 96 Iowa 402, 65 N. W. 340; *Chicago Lumber Co. v. Tomilson*, 54 Kans. 770, 39 Pac. 694; *Baker v. Moor*, 63 Maine 443; *Davis v. French*, 20 Maine 21, 37 Am. Dec. 36; *Durkin v. Langley*, 167 Mass. 577, 46 N. E. 119; *Kingman v. Soule*, 132 Mass. 285; *Luscomb v. Ballard*, 5 Gray (Mass.) 403, 66 Am. Dec. 374; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892, 4 Am. St. 867; *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352; *Stirling v. Winter*, 80 Mo. 141; *Richardson v. Palmer*, 24 Mo. App. 480; *Doolittle v. Willet*, 57 N. J. L. 398, 31 Atl. 385; *Le Baron v. Barker*, 143 App. Div. (N. Y.) 492, 127 N. Y. S. 979; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; *Austin v. Munro*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 N. Y. 315; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep.

378; *Patterson v. Craig*, 1 Baxt. (Tenn.) 291; *Fine v. Freeman*, 83 Tex. 529, 17 S. W. 783, 18 S. W. 963; *Rich v. Sowles*, 64 Vt. 408, 28 Atl. 723, 15 L. R. A. 850; *Adams v. Adams*, 16 Vt. 228; *Fitzhugh v. Fitzhugh*, 11 Grat. (Va.) 300, 62 Am. Dec. 653.

⁷⁵ *Christian v. Morris*, 50 Ala. 585; *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695; *Cornthwaite v. First Nat. Bank*, 57 Ind. 268; *Valley Nat. Bank v. Crosby*, 108 Iowa 651, 79 N. W. 383; *Rice v. Strange*, 24 Ky. L. 1945, 72 S. W. 756; *Ellis' Admr. v. Merri-man*, 5 B. Mon. (Ky.) 296; *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215; *First National Bank v. Collins*, 17 Mont. 433, 43 Pac. 499, 52 Am. St. 695; *Morehead Banking Co. v. Morehead*, 122 N. Car. 318, 30 S. E. 331; *Smith v. Hayward*, 5 Ohio N. P. 501; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804; *Gregory v. Leigh*, 33 Tex. 813; *Robertson v. Breckenridge's Admr.*, 98 Va. 569, 37 S. E. 8.

⁷⁶ *Johnston v. Union Bank*, 37 Miss. 526.

⁷⁷ *Perry v. Cunningham*, 40 Ark. 185.

⁷⁸ *In re Claghorn's Estate*, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. 680. But see vol. 3, chapter on Statute of Limitations.

⁷⁹ *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *Bryan v. Craig*, 64 Ark. 438, 44 S. W. 348; *Pike v. Thomas*, 65 Ark. 437, 47 S. W. 110; *In re Page*, 57 Cal. 238; *Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633; *McKee v.*

for the payment of a contingent fee out of its assets.⁸⁰ Certain exceptions have been recognized to the rule that an executor or administrator cannot bind the estate for the payment of attorney's fees, as where the personal representative is insolvent,⁸¹ has died⁸² or resigned,⁸³ coupled with the fact that such former representative has failed to pay for such services, will entitle the attorney to proceed against the estate or the succeeding administrator. It has been held that the estate is not liable on the executor or administrator's contract to buy real estate,⁸⁴ nor for the value of property bought for the estate,⁸⁵ nor on his contract of war-

Soher, 138 Cal. 367, 71 Pac. 438; Lusk v. Patterson, 2 Colo. App. 306, 30 Pac. 253; Clark v. Sayre, 122 Iowa 591, 98 N. W. 484; Brown v. Quinton, 80 Kans. 44, 102 Pac. 242, 25 L. R. A. (N. S.) 71; Clopton v. Gholson, 53 Miss. 466; State v. Second Judicial District Ct., 25 Mont. 33, 63 Pac. 717; Wait v. Holt, 58 N. H. 467; Platt v. Platt, 105 N. Y. 488, 12 N. E. 22; Parker v. Day, 155 N. Y. 383, 49 N. E. 1046; In re Halsey, 13 Abb. N. Cas. (N. Y.) 353; Re O'Brien, 5 Misc. (N. Y.) 136, 25 N. Y. S. 704; Re Weisenbach, 3 Dem. Surr. (N. Y.) 145; Re McDonough, 132 App. Div. (N. Y.) 614, 117 N. Y. S. 258; Kessler v. Hall, 64 N. Car. 60; Lindsay v. Darden, 124 N. Car. 307, 32 S. E. 678; Thomas v. Moore, 52 Ohio St. 200, 39 N. E. 803; Mellen v. West, 5 Ohio C. C. 89; Waite v. Willis, 42 Ore. 288, 70 Pac. 1034; Besancon v. Wegner, 16 N. Dak. 240, 112 N. W. 965; In re Sullivan's Estate, 36 Wash. 217, 78 Pac. 945; Thompson v. Mann, 65 W. Va. 648, 64 S. E. 920, 22 L. R. A. (N. S.) 1094n, 131 Am. St. 987. See also, In re Bullion's Estate, 87 Nebr. 700, 128 N. W. 32, which holds the administrator as not entitled to credit for attorney's fees or other expenses incurred in defending a suit to which there was no meritorious defense. See, however, Nave v. Salmon, 51 Ind. 159; Long v. Rodman, 58 Ind. 58; Jackson v. Leech, 113 Mich. 391, 71 N. W. 846; Marx v. McMorran, 136 Mich. 406, 99 N. W. 396; Nichols v. Reyburn, 55 Mo. App. 1; State v. Walsh, 67 Mo. App.

348; Matson v. Pearson, 121 Mo. App. 120, 97 S. W. 983; In re Wilson's Appeal, 3 Walk. (Pa.) 216; In re Cook's Estate, 1 Phila. (Pa.) 408; Portis v. Cole, 11 Tex. 157.

⁸⁰ Tucker v. Grace, 61 Ark. 410, 33 S. W. 530; In re Page, 57 Cal. 238; Rickel v. Chicago, R. I. & P. R. Co., 112 Iowa 148, 83 N. W. 957; Platt v. Platt, 105 N. Y. 488, 12 N. E. 22; Thomas v. Moore, 52 Ohio St. 200, 39 N. E. 803. See, however, MacKie v. Howland, 3 App. (D. C.) 461; Stansell v. Lindsay, 50 Ga. 360; Lee v. Van Voorhis, 78 Hun (N. Y.) 575, 61 N. Y. St. 220, 29 N. Y. S. 571, affd., 145 N. Y. 603, 40 N. E. 164; In re McCullough's Estate, 31 Ore. 86, 49 Pac. 886; Thompson v. Nowlin, 51 W. Va. 346, 41 S. E. 178.

⁸¹ Clapp v. Clapp, 44 Hun (N. Y.) 451, 9 N. Y. St. 275; Sartorelli v. Ezagni, 64 Misc. (N. Y.) 115, 118 N. Y. S. 46; Miller v. Tracy, 86 Wis. 330, 56 N. W. 866.

⁸² Williams v. Walker, 31 Ga. 195. Contra, Besancon v. Wegner, 16 N. Dak. 240, 112 N. W. 965.

⁸³ Marvin's Estate, Myrick Probate Court Rep. (Cal.) 163; Contra, Fitzsimmons v. Safe Deposit & Co., 189 Pa. St. 514, 42 Atl. 41. See also, Stevenson v. Bruce, 10 Ind. 397.

⁸⁴ Wilson v. Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. 162.

⁸⁵ Daily v. Daily, 66 Ala. 266 (food for stock of estate); Yarborough v. Ward, 34 Ark. 204; Wilson v. Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. 162; Durkin v. Langley, 167 Mass. 577, 46 N. E. 119; West v. Dean, 15 Ohio C. C. 261.

ranty,⁸⁶ nor by his agreement to refund money received on the sale of certain property,⁸⁷ nor on his contract for services.⁸⁸

§ 514. Order of court—When it adds nothing to power of administrator.—Even an order of court does not confer the power to bind the estate by contract when the judge has no statutory authority to authorize such contract. The order of the judge in the absence of any statute adds nothing to the powers of the administrator.⁸⁹ Thus it has been held that the court had no power to fix the amount to be paid by an administrator for legal services.⁹⁰ The duties and powers of an administrator cannot be enlarged upon by a court of chancery and if it undertakes to confer upon him powers which are denied under the law, the decree of the court is a nullity.⁹¹

§ 515. Ratification of administrator's acts—Duties of administrator.—An administrator's unauthorized act may be ratified by the beneficiaries, but it is held that such ratification must be in toto, and when made is final.⁹² On the duties of an executor it may be said generally that both at common law and

⁸⁶ *Bauerle v. Long*, 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643; *Huffman v. Hendry*, 9 Ind. App. 324, 36 N. E. 727, 53 Am. St. 351; *Dunlap v. Robinson*, 12 Ohio St. 530; *Lockwood v. Gilson*, 12 Ohio St. 526; *Arnold v. Donaldson*, 46 Ohio St. 73, 18 N. E. 540.

⁸⁷ *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118.

⁸⁸ *In re Page*, 57 Cal. 238; *Dodson v. Nevitt*, 5 Mont. 518, 6 Pac. 358; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599. The foregoing, of course, has reference to those cases in which there is no statutory authority nor authority expressed in the will by which the executor or administrator was given the right to enter into any of the foregoing contracts.

⁸⁹ *Valley Nat. Bank v. Crosby*, 108 Iowa 651, 79 N. W. 383.

⁹⁰ *State v. Second Judicial District Court*, 25 Mont. 33, 63 Pac. 717. See, however, *In re Hite*, 155 Cal. 448, 101 Pac. 448; *In re Kasson*, 119 Cal. 489, 51 Pac. 706; *Scott v. Dailey*, 89 Ind. 477; *Jones v. Jones*, 19 Ky. L. 129,

39 S. W. 251; *Hoke v. Hoke*, 12 W. Va. 427.

⁹¹ *Alexander v. Herring* (Miss.), 55 So. 360. The above case holds that the chancery court could not authorize the administrator to engage in business.

⁹² *Wilson v. Stevens*, 129 Ala. 630, 29 So. 678, 87 Am. St. 86. It has been held that where an executor or administrator in good faith and in the exercise of ordinary care for the good of the beneficiaries and with their consent, carries on his decedent's business, the consenting beneficiaries cannot charge the representative with any loss which may arise therefrom. *Mathews v. Sheehan*, 76 Conn. 654, 57 Atl. 694, 100 Am. St. 1017. *In re Sparrow's Succession*, 39 La. Ann. 696, 2 So. 501; *Poole v. Munday*, 103 Mass. 174; *Swaine v. Hemphill*, 165 Mich. 561, 131 N. W. 68; *French v. Davis*, 38 Miss. 167; *Hibberd v. Hubbard*, 13 Pa. Dist. Ct. 12, revd. on other grounds, 211 Pa. St. 331, 60 Atl. 911.

under the statutes the executor succeeds to the possession of the testator and it is his duty to care for and preserve the property even before letters are issued to him.⁹³

§ 516. **Statutory authority.**—The powers of an executor or administrator are subject to statutory enlargement.⁹⁴ Statutory authority may be either express or implied, and the executor or administrator may contract within the limit of this express or implied authority.⁹⁵ Under such statutes it has been held that he might compromise claims,⁹⁶ consent to judgment being taken on a just claim,⁹⁷ and extend the time for the payment of an obligation binding upon the estate,⁹⁸ and it has been held that an executor might carry out a contract for the erection of a building, thus incurring expenses.⁹⁹ The statute may also give him power to employ an attorney¹ with² or without³ leave of court. The legislative enactment may also empower the executor to borrow money with the approval of a court of competent jurisdiction for the payment of debts, legacies, etc.⁴ The foregoing cases but illustrate the general rule which governs executors to the effect that if the thing promised is such as the executor is lawfully authorized or empowered to do or if he con-

⁹³ *Alerding v. Allison*, 170 Ind. 252, 83 N. E. 1006, 127 Am. St. 363. See *In re Hinchon*, 159 Cal. 755, 116 Pac. 47, 36 L. R. A. (N. S.) 303, holding that executors do not have the power to complete a building devised in an unfinished condition out of the funds of the estate except so far as contracts have already been let by the testator, but also stating that executors have the right and it is their duty to make such expenditures as are necessary to preserve the property left by the testator.

⁹⁴ See *MacKie v. Howland*, 3 App. (D. C.) 461; *Scott v. Meadows*, 16 Lea (Tenn.) 290; *Jack v. Cassin*, 9 Tex. Civ. App. 228, 28 S. W. 832; *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835.

⁹⁵ *Wilburn v. McCalley*, 63 Ala. 436; *Brown v. Eggleston*, 53 Conn. 110, 2 Atl. 321; *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352; *Price v. McIver*, 25 Tex. 769, 78 Am. Dec. 558.

⁹⁶ *Mulville v. Pacific & C. Ins. Co.*, 19 Mont. 95, 47 Pac. 650. "An executor or administrator has the power to settle or compromise claims for or against the estate, and a settlement made by him can be set aside only upon proof of bad faith or fraud." *Scully v. McGrath*, 201 N. Y. 61, 94 N. E. 195.

⁹⁷ *Sheldon v. Estate of Warner*, 59 Mich. 444, 26 N. W. 667.

⁹⁸ *Campbell v. Linder*, 50 S. Car. 169, 27 S. E. 648.

⁹⁹ *Bambrick v. Church Assn.*, 53 Mo. App. 225. Compare with *In re Hinchon*, 159 Cal. 755, 116 Pac. 47, 36 L. R. A. (N. S.) 303 and note.

¹ *Fenner v. McCann*, 49 La. Ann. 600, 21 So. 768.

² *Wassel v. Armstrong*, 35 Ark. 247.

³ *Baker v. Cauthorn*, 23 Ind. App. 611, 55 N. E. 963, 77 Am. St. 443; *Jackson v. Leech's Estate*, 113 Mich. 391, 71 N. W. 846.

⁴ *Hart v. Allen*, 166 Mass. 78, 44 N. E. 116.

tracts to do what he has a right or it is his duty to do in his official or representative capacity, then he is not personally bound, but instead his promise is enforceable against the estate.⁵

§ 517. **Powers given by will.**—The will may confer upon the executor power to bind the estate by contract. This power may be either expressed⁶ or implied.⁷ Thus authority to contract debts or borrow money is given where the testator authorizes his executor to carry on the deceased's business,⁸ or raise money,⁹ or operate a mine,¹⁰ or manage a plantation.¹¹ By some authorities it is held that under the power given an executor to borrow money to carry on the business of the deceased, the entire estate is bound for the repayment of money so borrowed.¹² The Supreme Court of Michigan has stated, however, "that where an administrator or executor, instead of closing out a business, continues it, even when authorized by will to do so, the trade debts will reach only the trade assets"; that is, property employed in the business or that resulted from doing the business.¹³ A power of sale, when not expressly given, will be implied from the

⁵ *Ashby v. Ashby*, 7 B. & C. 444; *Haynes v. Forshaw*, 11 Hare 93; *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352. In considering statutory power to bind the estate the distinction between an administrator and an executor must be borne in mind. The former is appointed by a court of competent jurisdiction and his rights, duties and obligations are statutory. On the other hand, the executor is appointed by the will of the deceased and such executor is in the main governed by the powers and restrictions which the testator has seen fit to impose upon him.

⁶ *Smith v. Courtney Exrs.*, 27 Ky. L. 642, 85 S. W. 1101; *Offutt v. Hall's Executors*, 27 Ky. L. 1072, 87 S. W. 785; *Brown v. Doherty*, 185 N. Y. 383, 78 N. E. 147, 113 Am. St. 915; *In re Watts' Estate*, 202 Pa. 85, 51 Atl. 588.

⁷ *Ames v. Holderbaum*, 44 Fed. 224; *Schlickman v. Citizen's Nat. Bank*, 139 Ky. 268, 129 S. W. 823, 29 L. R. A. (N. S.) 264; *Robinson v. Robinson*, 105 Maine 68, 72 Atl. 883, 32

L. R. A. (N. S.) 675n, 134 Am. St. 537.

⁸ *Schlickman v. Citizen's Nat. Bank*, 139 Ky. 268, 129 S. W. 823, 29 L. R. A. (N. S.) 264. To same effect, *Primm v. Mensing*, 14 Tex. Civ. App. 395, 38 S. W. 382.

⁹ *Fletcher v. American &c. Banking Co.*, 111 Ga. 300, 36 S. E. 767, 78 Am. St. 164.

¹⁰ *In re Waddell's Estate*, 196 Pa. St. 294, 46 Atl. 304.

¹¹ *Primm v. Mensing*, 14 Tex. Civ. App. 395, 38 S. W. 382. In the absence of either statutory authority or authority in the will an administrator or executor does not have authority to carry on the business in which the deceased was engaged at the time of his death. *Western Newspaper Co. v. Thurmond*, 27 Okla. 261, 111 Pac. 204, Ann. Cas. 1912 B, 727.

¹² *Schlickman v. Citizens' Nat. Bank*, 139 Ky. 268, 129 S. W. 823, 29 L. R. A. (N. S.) 264; *Furst v. Armstrong*, 202 Pa. St. 348, 51 Atl. 996, 90 Am. St. 653.

¹³ *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501.

fact that the trustee is charged with a duty which cannot be performed without a power of sale.¹⁴ It has been held, however, that a power to sell does not confer upon the executor the power to warrant¹⁵ or to mortgage¹⁶ the property.¹⁷

§ 518. **Liability where estate is benefited.**—As has already been mentioned, the contracts of an executor or administrator, even when made in behalf of the estate, are not binding upon it in the absence of any statutory authority, or express or implied power in the will itself. The contract of an administrator or executor is personal.¹⁸ The object of this rule is to conserve and protect the estate. It is not, however, intended to operate unjustly against the executor or administrator. While personally liable, yet it is his right in a proper case that he be reimbursed and credited in his accounts with the amount to which the estate has been actually benefited by such contract.¹⁹ The executor has the right to charge the estate with the amount that he has prop-

¹⁴ *Carlisle v. Cooke* (1905), 1 I. R. 269; *Wood v. White*, 4 Myl. & C. 460, 2 Keen. 664, 8 L. J. Ch. (N. S.) 209, 3 Jur. 117; *Cherry v. Greene*, 115 Ill. 591, 4 N. E. 257; *Gammon v. Gammon*, 153 Ill. 41, 38 N. E. 890; *Stoff v. McGinn*, 178 Ill. 46, 52 N. E. 1048; *Poulter v. Poulter*, 193 Ill. 641, 61 N. E. 1056; *Robinson v. Robinson*, 105 Maine 68, 72 Atl. 883, 32 L. R. A. (N. S.) 675n, 134 Am. St. 537; *Putnam Free School v. Fisher*, 30 Maine 523; *Going v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; *Purdie v. Whitney*, 20 Pick. (Mass.) 25; *Gibbens v. Curtis*, 8 Gray (Mass.) 392; *Wood v. Lembcke*, 72 N. J. Eq. 651, 66 Atl. 903; *Asche v. Asche*, 18 Abb. N. Cas. 82, affd. in 47 Hun (N. Y.) 285, which is affirmed in 113 N. Y. 232, 21 N. E. 70; *Stewart v. Hamilton*, 37 Hun (N. Y.) 19; *Wood v. Nesbitt*, 62 Hun (N. Y.) 445, 42 N. Y. St. 778, 16 N. Y. S. 918, decision vacated in 47 N. Y. St. 34, 19 N. Y. S. 423, for irregular procedure; *Meehan v. Brennan*, 16 App. Div. (N. Y.) 395, 45 N. Y. S. 57; *Reade v. Continental Trust Co.*, 49 App. Div. (N. Y.) 400, 63 N. Y. S. 395; *Meakings v. Cromwell*, 5 N. Y.

136; *Salisbury v. Slade*, 160 N. Y. 278, 54 N. E. 741; *Cowan v. Cowan* (Tenn.), 53 S. W. 1101; *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087; *Williams v. Williams*, 135 Wis. 60, 115 N. W. 342. For an exhaustive note as to when the power to sell will be implied, see 32 L. R. A. (N. S.) 676, 695.

¹⁵ *Bauerle v. Long*, 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643.

¹⁶ *McMillan v. Cox*, 109 Ga. 42, 34 S. E. 341.

¹⁷ A power of sale vests in the executor power to contract for the sale of the property. *Owen v. Riddle* (N. J.), 79 Atl. 886.

¹⁸ See ante, § 511.

¹⁹ *City of Bangor v. Peirce*, 106 Maine 527, 76 Atl. 945, 138 Am. St. 363; *Shirkey v. Kirby*, 110 Va. 455, 66 S. E. 40, 135 Am. St. 949; *Thompson v. Mann*, 65 W. Va. 648, 64 S. E. 920, 22 L. R. A. 1094n, 131 Am. St. 987. See also, *In re Hentges*, 86 Nebr. 75, 124 N. W. 929, 26 L. R. A. (N. S.) 757, and note (right to an allowance for attorney's fees); *In re Bullion*, 87 Nebr. 700, 128 N. W. 32, 31 L. R. A. (N. S.) 350 (right to allowance for attorney's fees).

erly paid in settlement of debts against the estate.²⁰ He has been held entitled to reimbursement out of the funds of the estate where he personally with his own money pays a judgment against deceased.²¹ In certain jurisdictions a creditor is allowed to proceed directly against the estate where the services rendered or money advanced by him has been beneficial to the same on either statutory,²² or equitable²³ grounds. The executor or administrator is also entitled to reimbursement for all reasonable costs and expenses of administration.²⁴ He is not, however, entitled to a credit for an unauthorized or unnecessary payment. Thus executors have been refused a credit for the payment by them of the funeral expenses of a devisee under the will,²⁵ and a subscription paid to a railroad company for the purpose of assisting it in rebuilding a portion of its track when there was nothing in the will authorizing such payments.²⁶ Nor can he, when authorized to carry on decedent's business temporarily, for the purpose of closing it out, have implied power to borrow money on which to do business.²⁷

§ 519. **Personal liability.**—It has already been seen that an executor cannot ordinarily bind the estate. His engagements are

²⁰ *Bolton v. Myers*, 146 N. Y. 257, 40 N. E. 737, *affd.* 83 Hun (N. Y.) 259, 64 N. Y. St. 142, 31 N. Y. S. 588; *Peter v. Beverly*, 10 Pet. (U. S.) 532, 9 L. ed. 522.

²¹ *Purcel v. Purcel*, 14 N. J. Eq. 514. An executor is not, however, entitled to interest on money borrowed to pay an obligation binding on the estate when such obligation was not yet due and did not bear interest. *Nicholson v. Whitlock*, 57 S. Car. 36, 35 S. E. 412.

²² By the statutes of Colorado expenses incurred in settlement of the estate are claims against the estate. *Gordon-Tiger &c. Co. v. Loomer* (Colo.), 115 Pac. 717; *Long v. Rodman*, 58 Ind. 58; *Baker v. Cauthorn*, 23 Ind. App. 611, 55 N. E. 963, 77 Am. St. Rep. 443. See also, *In re Kasson's Estate*, 119 Cal. 489, 51 Pac. 706; *In re Hincheon*, 159 Cal. 755, 116 Pac. 47, 36 L. R. A. (N. S.) 303. *Contra*, *Pike v. Thomas*, 62 Ark. 223, 35 S. W. 212, 54 Am. St. 292; overruling *Turner v. Tapscott*, 30

Ark. 312; *Yarborough v. Ward*, 34 Ark. 204; *Ferrin v. Myrick*, 41 N. Y. 315.

²³ *Mosely v. Norman*, 74 Ala. 422; *Pike v. Thomas*, 65 Ark. 437, 47 S. W. 110; *Norton v. Phelps*, 54 Miss. 467; *Thompson v. Smith*, 64 N. H. 412, 13 Atl. 639; *Laible v. Ferry*, 32 N. J. Eq. 791; *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; *Hewitt v. Phelps*, 105 U. S. 393, 26 L. ed. 1072.

²⁴ *City of Bangor v. Pierce*, 106 Maine 527, 76 Atl. 945, 138 Am. St. 363; *Benjamin v. Bush*, 89 Nebr. 334, 131 N. W. 602; *Thompson v. Mann*, 65 W. Va. 648, 64 S. E. 920, 131 Am. St. 987.

²⁵ *Judson v. Bennett*, 233 Mo. 607, 136 S. W. 681. Compare with *In re Hincheon's Estate*, 159 Cal. 755, 116 Pac. 47, 36 L. R. A. (N. S.) 303.

²⁶ *Judson v. Bennett*, 233 Mo. 607, 136 S. W. 681.

²⁷ *Gordon-Tiger &c. Co. v. Loomer*, (Colo.), 115 Pac. 717.

obligatory only on himself, except where power is given him to bind the estate or where he specifically contracts against personal liability.²⁸ Administrators and executors have been held personally liable on notes executed by them²⁹ notwithstanding they may have signed as executor,³⁰ or administrator, as where the signature read as follows: "The estate of E. Langevin, by Achille Michaud, Administrator."³¹ The executor has, however, been held not personally liable when he inserts in the note a provision against personal liability.³² It is also well settled that where an administrator mingles the funds of the estate with his own and uses them for his own benefit he is chargeable with interest.³³ At common law an executor or administrator is held liable for any loss that may be sustained by his attempted performance of a contract entered into by the deceased which he himself was not bound to do, while any profits realized belonged to the estate.³⁴ The same is true of an executor or administrator

²⁸ *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. 127; *In re Page*, 57 Cal. 238; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *DeCoudres v. Trust Co.*, 25 Ind. App. 271, 58 N. E. 90, 81 Am. St. 95; *Mills v. Kuykendall*, 2 Blackf. (Ind.) 47; *Luscomb v. Ballard*, 5 Gray (Mass.) 403, 66 Am. Dec. 374; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286, 54 Am. St. 653; *First Nat. Bank v. Collins*, 17 Mont. 433, 43 Pac. 499, 52 Am. St. 695; *Doolittle v. Willet*, 57 N. J. L. 398, 31 Atl. 385; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046; *Morehead Banking Co. v. Morehead*, 122 N. Car. 318, 30 S. E. 331; *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *West v. Dean*, 15 Ohio C. C. 261; *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118. See also, ante, §§ 511, 518.

²⁹ *Lynch v. Kirby*, 65 Ga. 279; *Dunne v. Deery*, 40 Iowa 251; *Winter v. Hite*, 3 Iowa 142; *White v. Thompson*, 79 Maine 207, 9 Atl. 118; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286, 54 Am. St. 653; *First Nat. Bank v. Collins*, 17 Mont. 433, 43 Pac. 499, 52 Am. St. 695.

³⁰ *Hopson v. Johnson*, 110 Ga. 283, 34 S. E. 848; *Morehead Banking Co. v. Morehead*, 116 N. Car. 410, 21 S. E. 190; *In re Claghorn's Estate*, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. 680; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804.

³¹ *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286, 54 Am. St. 653. See also, *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. 127.

³² *Morehead Banking Co. v. Morehead*, 116 N. Car. 413, 21 S. E. 191. An executor who indorsed a promissory note with these words, "Estate of Jona D. Wheeler, Henry F. Wing, Executor," did not bind the executor. If a man does not purport to be a party to a negotiable paper he is not a party to it. *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. 303. See, however, *Dunham v. Blood* (Mass.), 93 N. E. 804.

³³ *Benjamin v. Bush*, 89 Nebr. 334, 131 N. W. 602; *Westover v. Carman's Estate*, 49 Nebr. 397, 68 N. W. 501.

³⁴ *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Mowry v. Adams*, 14 Mass. 327. "While it is the duty of executors to perform valid and uncompleted contracts which have been entered into by their testator, they

who, without authority of law, carries on his decedent's business.³⁵

§ 520. Joint liability of two or more executors or administrators.—In case there are two or more executors or administrators it has been said: "they are esteemed in law but as one person, representing the testator, and therefore the acts done by any one of them, which relates either to the delivery, gift, sale, payment, possession or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority over the whole."³⁶ This is the common-law rule. It has been modified by the statutes of some states.³⁷ One administrator is not liable, however, for the acts, defaults, or devastavit of his coexecutors or administrators unless he has aided, concurred in, or by his negligence contributed to, such acts by his coexecutors or administrators.³⁸

§ 521. When relieved from personal liability.—An executor or administrator may be relieved from personal liability on a contract made on behalf of an estate by showing that the assets of the estate received were less than the indebtedness of the de-

are not called on, nor have the right, to expend the funds of the estate for the doing of new work which the testator himself was not bound to do. Such expenditure, unless incurred for the preservation of the property of the decedent, is not a charge upon the estate." *In re Hinchon's Estate*, 159 Cal. 755, 116 Pac. 47, 36 L. R. A. (N. S.) 303. See also, *Ellis' Admr. v. Merriman*, 5 B. Mon. (Ky.) 296; *Davis v. French*, 20 Maine 21, 37 Am. Dec. 36. Compare with *Macdonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912A, 417.

³⁵ *Gilligan v. Daly* (N. J. Eq.), 80 Atl. 994; *Western Newspaper Union v. Thurmond*, 27 Okla. 261, 111 Pac. 204, Ann. Cas. 1912B, 727 and note.

³⁶ *Owen v. Owen*, 1 Atk. 495, 26 Eng. Reprint 313; *Ex parte Rigby*, 19 Ves. Jr. 463, 2 Rose 224, 34 Eng. Reprint 588; *Willis v. Farley*, 24 Cal. 490; *Boudereau v. Montgomery*, Fed. Cas. No. 1694, 4 Wash. C. C. 186; *Wilkerson v. Wooten*, 28 Ga. 568; *Scruggs v. Gibson*, 40 Ga. 511; *Aler-*

ding v. Allison, 170 Ind. 252, 83 N. E. 1006, 127 Am. St. Rep. 363; *Clark's Exrs. v. Farrar*, 3 Mart. (La.) (O. S.) 247; *Bodley v. McKinney*, 9 Sm. & M. (17 Miss.) 339; *Bank of Port Gibson v. Baugh*, 9 Sm. & M. (17 Miss.) 390; *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq. 328; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; *In re Bradley*, 25 Misc. (N. Y.) 261, 54 N. Y. S. 555, 2 Gibbons 597 (affd. 42 App. Div. (N. Y.), 301, 59 N. Y. S. 105, 2 Gibbons 597); *Arkenburgh v. Arkenburgh*, 27 Misc. (N. Y.) 760, 59 N. Y. S. 612; *Chapman v. City Council of Charleston*, 30 S. Car. 549, 9 S. E. 591, 3 L. R. A. 311; *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166, 10 L. ed. 402; 4 Bacon's Abridgment 37 (D).

³⁷ See statutes of Arizona, California, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, Wyoming.

³⁸ *Hargthorpe v. Milforth*, Cro. Eliz., pt. 1, p. 318; *Miller v. Coleman*,

cedent.³⁹ As in the case of the trustee in the limited sense, an executor or administrator is not an insurer of his acts. The care, prudence and judgment which the man of average capacity and ability exercises in the transaction of his own business furnishes the standard to govern an administrator or executor in the discharge of his trust duties.⁴⁰ Under this principle it has been held proper to credit an administrator with money deposited in a solvent bank, subsequently lost by the bank's unexpected failure.⁴¹

§ 522. **Guardians—Authority generally.**—The powers and obligations of a guardian are very similar to those of a trustee or executor. The principal distinction between the former and the latter is that a trustee in the limited sense of the term holds the legal title to the trust estate whether it consists of personalty or realty, an executor or administrator holds only the legal title to his deceased's personal property, while the guardian does not have title to the ward's property at all but instead has only the

25 Low. Can. Jur. 196; King v. Hilton, 29 Grant Ch. (U. C.) 381; Turner's Exrs. v. Wilkins, 56 Ala. 173; State v. Belin, 5 Harr. (Del.) 400; Cameron v. Inferior Ct. Justices, 1 Ga. 36, 44 Am. Dec. 636; Davis v. Walford, 2 Ind. 88; Moore v. State, 49 Ind. 558; Insley v. Shire, 54 Kans. 793, 39 Pac. 713, 45 Am. St. 308; Moore v. Tandy, 3 Bibb. (Ky.) 97; Brazier v. Clark, 5 Pick. (Mass.) 96; Cheever v. Ellis, 144 Mich. 477, 108 N. W. 390, 11 L. R. A. (N. S.) 296; Sutherland v. Brush, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383; Ormiston v. Olcott, 84 N. Y. 339; Douglass v. Satterlee, 11 Johns. (N. Y.) 16; In re Lamb, 10 Misc. (N. Y.) 638, 32 N. Y. S. 225, 65 N. Y. St. 460, 1 Gibbons 190; Nanz v. Oakley, 120 N. Y. 84, 24 N. E. 306, 9 L. R. A. 223; In re Wilson's Appeal, 115 Pa. St. 95, 9 Atl. 473; In re Fesmire's Estate, 134 Pa. St. 67, 19 Atl. 502, 19 Am. St. 676; In re Swift's Estate, 6 Northampton Co. Rep. (Pa.) 105; Myer v. Myer, 187 Pa. 247, 41 Atl. 24; Knox v. Pickett, 4 Desaus. Eq. (S. Car.) 199, 6 Am. Dec. 597; Gayden v. Gayden, McMul. Eq. (S. Car.) 435. See also, in this connection,

Groover v. Ash, 132 Ga. 371, 64 S. E. 323, 22 L. R. A. (N. S.) 1119.

³⁹ "Regardless of any personal consideration, the assets of the estate are a consideration supporting the promise to pay. The fact of the execution of such a note is prima facie evidence of assets, because they are the legal consideration upon which the law presumes the note to rest. Therefore it is not incumbent on the payee to prove assets. This presumption of a consideration may, however, be rebutted between the original parties, by the defendant showing that, in fact, there was a deficiency of assets, and therefore a failure of consideration to support the note. When such deficiency is shown, the liability will be diminished to the extent of such failure of consideration." Boyd v. Johnston, 89 Tenn. 284, 14 S. W. 804. See also, McGrath v. Barnes, 13 S. Car. 328, 36 Am. Rep. 687.

⁴⁰ In re Chadbourne's Estate (Cal. App.), 114 Pac. 1012; Dundas v. Chrisman, 25 Nebr. 495, 41 N. W. 449; Benjamin v. Bush, 89 Nebr. 334, 131 N. W. 602.

⁴¹ In re Succession of Bertrand (La.), 54 So. 127.

custody and management of such estate.⁴² The term "guardian," without words of limitation, and in the absence of any statutory provision on the subject, describes one who is charged with the care and custody of the property and person of the ward.⁴³

A guardian not only has the custody of his ward's estate, but it is also his duty to manage the same and in case any of his funds are idle or not properly invested, it is his duty to make a proper investment of such funds, obtaining an order from a court of competent jurisdiction which permits such investment. Thus while a guardian is permitted to leave the funds of his ward temporarily on deposit in a reputable bank pending investment or other disposition of the same,⁴⁴ he is personally chargeable with the loss of money deposited with a bank for a fixed period of time without the order of a court of competent jurisdiction.⁴⁵ "Where the guardian without authority invests the money of his ward, the latter has the option to elect to claim the benefit of such invest-

⁴² *Seilert v. McAnnally*, 223 Mo. 505, 122 S. W. 1064, 135 Am. St. 522; *Shirkey v. Kirby*, 110 Va. 455, 66 S. E. 40, 135 Am. St. 949. See also, *Hudson v. Helmes' Exrs.*, 23 Ala. 585; *Lee v. Lee*, 55 Ala. 590; *Gentry v. Owen*, 14 Ark. 396, 60 Am. Dec. 549; *Baltimore & C. R. Co. v. Taylor*, 6 App. (D. C.) 259; *Lang v. Whitney*, 36 Maine 155; *Conant v. Kendall*, 21 Pick. (Mass.) 36; *Mansur v. Pratt*, 101 Mass. 60; *Wallis v. Bardwell*, 126 Mass. 366; *Rollins v. Marsh*, 128 Mass. 116; *Grist v. Forehand*, 36 Miss. 69; *Jenkins v. Sherman*, 77 Miss. 884, 28 So. 726; *Cooper v. Wallace*, 55 N. J. Eq. 192, 36 Atl. 575; *Kent v. West*, 33 App. Div. (N. Y.) 112, 53 N. Y. S. 244; *Moore v. Hood*, 9 Rich. Eq. (S. Car.) 311, 70 Am. Dec. 210.

⁴³ *Burger v. Frakes*, 67 Iowa 460, 23 N. W. 746, 25 N. W. 735. As a general rule the custody of both the person and the estate is placed in the hands of one guardian, "From a separation of these duties, while very little benefit can be anticipated, many inconveniences and considerable increase of expense may necessarily follow." *Tenbrook v. McColm*, 12 N. J. L. 97. See also, *In re Ross*, 53 N. J. Eq. 344,

35 Atl. 48. These duties may, however, be separated. See 2 Kent's Comm. 227. "Guardian by nature at common law is the father, and on his death, the mother, and continues until the child is twenty-one years of age; but it extends only to the custody of the person. * * * It gives the father no right or control over the infant's property, real or personal." *Ferguson v. Phoenix Mut. Life Ins. Co.*, 84 Vt. 350, 79 Vt. 997, 35 L. R. A. (N. S.) 844.

⁴⁴ *Nelson v. Cowling*, 89 Ark. 334, 116 S. W. 890; *Corcoran v. Kostrometinoff* (C. C. A.), 164 Fed. 685, 21 L. R. A. (N. S.) 399; *In re Guardianship of Corcoran*, 3 Alaska 263; *In re Grammel*, 120 Mich. 487, 79 N. W. 706; *In re Law's Estate*, 144 Pa. St. 499, 22 Atl. 831, 14 L. R. A. 103n; *Murph v. McCullough*, 40 Tex. Civ. App. 403, 90 S. W. 69.

⁴⁵ *Corcoran v. Kostrometinoff*, 164 Fed. 685, 91 C. C. A. 699, 21 L. R. A. (N. S.) 399; *Murph v. McCullough*, 40 Tex. Civ. App. 403, 90 S. W. 69. By the statutes of many states he is charged with interest on funds which he keeps uninvested for an unreasonable length of time without reason for not investing.

ment, or to disregard it and charge the guardian with interest. He cannot claim both profits and interest. But when a definite election is made to claim the profits, and the guardian refuses to account for the profits, then, in such event * * * the guardian is chargeable with interest on both principal and profits from the date of such election by the ward."⁴⁶ It has been held that a guardian has the right to pledge a life insurance policy payable to the ward as security for a loan the proceeds of which were to be used in sending the ward to dental college when the transaction was executed with due regard for the ward's interests.⁴⁷ The degree of care which a guardian is required to exercise in the management of the estate is such as an ordinarily prudent man employs in his own affairs.⁴⁸ The above is the usual statement of the rule found in the decided cases. Its usefulness is, however, doubted.⁴⁹

§ 523. When and how guardians may bind estates.—A guardian's contract for the benefit of the ward is, as a general rule, not binding on the ward's estate.⁵⁰ There are, however, to this general rule two exceptions, one of which is perfectly apparent and well settled; the outlines of the other are vague and indefinite. The first exception is to the effect that a guardian may bind his ward's estate by a contract when he acts in conformity with legal authority. Such contracts are, as a general rule, made under the direction of a court of competent jurisdiction.⁵¹ Thus

⁴⁶ *Meyers v. Martinez* (Ala.), 55 So. 498.

⁴⁷ In this case it was held that the policy might be canceled in accordance with its terms without notice upon default in payment of the loan. *Clare v. Mutual Life Ins. Co.*, 201 N. Y. 492, 94 N. E. 1075, 35 L. R. A. (N. S.) 1123 and note. The above case also holds that while the guardian is accountable for her management, yet as to third persons her acts were valid, if not affected by any collusion or fraud. Compare the foregoing case with that of *Ferguson v. Phoenix Mut. Life Ins. Co.*, 84 Vt. 350, 79 Atl. 997, 35 L. R. A. (N. S.) 844, in which a father insured his life, making three of his children beneficiaries. Later he for a con-

sideration running to himself surrendered the policy. It was held that, under a statute making the father the natural guardian of his minor children without defining his rights did not give him the power to surrender as guardian for his minor children the above policy.

⁴⁸ In *re Wood's Estate*, 159 Cal. 466, 114 Pac. 992; *Hughes v. People*, 111 Ill. 457; *Slauter v. Favorite*, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106n; *Donaldson v. Allen*, 182 Mo. 626, 81 S. W. 1151.

⁴⁹ See *Indiana Trust Co. v. Griffith* (Ind.), 95 N. E. 573. See ante, *Trustees*.

⁵⁰ See post, § 524.

⁵¹ *Reading v. Wilson*, 38 N. J. Eq. 446; *Kent v. West*, 33 App. Div. (N.

a county court has been held to have authority to empower the guardian of minor heirs to exercise an option held by the ancestor.⁵² Even though the contract is authorized by a court it does not bind the estate unless such court had statutory authority to authorize the agreement. Neither the guardian nor the court having jurisdiction over the estate of an incompetent person, has power to bind the estate of such person unless expressly authorized to do so by law.⁵³ A court of chancery it seems, has no inherent power to make such an order.⁵⁴

A second exception is recognized by certain authorities when they permit a creditor to hold the estate liable for a just and meritorious claim or debt contracted by the guardian. These decisions are based on equitable grounds.⁵⁵ Thus it has been held that a person who furnishes maintenance to a ward under a contract with the guardian, but who does not give exclusive credit to the guardian, has a right, which a court of equity will recognize, to have the profits of the estate applied for his benefit. The creditor in such a case, in addition to his claim at law against the guardian, upon his personal contract has a direct and original

Y.) 112, 53 N. Y. S. 244. See also, *Indiana Trust Co. v. Griffith* (Ind.), 95 N. E. 573; *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034n, 131 Am. St. 724; *Logan Planing Mill Co. v. Aldredge*, 63 W. Va. 660, 60 S. E. 783, 15 L. R. A. (N. S.) 1159n, 129 Am. St. 1035.

⁵² *Ankeny v. Richardson*, 187 Fed. 550, 109 C. C. A. 316.

⁵³ *Andrus v. Blazzard*, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354. The sanction of the court will not protect the guardian unless it obtains jurisdiction. Thus if the statute provides a notice must be given to all other persons interested, an order obtained without such notice does not protect the guardian. *Corcoran v. Kostrometinoft*, 164 Fed. 685, 91 C. C. A. 699, 21 L. R. A. (N. S.) 399. Thus the power to direct investments by guardians in such "good security" as the court may approve does not authorize the court to approve a loan of the guardianship funds directly to

the guardian himself on the latter's individual note. *Fidelity &c. Co. v. Freud*, 115 Md. 29, 80 Atl. 603.

⁵⁴ *Logan Planing Mill Co. v. Aldredge*, 63 W. Va. 660, 60 S. E. 783, 15 L. R. A. (N. S.) 1159n, 129 Am. St. 1035.

⁵⁵ "As it is equitable that the ward's property should be liable for an expense, which the guardian, in the proper discharge of his duty, has a right to incur, there is no inconsistency in our courts, possessing a blended jurisdiction both of law and equity, in allowing a direct recourse upon the ward's property, on the part of the attorney, upon his averring and proving such facts as would compel the county court to allow his claim to the guardian, if paid and presented for allowance, as an expense incurred by the guardian." *Caldwell v. Young*, 21 Tex. 800. To same effect, *Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104, reviewing many authorities.

claim in equity and not merely a claim by substitution to the guardian, to be paid out of the profits of the ward's estate.⁵⁶

§ 524. **Personal liability of guardian.**—In the absence of any statutory authority the guardian has no power to bind either the person or the estate of this ward by contract. "It is his duty to see that his ward is maintained and educated in a manner suitable to his means, and if, in the performance of this duty it becomes necessary for him to enter into contracts, such contracts impose no duty on the ward, and do not bind his estate, but bind the guardian personally and alone. For any reasonable expenditure made by a guardian out of his own means, for the benefit of the ward, he is, of course, entitled to be reimbursed out of the ward's estate, but this is the limit of the ward's liability, whether measured by the rules of the law or rules of equity."⁵⁷ The fact that the guardian enters into such agreement expressly as guardian is immaterial. If any liability attaches, it is one personal to the guardian and not to the ward or his estate.⁵⁸ The reasons under-

⁵⁶ *Barnum v. Frost's Admr.*, 17 Grat. (Va.) 398. See, however, in connection with this last case the case of *Reading v. Wilson*, 38 N. J. Eq. 446, in which it is declared "radically unsound" and in addition says "there can be no doubt that if it is the duty of the guardian to maintain his ward, and to that end he may use so much of his ward's estate as may be necessary for that purpose, but this gives him no right whatever to charge or encumber his ward's estate." It is believed that this latter case criticizing the Virginia case is sound in principle and its principles should be adhered to, notwithstanding its seeming harshness.

⁵⁷ *Reading v. Wilson*, 38 N. J. Eq. 446. To same effect, see *Simms v. Norris*, 5 Ala. 42; *St. Joseph's Academy v. Augustini*, 55 Ala. 493; *Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56; *Brown v. Eggleston*, 53 Conn. 110, 2 Atl. 321; *Poole v. Wilkinson*, 42 Ga. 539; *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. 475, 8 Am. St. 378; *Stevenson v. Bruce*, 10 Ind. 397; *Raymond v. Sawyer*, 37 Maine 406; *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 58, 4

Am. Dec. 87; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Bicknell v. Bicknell*, 111 Mass. 265; *Wallis v. Bardwell*, 126 Mass. 366; *Rollins v. Marsh*, 128 Mass. 116; *Phelps v. Worcester*, 11 N. H. 51; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Hardy v. Citizens' Nat. Bank*, 61 N. H. 34; *Kent v. West*, 33 App. Div. (N. Y.) 112, 53 N. Y. S. 244; *Fessenden v. Jones*, 52 N. Car. 14, 75 Am. Dec. 445; *Shephard v. Hanson*, 9 N. Dak. 249, 83 N. W. 20; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Andrus v. Blazzard*, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354. "A guardian's liability upon his own contract for the benefit of the ward is personal, and the judgment of a court rendered for such a debt is against him personally and not against his ward's estate." *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034n, 131 Am. St. 724. See, however, the case of *Robinson v. Hersey*, 60 Maine 225, and *In re Price's Appeal*, 116 Pa. St. 410, 9 Atl. 856.

⁵⁸ *Sperry v. Fanning*, 80 Ill. 371; *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6

lying this rule have been thus expressed: "The contract should be made with the guardian, and hence the guardian ought to be looked to for payment. To allow departure from the above rule would, in the first place, have the effect to encourage in the youth of the country, appeals from the judgments of their guardians, and in the next, make the right to compensation on the part of the creditor depend upon a condition of things of which he has no means to judge, and therefore uncertain and precarious. * * * To turn persons, dealing with the guardian in relation to the ward's estate, over to the ward, would render it necessary, in every case, for such persons in order to guard themselves against loss, to enter into an account with the guardian as to the amount of the ward's estate—the income and expenditures, and the necessity for the expenditure then contemplated. Such requirements applied to the ordinary transactions of life. * * * are manifestly absurd."⁵⁹

§ 525. **When not personally liable.**—The guardian may, however, contract against personal liability. This may be done by an express condition showing clearly that both parties agree to act upon the responsibility of the fund in his hand, alone, or upon some other responsibility, or there may appear some other circumstances clearly indicating another party who is bound by the contract, and upon whose credit alone it is made.⁶⁰ But while, as a general rule, the ward is not bound by his guardian's contract, the converse of this is also true and the guardian is not bound nor liable on contracts entered into by his ward.⁶¹ Nor is this rule changed by the fact that the ward's contract is for necessities.⁶² Should the guardian fail to supply his ward with necessi-

Mass. 558, 4 Am. Dec. 87; *Hardy v. Citizens' Nat. Bank*, 61 N. H. 34; *Andrus v. Blazzard*, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354.

⁵⁹ *Fessenden v. Jones*, 52 N. Car. 14, 75 Am. Dec. 445. "In all expenditures arising under such contracts, the ward should be liable only to the guardian. He is then amenable to but one individual, and then only on a decree of court on the settlement of his guardianship account." *Phelps v. Worcester*, 11 N. H. 51.

⁶⁰ *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. 475, 8 Am. St. 378. See also, *Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896.

⁶¹ *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610.

⁶² *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610; *Baird v. Steadman*, 39 Fla. 40, 21 So. 572; *McNabb v. Clipp*, 51 Ind. App. 204, 31 N. E. 858; *Spring v. Woodworth*, 4 Allen (Mass.) 326; *Pendexter v. Cole*, 66 N. H. 556, 22 Atl. 560.

ties the ward may purchase them himself, but in such cases he binds his estate and not the guardian.⁶³ However, where the guardian expends money in satisfaction of an agreement properly made on behalf of his ward, he may be reimbursed out of the estate for such expense,⁶⁴ and he is ordinarily accorded a lien on the estate for such expense.⁶⁵ Thus the guardian is entitled to all reasonable expenses incurred in making necessary repairs on his ward's estate.⁶⁶

§ 526. Statutory authority to bind estate.—The foregoing has reference to those instances in which the guardian has no statutory authority, express or implied, to bind the estate by contract. The statute may make provision for his binding the estate by certain contracts and the procedure to be followed in so doing.⁶⁷ Thus power to manage and control the ward's estate carries with it the power to lease the real property of his ward for a term of years within the period of his guardianship.⁶⁸ He

⁶³ *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610; *Creswell v. Matthews*, 52 Ark. 87, 12 S. W. 158; *Oliver v. McDuffie*, 28 Ga. 522; *Spring v. Woodworth*, 4 Allen (Mass.) 326; *Call v. Ward*, 4 Watts & S. (Pa.) 118, 39 Am. Dec. 64; *Edmunds v. Davis*, 1 Hill. (S. Car.) 279; *Tucker v. M'Kee*, 1 Bail. (S. Car.) 344; *Elrod v. Myers*, 2 Head. (Tenn.) 33; *Barnum v. Frost*, 17 Grat. (Va.) 398. See also, *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034n, 131 Am. St. 724, in which it is said an action cannot be maintained against a guardian upon the liability of the ward, but only against the ward, and the guardian, being a proper party, may appear and defend the action in the interest of the ward, but he is not a party for the purpose of establishing a personal liability against himself.

⁶⁴ *Curran v. Abbott*, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. 337; *Sims v. Billington*, 50 La. Ann. 968, 24 So. 637 (insurance); *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034n, 131 Am. St. 724; *In re Merkel's Estate*, 154 Pa. St. 285, 26 Atl. 428 (money).

⁶⁵ *Curran v. Abbott*, 141 Ind. 492, 40 S. E. 1091, 50 Am. St. 337.

⁶⁶ *Waldrip v. Tulley*, 48 Ark. 297, 3 S. W. 192; *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609; *Lane v. Taylor*, 40 Ind. 495; *M'Cracken's Heirs v. M'Cracken*, 6 B. Mon. (Ky.) 342; *Brodess v. Thompson*, 2 Har. & G. (Md.) 120; *Antonidas v. Walling*, 4 N. J. Eq. 42, 31 Am. Dec. 248; *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Hassard v. Rowe*, 11 Barb. (N. Y.) 22; *Copley v. O'Neil*, 57 Barb. (N. Y.) 299; *In re Hind's Estate*, 183 Pa. St. 260, 38 Atl. 599; *Barrett v. Cocke*, 12 Heisk. (Tenn.) 566; *Hobbs v. Harlan*, 10 Lea (Tenn.) 268, 43 Am. Rep. 309; *Jackson's Heirs v. Jackson's Admsrs.*, 1 Grat. (Va.) 143. He has no power without leave of court to make improvements that are not necessary for the preservation of the estate. *Waldrip v. Tulley*, 48 Ark. 297, 3 S. W. 192; *Brodess v. Thompson*, 2 Har. & G. (Md.) 120; *Antonidas v. Walling*, 4 N. J. Eq. 42, 31 Am. Dec. 248; *Cooper v. Wallace*, 55 N. J. Eq. 192, 36 Atl. 575; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26, 7 Am. Dec. 475; *Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154.

⁶⁷ *United States Mortgage Co. v. Sperry*, 138 U. S. 313.

⁶⁸ *Shaw v. Shaw, Vern. & S.* 607; *Freeman v. Bradford*, 5 Port. (Ala.)

may also have implied statutory authority to borrow money with the consent of the probate court⁶⁹ or to contract for the location of a land certificate without authority of the probate court.⁷⁰ He may also pay off an encumbrance⁷¹ but not encumber⁷² the lands of his ward without an order of court. The court may be given authority to empower a guardian to exercise an option to purchase land and to purchase and pay for the land thereunder either in cash or by part payment in cash and giving a mortgage for the balance.⁷³

§ 527. **Receivers—Authority generally.**—A receiver is an officer of the court who takes charge of designated funds or property for the common benefit of all parties in interest.⁷⁴ Property

270; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Clark v. Burnside*, 15 Ill. 62; *Muller v. Benner*, 69 Ill. 108; *Graham v. Chatoque Bank &c.*, 5 B. Mon. (Ky.) 45; *Anderson v. Layton*, 3 Bush (Ky.) 87; *Hutchins v. Dresser*, 26 Maine 76; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Richardson v. Richardson*, 49 Mo. 29; *Antonidas v. Walling*, 4 N. J. Eq. 42, 31 Am. Dec. 248; *Van Doren v. Everitt*, 5 N. J. L. 460, 8 Am. Dec. 615; *Snook v. Sutton*, 10 N. J. L. 157; *Jackson v. Todd*, 25 N. J. L. 121; *Emerson v. Spicer*, 46 N. Y. 594; *Low v. Purdy*, 2 Lans. (N. Y.) 422; *Pond v. Curtiss*, 7 Wend. (N. Y.) 45; *Holmes v. Seely*, 17 Wend. (N. Y.) 75; *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; *Coakley v. Mahar*, 36 Hun (N. Y.) 157; *Thacker v. Henderson*, 63 Barb. (N. Y.) 271; *State v. Hamilton Co.*, 39 Ohio St. 58; *Carskadden v. McGhee*, 7 Watts & S. (Pa.) 140; *In re Stoughton's Appeal*, 88 Pa. St. 198; *Ronald v. Barkley*, 1 Brock. (U. S.) 356, Fed. Cas. No. 12031; *Ross v. Gill*, 1 Wash. (Va.) 87; *Truss v. Old*, 6 Rand. (Va.) 556, 18 Am. Dec. 748; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776. See in this connection, *Cooper v. Wallace*, 55 N. J. Eq. 192, 36 Atl. 575.

⁶⁹ *Ray v. McGinnis*, 81 Ind. 451.

⁷⁰ *Ellis v. Stone*, 4 Tex. Civ. App. 157, 23 S. W. 405.

⁷¹ *Palmes v. Danby*, 1 Eq. Cas. Abr. 261; *Cheney v. Roodhouse*, 135 Ill. 257, 25 N. E. 1019; *Wright v. Comley*, 14 Ill. App. 551; *Ray v. McGinnis*, 81 Ind. 451; *Switzer v. Switzer*, 57 N. J. Eq. 421, 41 Atl. 486; *Ronald v. Barkley*, 1 Brock. (U. S.) 356, Fed. Cas. No. 12031.

⁷² *Los Angeles Co. v. Winans*, 13 Cal. App. 234, 109 Pac. 640; *Roscoe v. McDonald*, 101 Mich. 313, 59 N. W. 603; *Sample v. Lane*, 45 Miss. 556; *Johns v. Tiers*, 114 Pa. St. 611, 7 Atl. 923. As to the inherent power of a court to mortgage an infant's real estate under guardianship, see *Warren v. Union Bank*, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. 777.

⁷³ *Ankeny v. Richardson*, 187 Fed. 550, 109 C. C. A. 316. Nebraska statute construed.

⁷⁴ *Davis v. Duke of Marlborough*, 2 Swans. 108; *Wilkinson v. Lehman-Durr Co.*, 136 Ala. 463, 34 So. 216; *McGarrah v. Bank of Southwestern Ga.*, 117 Ga. 556, 43 S. E. 987; *Hooper v. Winston*, 24 Ill. 353; *Baker v. Administrator of Backus*, 32 Ill. 79; *Kaiser v. Kellar*, 21 Iowa 95; *Williamson v. Wilson*, 1 Bland. (Md.) 418; *Ellicott v. Warford*, 4 Md. 80; *Shadewald v. White*, 74 Minn. 208, 77 N. W. 42; *Van Rensselaer v. Emery*, 9 How. Pr. (N. Y.) 135; *Osborn v. Heyer*, 2 Paige (N. Y.) 342; *Curtis v. Leavitt*, 1 Ab. Pr. (N. Y.) 274, 10 How. Pr. (N. Y.) 481; *Brown v. Northrup*, 15 Ab. Pr. (N. S.) 333;

in the hands of a receiver is considered as in custodia legis and he has no powers other than those derived from the statute and the order by which he is appointed or from the established practice of courts of equity.⁷⁵ He is the agent of neither party in interest and cannot bind them personally by his contracts.⁷⁶ An act of ratification binds neither party when made without the consent of the court appointing the receiver.⁷⁷ However, the receiver of an insolvent nongoing corporation takes the property of the company for the creditors, subject to equities, liens or encumbrances, whether created by operation of law or by act of the corporation, which existed against the company at the time of his appointment.⁷⁸

Corey v. Long, 43 How. Pr. (N. Y.) 492, 12 Ab. Pr. (N. S.) 427; Booth v. Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Meier v. Kansas Pac. R. Co., 5 Dill. (U. S.) 476, Fed. Cas. No. 9394; King v. Cutts, 24 Wis. 627. In Louisiana it is held that the receiver of a partnership appointed by consent of the partners pending a suit for dissolution is the agent of the partners and not an officer of the court. Kellar v. Williams, 3 Rob. (La.) 321. As to the circumstances that will justify a court of equity in appointing a receiver, see Gray v. Council of Town of Newark (Del.), 79 Atl. 739.

⁷⁵ And see Gayle v. Johnson, 80 Ala. 388; Ashurst v. Lehman, 86 Ala. 370, 5 So. 731; Coburn v. Ames, 57 Cal. 201; Carswell v. Farmers' L. & T. Co., 74 Fed. 88, 20 C. C. A. 282, 43 U. S. App. 300; Hooper v. Winston, 24 Ill. 353; Nevitt v. Woodburn, 190 Ill. 283, 60 N. E. 500; Kaiser v. Kellar, 21 Iowa 95; Howell v. Hough, 46 Kans. 152, 26 Pac. 436; Ellicott v. Warford, 4 Md. 80; Hunt v. Wolfe, 2 Daly (N. Y.) 298; Deven-dorf v. Dickinson, 21 How. Pr. (N. Y.) 275; Corey v. Long, 43 How. Pr. (N. Y.) 492, 12 Ab. Pr. (N. S.) 427; Skinner v. Maxwell, 66 N. Car. 45, 68 N. C. 400; Battle v. Davis, 66 N. Car. 252; Booth v. Clark, 17 How. (U. S.) 322, 15 L. ed. 164. "The receiver as an officer of the court which has taken control of the property, is for the purpose of the admin-

istration of the assets thereof, invested with the title to its property, and is the real party in interest in any litigation concerning it." Buchanan v. Hicks, 98 Ark. 370, 136 S. W. 177, 34 L. R. A. (N. S.) 1200. "It is the law that the title of the receiver and his right to possession vests by relation back to the date of the order appointing him." Saginaw Sav. Bank v. Duffield, 157 Mich. 522, 122 N. W. 186, 133 Am. St. 354. See also, Randall v. Wagner Glass Co. (Ind. App.), 94 N. E. 739. "A receiver appointed to take charge of property, particularly real estate, should ordinarily be directed to hold, care for, and preserve the same until the issues in the receivership action are finally determined." Boothe v. Summit Coal Min. Co., 63 Wash. 630, 116 Pac. 269.

⁷⁶ Farmers' Loan & Trust Co. v. Oregon Pac. R. Co., 31 Ore. 237, 48 Pac. 706, 38 L. R. A. 424, 65 Am. St. 822.

⁷⁷ Groveland Improvement Co. v. Farmers' Supply Co., 25 Wash. 344, 65 Pac. 529, 87 Am. St. 755. Such an act does not bind the receiver if made without knowledge of all material facts and circumstances essential to an effective ratification. Groveland Improvement Co. v. Farmers' Supply Co., 25 Wash. 344, 65 Pac. 529, 87 Am. St. 755.

⁷⁸ Ardmore Nat. Bank v. Briggs Machinery & Co., 20 Okla. 427, 94 Pac. 533, 23 L. R. A. (N. S.) 1074. As to the effect of the appointment of a

§ 528. **Receiver's contracts under order of court.**—A receiver has no power to make contracts not authorized by the court appointing him and all persons that contract with him are charged with knowledge of his power in this regard and contract with him at their peril.⁷⁹ The court has power to ratify, vacate, or modify a contract which the receiver has made. This will not be done, however, without notice and a hearing.⁸⁰ Ordinarily a receiver who acts under the order of the court appointing him is not personally bound by his contract but instead the obligation incurred will be a lien on the funds or property in his possession.⁸¹ Thus in a proper case the receivers may be authorized to borrow money⁸² and make the debt incurred a lien on certain property.⁸³ The receiver is entitled as a matter of right to the benefit of counsel when the nature of the trust requires it, and while he usually selects his own counsel he cannot make any contract of hiring or agreement for compensation that is binding upon the court for it is the function of the court to determine both the necessity for

receiver for a corporation as constituting a breach of contract for services of an officer or agent, see *Law v. Waldron*, 230 Pa. St. 458, 79 Atl. 647, Ann. Cas. 1912A, 467.

⁷⁹ *Hendrie & Bolthoff Mfg. Co. v. Parry*, 37 Colo. 359, 86 Pac. 113; *Tripp v. Boardman*, 49 Iowa 410; *Ellis v. Little*, 27 Kans. 707, 41 Am. Rep. 434.

⁸⁰ *Mooney v. British Columbia Life Ins. Co.*, 9 Abb. Pr. (N. S.) (N. Y.) 103. See also, *Florence Gas, Electric Light & Co. v. Hanby*, 101 Ala. 15, 13 So. 343; *Lazear v. Ohio Valley Steel Foundry Co.*, 65 W. Va. 105, 63 S. E. 772. One who takes the assignment of a contract entered into with a receiver submits himself to the jurisdiction of the court and the court may after proper notice and hearing vacate such contract. *Pacific Lumber Co. v. Prescott*, 40 Ore. 374, 67 Pac. 207. In the above case the assignee failed to carry out the obligation imposed upon him by the contract. "The contracts of a receiver made with express or implied authority cannot be annulled at the pleasure of the court." *State Bank of Virginia v. Domestic Sewing Machine*

Co., 99 Va. 411, 39 S. E. 141, 86 Am. St. 891.

⁸¹ *Girard Life Ins. & Co. v. Cooper*, 51 Fed. 332, 2 C. C. A. 245; *John H. McGowan Co. v. Ingalls*, 60 Fla. 116, 53 So. 932; *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188; *State Bank v. Domestic & Machine Co.*, 99 Va. 411, 39 S. E. 141, 86 Am. St. 891.

⁸² *Clarke v. Central & C. Banking Co.*, 54 Fed. 556; *State Bank v. Domestic Machine Co.*, 99 Va. 411, 39 S. E. 141, 86 Am. St. 891.

⁸³ *American & Co. v. German*, 126 Ala. 194, 20 So. 603, 85 Am. St. 21. In the above case a debt incurred by the receiver was made a lien on the product manufactured by him. The contracts made by a receiver in the operation of an insolvent railroad are sui generis. Such a receiver is not exempt from liability to answer for injuries inflicted by wrongdoing or negligence of those he employs in operating the railroad. Yet the liability is not a personal one but only falls on the receiver as the representative of the property and fund managed by the court. *Vanderbilt v. Little*, 43 N. J. Eq. 669, 12 Atl. 188.

counsel and the compensation to be allowed therefor.⁸⁴ No personal liability attaches to the receiver for attorney's fees when the contract of hiring was sanctioned by the court and the attorney's compensation fixed by it.⁸⁵ The order appointing a receiver is the authority under which he acts. Whenever this is reversed his authority is gone and it then becomes his duty immediately to render his final report and demand his formal discharge.⁸⁶

§ 529. Receiver's certificates.—The court in whose hands is placed, through the medium of a receivership proceeding, the property of a corporation may in a proper case authorize the issuance of a receiver's certificate which shall constitute a paramount charge upon the franchise, property and earnings of the corporation.⁸⁷ The power to issue such certificate is ordinarily considered as largely discretionary with the court.⁸⁸ But the order by which the issuance of the certificate is authorized will be held void if in excess of the court's powers.⁸⁹ Moreover since it is a power that is liable to abuse it should be sparingly exercised and then with caution, prudence and reserve and never without giving those whose interests are to be affected the opportunity to be heard.⁹⁰ It has been held that such certificates may be issued to pay the operating and like expenses of a public service corpora-

⁸⁴ *Hickey v. Parrot Silver & Copper Co.*, 32 Mont. 143, 79 Pac. 698, 108 Am. St. 510; *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568. See also, *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782.

⁸⁵ *Walsh v. Raymond*, 58 Conn. 251, 20 Atl. 464, 18 Am. St. 264.

⁸⁶ *Hickey v. Parrot Silver & Copper Co.*, 32 Mont. 143, 79 Pac. 698, 108 Am. St. 510.

⁸⁷ *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Union Trust Co. v. Illinois Midland Railway Co.*, 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. 809. High in his work on *Receivers* (4th ed.), p. 565, criticizes this doctrine; he says: "A power so dangerous because boundless cannot be sustained upon any just principles of legal reasoning. * * * Nevertheless this branch of the jurisdiction is so well established upon authority

that its existence is no longer open to question."

⁸⁸ *Town of Vandalia v. St. Louis & C. R. Co.*, 209 Ill. 73, 70 N. E. 662.

⁸⁹ *Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co.*, 201 N. Y. 379, 94 N. E. 871.

⁹⁰ *Illinois Steel Co. v. Ramsey*, 176 Fed. 853, 100 C. C. A. 323; *Bernard v. Union Trust Co.*, 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118; *Lockport Felt Co. v. United Box Board & Paper Co.*, 74 N. J. Eq. 686, 70 Atl. 980; *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446. These liens cannot be made a lien on property outside the boundaries of the state, consequently application therefor must be made in the jurisdiction where the property lies. *Lockport Felt v. United Box Board & Paper Co.*, 74 N. J. Eq. 686, 70 Atl. 980; *Pool v. Farmers' Loan & C. Co.*, 7 Tex. Civ. App. 334, 27 S. W. 744.

tion such as a railroad,⁹¹ and in some instances to make necessary repairs and betterments⁹² and to pay for reconstruction work.⁹³

There is a wide distinction between quasi public and private corporations in that with the former the public is directly interested in their maintenance and upkeep. The public is not considered as having a vital interest in the continued operation of a private corporation, consequently it has been doubted or apparently denied that receivers' certificates can be issued by a court of chancery which will displace prior liens.⁹⁴ It would seem, however, that the Supreme Court of New Jersey has given expression to the proper rule on this subject. It says: "In the case of private corporations, the court may authorize its receiver to borrow money upon the faith and credit of all the property of the

⁹¹ *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. 809; *Taylor v. Philadelphia & R. Co.*, 7 Fed. 377; *Humphreys v. Allen*, 101 Ill. 490; *Metropolitan Trust Co. v. Tonawanda Valley &c. R. Co.*, 40 Hun (N. Y.) 80. See in connection with the above case *Central Trust Co. v. Syracuse &c. R. Co.*, 53 Hun (N. Y.) 638, 25 N. Y. St. 635, 6 N. Y. S. 918; *Crosby v. Morristown &c. Co.* (Tenn.), 42 S. W. 507; *International & G. N. R. Co. v. Coolidge*, 26 Tex. Civ. App. 595, 62 S. W. 1097. See also, *Central Trust &c. Co. v. Chester County Electric Co.* (Del.), 80 Atl. 801.

⁹² *Meyer v. Johnston*, 53 Ala. 237; *Kampmann v. Sullivan*, 26 Tex. Civ. App. 308, 63 S. W. 173; *Pennsylvania Steel Co. v. New York City R. Co.*, 165 Fed. 455; *Credit Co. v. Arkansas Cent. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. 46; *Union Trust Co. v. Illinois &c. R. Co.*, 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. 809. The power should be sparingly exercised. *Credit Co. v. Arkansas &c. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. 46.

⁹³ *First Nat. Bank v. Ewing*, 103 Fed. 168, 43 C. C. A. 150 (writ of certiorari denied, 179 U. S. 686, 45 L. ed. 386, 21 Sup. Ct. 919); *Bibber-White Co. v. White River &c. R. Co.*, 115 Fed. 786, 53 C. C. A. 282; *Rochester &c. Co. v. Oneonta &c. R. Co.*, 122 App. Div. (N. Y.) 193, 107 N.

Y. S. 237; *Rutherford v. Pennsylvania &c. R. Co.*, 178 Pa. 38, 35 Atl. 926; *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.) 506, Fed. Cas. No. 13296; *Shaw v. Little Rock &c. R. Co.*, 100 U. S. 605, 25 Law ed. 757. "The power to authorize the issuance of certificates is limited by, and is co-extensive with, its obligation to conserve the property in its custody." *Illinois Steel Co. v. Ramsey*, 176 Fed. 853, 100 C. C. A. 323.

⁹⁴ *Lamar Land & Canal Co. v. Belknap Sav. Bank*, 28 Colo. 344, 64 Pac. 210; *International Trust Co. v. United Coal Co.*, 27 Colo. 246, 60 Pac. 621, 83 Am. St. 59; *Doe v. Northwestern Coal &c. Co.*, 78 Fed. 62; *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 So. 502; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; *In re Westchester Co. Brewery*, 73 Misc. (N. Y.) 352, 131 N. Y. S. 16; *Merriam v. Victory Min. Co.*, 37 Ore. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997. "In the case of corporations engaged in a public service, like railroad, water and lighting companies, and which service cannot be interrupted without inconvenience and harm to the community, courts of equity authorize its receivers of such corporations to issue certificates of indebtedness to raise money to do repairs or obtain supplies to keep the service going, and make such certificates prior liens to the mortgage indebtedness.

corporation, and authorize the issuing of securities which shall displace all prior liens and encumbrances, but only for one purpose, namely, the preservation of the property and the expenses of realizing upon it by a sale. This necessity should be imperative and paramount, and under no other circumstances can a court justify itself in attempting to undermine prior liens. * * * In addition to the limitations thus set to the power of the court, it may be well to add that in every case the power now appealed to is an extraordinary one, and is liable to abuse unless exercised with the utmost caution."⁹⁵ A receiver's certificate of indebtedness will be invalid unless based upon a consideration.⁹⁶ The

"But in the case of corporations not engaged in such a service, there is no such practice. It is justified only on the score of public necessity, and even when so exercised has become a great abuse and wrong to mortgage bondholders in many instances, as we all know." *Wiggins v. Neversink Light & Power Co.*, 93 N. Y. S. 853. "It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but, if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances, is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good-will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the incorporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view, that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and prop-

erty, by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice." *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. 809.

⁹⁵ *Lockport Felt Co. v. United Box Board & Paper Co.*, 74 N. J. Eq. 686, 70 Atl. 980. See also, *Farmers' Loan & Co. v. Grape Creek Coal Co.*, 50 Fed. 481, 16 L. R. A. 603; *Fidelity Ins. Co. v. Roanoke Iron Co.*, 68 Fed. 623; *International Trust Co. v. Decker Bros.*, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152. See, however, *Porch v. Agnew* (N. J.), 57 Atl. 546, in which a receiver was allowed to issue certificates to pay insurance on and for watchmen to look after certain hotel property. See contra to this case, *Raht v. Attrill*, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456. See also, *Dalliba v. Winshell*, 11 Idaho 364, 82 Pac. 107, 114 Am. St. 267; *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431. In the latter case a receiver was authorized to repair a railroad operated in connection with a mine, the expense to be covered by receivership certificates which were made a first lien on all the property of the company, the mine included.

⁹⁶ *Turner v. Peoria & C. R. Co.*, 95

ordinary receiver's certificates are nonnegotiable, consequently if they are invalid in their inception they cannot be enforced even though in the hands of an innocent purchaser for value. A subsequent transfer to a bona fide purchaser does not cut off any equities that may have existed between the original parties.⁹⁷

§ 530. Personal liability of receiver.—Receivers are required to exercise good faith and reasonable diligence in the administration of the trust and this means that a receiver is required at least to exercise the diligence which an ordinarily prudent man would use with reference to his own affairs.⁹⁸ But a receiver is not personally liable on contracts entered into by him,

Ill. 134, 35 Am. Rep. 144; *Bank of Montreal v. Chicago & C. R. Co.*, 48 Iowa 518. In the latter case it was held that certificates issued for material contracted for but never delivered were unenforceable.

⁹⁷ *Union Trust Co. v. Chicago & C. R. Co.*, 7 Fed. 513; *Stanton v. Alabama & C. R. Co.*, 31 Fed. 585; *Gordon v. Newman*, 62 Fed. 686, 10 C. A. 587; *Central Nat. Bank v. Hazard*, 30 Fed. 484; *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N. S.) 252n, 128 Am. St. 95n; *Turner v. Peoria & C. R. Co.*, 95 Ill. 134, 35 Am. Rep. 144; *Newbold v. Peoria & C. R. Co.*, 5 Ill. App. 367; *McCurdy v. Bowes*, 88 Ind. 583; *Montreal Bank v. Chicago & C. R. Co.*, 48 Iowa 518; *Knickerbocker Trust Co. v. Oneonta C. & R. S. R. Co.*, 201 N. Y. 379, 94 N. E. 871; *Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 506, Fed. Cas. No. 13296. It would seem, however, that the receiver might be authorized to issue negotiable certificates. *Meyer v. Johnston*, 53 Ala. 237. But while the court may authorize the issuance of negotiable certificates it seems doubtful whether they are negotiable in any real sense for on this subject it has been said: "As to the claim of Bernard that he was an innocent purchaser without notice and for value," said the court in this case, "it is sufficient to say that although it be true that by the terms of the order the receiver was authorized and empowered to issue a negotiable receiver's

certificate, he cannot claim to hold as an innocent purchaser without notice, in the sense which that phrase imports, for certificates of this kind have not the quality of negotiable instruments under the law-merchant. They are not commercial paper, and the purchaser or assignee can recover upon them only to the extent of the rights of the first payee. He is put upon inquiry as to all that was done in the cause wherein the certificates are issued and chargeable with notice. As said by the court in *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 456, 6 Sup. Ct. 809, 29 L. ed. 963, 'the receiver and those lending money to him on certificates issued and orders made without prior notice to the parties interested take the risk of the final action of the court in regard to the loans. The court always retains control of the matter; its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments.'" *Bernard v. Union Trust Co.*, 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118. A mechanic's or other lien upon property is not, ipso facto, affected by the appointment of a receiver. *Randall v. Wagner Glass Co.* (Ind. App.), 94 N. E. 739.

⁹⁸ *State v. Germania Bank*, 106 Minn. 164, 118 N. W. 683, 130 Am. St. 599; *In re Cornell*, 110 N. Y. 351, 18 N. E. 142. The degree of care which he must exercise is the same as that which must be exercised

as such, in the exercise of reasonable diligence and within the authority, express or implied, conferred upon him. Thus a receiver may, in his official capacity, deposit funds of the estate coming into his hands in a bank of good standing and repute and if he exercises that degree of care ordinarily exhibited by reasonably cautious men in transacting their own business of like importance in selecting the bank he will not be personally liable for any loss due to a failure of the bank.⁹⁹ It has also been held that in those cases involving legal questions which make it necessary for a receiver to take the advice of counsel and competent counsel is employed and his advice is followed in good faith that a receiver is not liable for loss resulting therefrom.¹ Nor is he liable in his official capacity on executory contracts entered into by the owner of the trust estate prior to his appointment. Receivers become liable on such contracts solely by reason of their own acts.² The receiver may, however, ratify and adopt such contract and if by equivocal acts he shows an intention so to do he will be held to have elected to be bound thereby and accordingly become subject to the liabilities thereby created.³

It has already been seen that unless properly authorized the receiver cannot make his agreement a lien on the trust fund.⁴ It has been held, however, that the receiver may be individually

by a guardian or administrator, or other trustee. See, ante, § 510, also § 512 et seq., Executor and Administrator.

⁹⁹ *State v. Corning State Sav. Bank*, 128 Iowa 597, 105 N. W. 159; *Ficener v. Bott*, 20 Ky. L. 632, 47 S. W. 251; *Groesbeck Cotton Oil & Compress Co. v. Oliver*, 44 Tex. Civ. App. 303, 97 S. W. 1092. Compare, however, *Ricks v. Broyles*, 78 Ga. 610, 3 S. E. 772, 6 Am. St. 280; *State v. Gooch*, 97 N. Car. 186, 1 S. E. 653, 2 Am. St. 284. Otherwise where he deposits the money in his own name, mingles it with funds of his own and makes a profit from it. *Schwartz v. Keystone Oil Co.*, 153 Pa. 283, 25 Atl. 1018.

¹ *State v. Germania Bank*, 106 Minn. 164, 118 N. W. 683, 130 Am. St. 599. The above case reviews a number of authorities on this subject.

² *Central Trust Co. v. East & C.*

L. & T. Co., 79 Fed. 19; *Scott v. Rainier, P. & R. Co.*, 13 Wash. 108, 42 Pac. 531; *Casey v. Northern Pac. R. Co.*, 15 Wash. 450, 48 Pac. 53. He may with the approval of the court abandon such contract and not be liable to respond in damages for any injury caused by such abandonment. *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599.

³ *Central Trust Co. v. East & C. Land Co.*, 79 Fed. 19; *Spencer v. World's Columbian Exposition*, 163 Ill. 117, 45 N. E. 250; *DeWolf v. Royal Trust Co.*, 173 Ill. 435, 50 N. E. 1049; *Casey v. Northern Pacific R. Co.*, 15 Wash. 450, 48 Pac. 53. See also, *Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348, 35 Pac. 744.

⁴ *Lehigh Coal & Navigation Co. v. Central R. Co.*, 35 N. J. Eq. 426; *Wyckoff v. Scofield*, 103 N. Y. 630, 9 N. E. 498; *Hand v. Savannah & C. R. Co.*, 17 S. Car. 219; *Union Trust*

liable. Thus where he has no authority to execute certain notes, it has been held that he had no responsible principal behind him for whom he might promise and that he alone was liable on contract.⁵ The receiver may, however, contract against personal liability.⁶ The receiver is entitled to reimbursement out of the trust property for his reasonable expenses incurred in the performance of his duties,⁷ and the same is true of contract liabilities incurred on a fair and reasonable contract for the benefit of the estate.⁸

It would seem that the federal court strictly limits a receiver's authority to the jurisdiction of the court appointing him, and denies that even comity gives him the right to sue in the courts of another jurisdiction.⁹ Other authorities hold that the recognition of a foreign receiver is a matter of comity.¹⁰

§ 531. Other persons occupying fiduciary relations, as parties to contracts, trustees in bankruptcy.—About the only difference existing between the powers and obligations of a trustee in bankruptcy and those of the ordinary receiver is that the latter cannot sue without direction of the court given generally in the order of appointment or specially conferred while

Co. v. Midland Co., 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. 809; Cowdrey v. Galveston & C. R. R., 93 U. S. 352, 23 L. ed. 950.

⁵ Peoria Steam Marble Works v. Hickey, 110 Iowa 276, 81 N. W. 473, 80 Am. St. 296.

⁶ Vilas v. Page, 106 N. Y. 439, 13 N. E. 743.

⁷ Knickerbocker v. McKindley Coal & Mining Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54. However, as a general rule, a party to the cause of action who is appointed receiver in the action is entitled to no compensation for his services. Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1195 and note. He is ordinarily entitled to compensation for beneficial services rendered. Central Trust & Sav. Co. v. Chester County Electric Co. (Del.), 80 Atl. 801.

⁸ Vanderbilt v. Little, 43 N. J. Eq. 669, 12 Atl. 188; Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819, 14 Sup. Ct. 915.

⁹ Fowler v. Osgood, 141 Fed. 20, 72 C. C. A. 276, 4 L. R. A. (N. S.) 824; Great Western Min. & C. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. 770. See also, Zacher v. Fidelity Trust & Safety-Vault Co., 106 Fed. 593, 45 C. C. A. 480; Edwards v. National Window Glass Jobbers' Assn., 139 Fed. 795; Homer v. Barr Pumping Engine Co., 180 Mass. 163, 61 N. E. 883, 91 Am. St. 269; Farmers' & M. Ins. Co. v. Needles, 52 Mo. 17; Commercial Nat. Bank v. Motherwell Iron & Steel Co., 95 Tenn. 172, 31 S. W. 1002, 29 L. R. A. 164.

¹⁰ State v. Denton, 229 Mo. 187, 129 S. W. 709, 138 Am. St. 417. See also, Cooke v. Orange, 48 Conn. 401; Iglehart v. Bierce, 36 Ill. 133; Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 33 L. R. A. 203, 58 Am. St. 569; Cagill v. Wooldridge, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716. For a note on this subject see 4 L. R. A. (N. S.) 824, et seq.

the former may.¹¹ It is not considered necessary to enter further into this subject at this point.

§ 532. **Other persons occupying fiduciary relations—Promoters.**—A number of cases state in a general way that a promoter is the agent of a corporation.¹² This, however, is not an accurate statement as an agent must act for some one already in existence.¹³ Consequently he cannot act for and bind corporations not yet in existence.¹⁴ It follows that a corporation is not bound by the contracts of its promoters entered into prior to the incorporation of the company, unless, after it is chartered, it adopts such contracts as its own, in the absence of a provision in the articles of incorporation or in the statute under which the same is chartered that the corporation shall be liable on such contracts. In the absence of such adoption it is not liable for the contract's breach.¹⁵ It may be adopted by the corporation expressly, or

¹¹ *Walsh v. Shanklin*, 125 Ky. 715, 102 S. W. 295, 31 L. R. A. (N. S.) 365n.

¹² *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311; *The Telegraph v. Loetscher*, 127 Iowa 383, 101 N. W. 773, 4 Am. & Eng. Ann. Cas. 667; *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036; *Richlands Oil Co. v. Morris*, 108 Va. 288, 61 S. E. 762.

¹³ See, ante, chap. 15, Agency. "A promoter is a person who brings about the incorporation and organization of a company." *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564.

¹⁴ *More & Co. v. Towers & Co.*, 87 Ala. 206, 6 So. 41, 13 Am. St. 23n; *San Joaquin & Co. v. West*, 94 Cal. 399, 29 Pac. 785; *Ruby Chief Mining & Co. v. Gurley*, 17 Colo. 199, 29 Pac. 668; *New York & Co. R. Co. v. Ketchum*, 27 Conn. 170; *Winters v. Hub Mining Co.*, 57 Fed. 287; *Park v. Modern Woodmen of America*, 181 Ill. 214, 54 N. E. 932; *Western & Mfg. Co. v. Cousley*, 72 Ill. 531; *Gent v. Manufacturers' & Merchants' Ins. Co.*, 107 Ill. 652; *Smith v. Parker*, 148 Ind. 127, 45 N. E. 770; *Davis & Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 42, 37 N. E. 549;

Carey v. Des Moines & Co. Mining Co., 81 Iowa 674, 47 N. W. 882; *Tryber v. Cold Storage Co.*, 67 Kans. 489, 73 Pac. 83; *Holyoke Envelope Co. v. United States Envelope Co.*, 182 Mass. 171, 65 N. E. 54; *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193; *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22; *Cuba Colony Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133; *Durgin v. Smith*, 133 Mich. 331, 94 N. W. 1044; *Battelle v. Northwestern & Co. Pavement Co.*, 37 Minn. 89, 33 N. W. 327; *Hiil v. Gould*, 129 Mo. 106, 30 S. W. 181; *Davis v. Ravenna Creamery Co.*, 48 Nebr. 471, 67 N. W. 436; *Munson v. Syracuse & Co. R. Co.*, 103 N. Y. 58, 8 N. E. 355; *Tift v. Bank*, 141 Pa. St. 550, 21 Atl. 660; *Weatherford & Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. 837; *Bash v. Culver Gold Mining Co.*, 7 Wash. 122, 34 Pac. 462; *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776; *Standard & Co. v. Publishing Co.*, 87 Wis. 127, 58 N. W. 238.

¹⁵ *Rideout v. Nat. Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192; *Bank of Forest v. Orgill Bros. & Co.*, 82 Miss. 81, 34 So. 325; *American Home Life Ins. Co. v. Jenkins* (Tex. Civ. App.), 138 S. W. 424.

impliedly, by exercising rights under it but otherwise it is not binding on the corporation.¹⁶ It thus appears that it is not necessary that such adoption, ratification or acceptance be express, as it may be inferred from acts or acquiescence on the part of the corporation or by its authorized agents in its behalf as similar contracts may be established.¹⁷ The agreement must be one, however, which the usual agents of the company have express or implied authority to make. But where, with full knowledge of all the facts, the corporation assumes the contract, and agrees to pay the consideration, or accepts and retains the benefits, and impliedly adopts it the corporation will be bound.¹⁸

On the other hand, a promoter's contract cannot be enforced by the proposed corporation until it has been incorporated and organized and the contract adopted before the other party thereto

¹⁶ *Kelner v. Baxter*, L. R. 2 C. P. 174; *Melhado v. Porto Alegre & C. R. Co.*, L. R. 9 C. P. 503; *Kerridge v. Hesse*, 9 Car. & P. 200; *Morrison v. Gold & C. Mining Co.*, 52 Cal. 306; *Freeman Imp. Co. v. Osborn*, 14 Colo. App. 488, 60 Pac. 730; *New York & C. R. Co. v. Ketchum*, 27 Conn. 170; *Gent v. Manufacturers' & Merchants' Mut. Ins. Co.*, 107 Ill. 652; *Rockford & C. R. Co. v. Sage*, 65 Ill. 328; *Western & C. Mfg. Co. v. Cousley*, 72 Ill. 531; *Munson v. Syracuse & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355; *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776. See also, *Caledonia & C. R. Co. v. Magistrates of Helensburgh*, 2 Macq. H. L. 391, 2 Jur. (N. S.) 695; *Tift v. Quaker City Nat. Bank*, 141 Pa. St. 550, 21 Atl. 660.

¹⁷ *Stanton v. New York & C. R. Co.*, 59 Conn. 272, 21 Am. St. 110n; *Battelle v. Northwestern Pavement Co.*, 37 Minn. 89, 33 N. W. 327; *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. 653; *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776.

¹⁸ *Edwards v. Grand Junction R. Co.*, 1 Mylne & C. 650; *Stanley v. Birkenhead R. Co.*, 9 Simons 264; *Moore & C. v. Towers & C. Co.*, 87 Ala. 206, 6 So. 41, 13 Am. St. 23n; *Grand River Bridge Co. v. Rollins*, 13 Colo. 4, 21 Pac. 897; *Stanton v. New York & C. R. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110n; *Leonard*

v. Burlington & C. Mutual Loan Assn., 55 Iowa 594, 8 N. W. 463; *Paxton Cattle Co. v. First Nat. Bank*, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852; *Bells Gap R. Co. v. Christy*, 79 Pa. St. 59; *Coyote Gold & C. Co. v. Ruble*, 8 Ore. 284; *Schreyer v. Turner & C. Co.*, 29 Ore. 1, 43 Pac. 719; *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776. In *Schreyer v. Turner Mills Co.*, 29 Ore. 1, 43 Pac. 719, the court said: "It is alleged here, not only that the contract was made for and in behalf of the corporation, but that it had promised to pay the balance sued for; and it sufficiently appears that the parties contracting in its behalf were its promoters and organizers. It further appears, by the testimony, that it is highly probable the defendant received, accepted, and used the money to recover which this action was instituted. Under such circumstances, the objection to the action of the court in overruling the demurrer cannot be sustained." *Continental Trust Co. v. Toledo & C. Co.*, 86 Fed. 929; *Frankfort & S. T. Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; *Battelle v. Northwestern & C. Co.*, 37 Minn. 89, 33 N. W. 327; *Bank of Forest v. Orgill Bros. & Co.*, 82 Miss. 81, 34 So. 325; *Seymour v. Spring Forest & C. Assn.*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; *Bommer v.*

has withdrawn his offer.¹⁰ An agreement entered into by a promoter, on behalf of a corporation subsequently to be formed, with a second party is equivalent to a continuing offer by the latter which becomes binding when the corporation is organized and as such accepts the offer prior to its revocation.²⁰

The promoter does, however, stand in a position, in some respects at least, analogous to that of an agent to his principal.²¹

American Spiral &c. Co., 81 N. Y. 468; Hall v. Vermont & M. R. Co., 28 Vt. 401. See also, Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050. The benefits must be accepted with knowledge of the facts before such action will amount to an adoption. "Ratification will not be presumed, even when the corporation has received benefits, unless actual knowledge of the specific contract out of which the benefits arose is made to appear and the same knowledge is essential in considering the question of estoppel." Rideout v. Nat. Homestead Assn., 14 Cal. App. 349, 112 Pac. 192; Weatherford &c. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 195, 40 Am. St. 837. See also, American Home Life Ins. Co. v. Jenkins (Tex. Civ. App.), 138 S. W. 424. In some cases, however, it is denied that a corporation can ratify a contract so as to make it relate back to its inception before the corporation came into existence, Gunn v. London &c. Ins. Co., 12 C. B. (N. S.) 694; Melhado v. Porto Alegre &c. R. Co., L. R. 9 C. P. 503; In re Empress &c. Co., 16 Ch. Div. 125; Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. 193, citing Kelner v. Baxter, L. R. 2 C. P. 174. See also, Natal Land &c. Co. v. Pauline &c. Syndicate (1904), App. Cas. 120, 11 Manson 29. "It is true in principle that the adoption of such a contract (a contract made by promoters before the organization of the company) made for its benefit by a corporation thereafter formed amounts to a new contract requiring a sufficient consideration, but, where such appears, it imposes an equally valid obligation as though made with the corporate entity in the first instance." Richard Brown &c. Co. v. Bambrick Bros. &c. Co., 150 Mo. App. 505, 131

S. W. 134. But, as we understand these decisions, they do not decide that the corporation may not be held as upon a new contract from the time of its adoption. McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. 653.

¹⁹ Ireland v. Gobe Milling & Reduction Co., 20 R. I. 190, 38 Atl. 116, 38 L. R. A. 299. See also, McCandless v. Inland Acid Co., 112 Ga. 291, 37 S. E. 419; Plaquemines &c. Co. v. Buck, 52 N. J. Eq. 219, 47 Atl. 1094.

²⁰ Bridgeport &c. Co. v. Meader, 72 Fed. 115, 18 C. C. A. 451, affg. 69 Fed. 225, 15 C. C. A. 694; Old Colony Trust Co. v. Dubuque &c. Co., 89 Fed. 794; Davis v. Dexter &c. Co., 52 Kans. 693, 35 Pac. 776; Red Wing Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. 827; Pitts v. Steel Mercantile Co., 75 Mo. App. 221; Seymour v. Cemetery Assn., 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Schreyer v. Mills Co., 29 Ore. 1, 43 Pac. 719. "When the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right inconsistent with the nonexistence of such contract might be deemed conclusive evidence of such adoption." Weatherford &c. R. Co. v. Granger, 86 Tex. 350, 40 Am. St. 837.

²¹ Yeiser v. United States &c. Paper Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Cuba Colony Co. v. Kirby, 149 Mich. 453, 112 N. W. 1133.

Promoters stand in a fiduciary relation to the company to be organized,²² and all those whom they induce to subscribe for stock and to become members of the corporation.²³

A promoter may act as such after the corporation is organized to do business. If a corporation has been organized and persons promoting it up to that time continue to act for it by inducing persons to come in and subscribe for its capital stock their relations as promoters continue.²⁴

§ 533. Personal liability of promoter—Right to compensation.—Promoters are held personally liable on their contracts made for or in behalf of the projected corporation.²⁵ The formation of a company and its ratification of the promoter's contract does not relieve the latter from the liability unless it clearly appears that the liability of the promoter was intended to be re-

²² *Lagunas Nitrate Co. v. Lagunas Syndicate* (1899), 2 Ch. 392; *A. J. Cranor Co. v. Miller*, 147 Ala. 268, 41 So. 678; *Tegarden Bros. v. Big Star Zinc Co.*, 71 Ark. 277, 72 S. W. 989; *Hinkley v. Oil & C. Line Co.*, 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564; *Hayden v. Green*, 66 Kans. 204, 71 Pac. 236; *Camden Land Co. v. Lewis*, 101 Maine 78, 63 Atl. 523; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 74 N. E. 653, 108 Am. St. 479; *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036; *Plaque Mines & C. Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Arnold v. Searing*, 78 N. J. Eq. 146, 78 Atl. 762; *Second Nat. Bank v. Greenville Screw-Point Steel Fence Post Co.*, 23 Ohio C. C. 274; *Shawnee Commercial & Sav. Bank Co. v. Miller*, 24 Ohio C. C. 198; *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311; *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876; *Richlands Oil Co. v. Morriss*, 108 Va. 288, 61 S. E. 762.

²³ *Lagunas Nitrate Co. v. Lagunas Syndicate* (1899), 2 Ch. 392; *A. J. Cranor Co. v. Miller*, 147 Ala. 268, 41 So. 678; *Yeiser v. United States & C. Paper Co.*, 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; *Walker*

v. Pike County Land Co., 139 Fed. 609, 71 C. C. A. 593; *Goodwin v. Wilbur*, 104 Ill. App. 45; *Hinkley v. Sac Oil Co. & Pipe Line Co.*, 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564; *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036; *Colton Improv. Co. v. Ritcher*, 26 Misc. (N. Y.) 26, 55 N. Y. S. 486; *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

²⁴ *Pietsch v. Milbrath*, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 107 Am. St. 1017.

²⁵ *Ryland v. Hollinger*, 117 Fed. 218, 54 C. C. A. 248. The latter case states: "In Missouri it is held that, if persons who sign articles for incorporation contract debts or incur liabilities in the name of the projected corporation before all acts necessary to bring the corporation into existence have been performed, such persons may be held liable as partners. *Mosier v. Parry*, 60 Ohio St. 388, 54 N. E. 364. 'The promoters themselves are liable upon the contract, unless the person with whom they engage agrees to look to some other fund for payment.' *Weatherford & C. R. Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837. See also, *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153n.

leased when the liability of the corporation began.²⁶ Thus a person ordering goods for a corporation has been held liable therefor, notwithstanding the corporation was actually organized and the goods delivered to and received by it.²⁷ The promoter is also liable to the corporation for any secret profits he may derive from the transaction. If he is guilty of any misrepresentation of facts or suppression of truth in relation to his personal interest in the supposed purchase the corporation is entitled to set aside the transaction or recover compensation for any loss it has suffered.²⁸

²⁶ *Roberts Mfg. Co. v. Schlick*, 62 Minn. 332, 64 N. W. 826; *Queen City Furniture & Co. v. Crawford*, 127 Mo. 356, 30 S. W. 163. "Upon the soundest reasoning the tendency of the courts in recent years is to an adherence to the doctrine that those dealing with promoters should be left with the double security of the promoter and the company when one is formed, unless it clearly appears that the liability of the promoter was not intended, or that it was intended to be released when the liability of the corporation began; but where the evidence, as in this case, consisting of oral statements of witnesses as to facts and circumstances and a correspondence in writing, tends to show that it was not intended by the contracting parties that a person active in the promotion and organization of a corporation should be liable for goods or supplies furnished to the corporation, but that the party furnishing the goods or supplies understood and agreed that he was to look to, and did in fact look to, and receive payment in part from, the corporation, and was not to look to or demand payment from the promoter or organizer of the corporation, and, in fact, did not look to or demand payment from him until the insolvency of the corporation, an instruction which directs the attention of the jury to the written evidence only, ignoring the oral testimony, and authorizes a verdict on this evidence, singled out, is misleading and constitutes reversible error." *Strause v. Richmond Woodworking Co.*, 109 Va. 724, 65 S. E. 659, 132 Am. St. 937, 940.

²⁷ *Henderson Woollen Mills v. Ed-*

wards, 84 Mo. App. 448. But one who purchases stock in a corporation from a private individual who owns such stock cannot hold the directors and promoters of the corporation liable, notwithstanding he made the purchase in reliance on a fraudulent prospectus issued to induce purchases from the company. *Cheney v. Dickinson*, 172 Fed. 109, 96 C. C. A. 314, 28 L. R. A. (N. S.) 359.

²⁸ *In re Leeds & H. Theatres* (1902), 2 Ch. 809; *Gluckstein v. Barnes* (1900), A. C. 240; *In re Sale Hotel & Botanical Gardens*, 78 L. T. (N. S.) 368; *Tegarden Bros. v. Big Star Zinc Co.*, 71 Ark. 277, 72 S. W. 989; *Lomita Land & Co. v. Robinson* (Cal.), 97 Pac. 10, 18 L. R. A. (N. S.) 1106; *Yale Gas Stove Co. v. Wilcox* (Conn.), 25 L. R. A. 90; *Walker v. Pike County Land Co.*, 139 Fed. 609, 71 C. C. A. 593; *The Telegraph v. Loetscher*, 127 Iowa 383, 101 N. W. 773, 4 Am. & Eng. Ann. Cas. 667; *Cuba Colony Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133; *Cook v. Southern Columbian Climber Co.*, 75 Miss. 121, 21 So. 795; *Arnold v. Searing*, 78 N. J. Eq. 146, 78 Atl. 762; *Groel v. United Electric Co.*, 70 N. J. Eq. 616, 61 Atl. 1061; *Midwood Park Co. v. Baker*, 128 N. Y. S. 954; *Colton Improv. Co. v. Richter*, 26 Misc. (N. Y.) 26, 55 N. Y. S. 486; *Shawnee Commercial & Sav. Bank Co. v. Miller*, 24 Ohio C. C. 198; *Johnson v. Sheridan Lumber Co.*, 51 Ore. 35, 93 Pac. 470; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311; *Pietsch v. Milbrath*, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 107 Am. St. Rep. 1017. "The wrong being a wrong done by promoters to the corpora-

Corporations and their organizers have a right to make contracts with promoters to pay them for their services and to purchase property from them²⁹ and it has been held that this promise to pay the promoter for his services may be implied.³⁰ It would also seem that the promoters are entitled to be reimbursed for money necessarily or legitimately spent on behalf of the corporation.³¹

§ 534. Other persons occupying fiduciary relations—Directors of corporations.—A director occupies a position of trust or agency for his company of such a character that all dealings between him and the company where his interest is opposed to that of the company will be regarded with jealousy and suspicion and subjected to the closest scrutiny, and not sustained against the stockholders unless they are consistent with the utmost good faith and fair dealing on the part of the directors.³²

tion whereby the promoters have derived in secret an advantage not disclosed to existing members of the corporation, the corporation was the proper person to bring the suit to remedy the wrong." *Hughes v. Cadena &c. Min. Co.*, 13 Ariz. 52, 108 Pac. 231.

²⁹ *Touche v. Metropolitan &c. Warehousing Co.*, L. R. 6 Ch. App. 671; *Davis v. Montgomery &c. Chemical Co.*, 101 Ala. 127, 8 So. 496; *Stanton v. New York &c. R. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110n; *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; *Bommer v. American &c. Mfg. Co.*, 81 N. Y. 468; *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 54; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050. A corporation is liable for the expenses of its promoters in procuring a subscription, where, after its organization, it accepts the subscription with the knowledge of such expenses. *Weatherford &c. R. Co. v. Granger* (Tex. Civ. App.), 22 S. W. 70.

³⁰ *Farmers' Bank of Vine Grove v. Smith*, 105 Ky. 816, 49 S. W. 810, 88 Am. St. 341. See also, *Taussig v. St. Louis &c. R. Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. 674. For cases holding that there can be no implied promise to pay a promoter for his services, see *Weatherford &c. R. Co. v. Granger*, 86 Tex. 350,

40 Am. St. 837. See also, *Bash v. Culver Gold Min. Co.*, 7 Wash. 122, 34 Pac. 462. A corporation after organization cannot be compelled to pay for services rendered by its promoters with no view to compensation. *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564.

³¹ *Morton v. Hamilton College*, 100 Ky. 281, 18 Ky. L. 765, 38 S. W. 1, 35 L. R. A. 275; *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725.

³² *Aberdeen R. Co. v. Blaikie*, 1 Macq. H. L. 401; *Pacific &c. Works v. Smith*, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. 170; *Hinkley v. Sac Oil &c. Line Co.*, 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564; *Livermore Falls &c. Co. v. Riley* (Maine), 78 Atl. 980; *Marr v. Marr*, 73 N. J. Eq. 643, 70 Atl. 375, 133 Am. St. 742; *People v. Powell*, 201 N. Y. 194, 94 N. E. 634; *Commonwealth Title Ins. Co. v. Seltzer*, 227 Pa. 410, 76 Atl. 77, 136 Am. St. 896; *Scott v. Farmers' Nat. Bank*, 97 Tex. 31, 75 S. W. 7, 104 Am. St. 835. Nor can the directors ratify a contract made in violation of their trust so as to bind the stockholders. *Kenyan Realty Co. v. Nat. Deposit Bank*, 140 Ky. 133, 130 S. W. 965,

But it is not the law that an officer of a corporation cannot deal with the corporation if his acts are open and fair and known to the directors and stockholders.³³ Moreover, it has been held that a director does not sustain a fiduciary relation to an individual stockholder with respect to his stock over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger and that in the absence of actual fraud such a purchase will not be set aside by a mere failure to disclose any information the director may have affecting the value of the stock.³⁴

31 L. R. A. (N. S.) 169. It is the duty of the board of directors to manage the corporate affairs solely in the interest of the corporation. *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204. "Where the trust duty of the directors of a corporation and personal interests conflict the latter must give way." *Young v. Columbia Land & Investment Co.*, 53 Ore. 438, 99 Pac. 936, 101 Pac. 212, 133 Am. St. 844; *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5. (A good case illustrating the necessity for such principle). See also, *Malden & Melrose Gaslight Co.*

v. Chandler, 209 Mass. 354, 95 N. E. 791; *Southern Kansas Ry. Co. v. Logue* (Tex. Civ. App.), 139 S. W. 11.

³³ *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 127 N. W. 752, 139 Am. St. Rep. 587. See a note to the above case in 139 Am. St. 598, for an exhaustive review of the right of a director to contract with his corporation.

³⁴ *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. 170. See further, as to promoters and directors, post, ch. 18.

CHAPTER XVIII.

PRIVATE CORPORATIONS.

- | | |
|--|--|
| <p>§ 540. Power of private corporations to contract generally.</p> <p>541. Express power.</p> <p>542. Incidental and implied powers.</p> <p>543. Implied contracts.</p> <p>544. Seal.</p> <p>545. Power to take and hold land.</p> <p>546. Power to take by a mortgage and to mortgage real estate.</p> <p>547. Power to hold and convey personal or real property.</p> <p>548. Power of one corporation to purchase and hold stock in another corporation.</p> <p>549. Power to appoint agents.</p> <p>550. Power to appoint agent—Ratification.</p> <p>551. Power to act as agent.</p> <p>552. Power to make extra-territorial contracts.</p> <p>553. Extraterritorial contracts—What law governs.</p> | <p>§ 554. Foreign corporation subject to the laws of the state in which it seeks to do business.</p> <p>555. Contracts made before incorporation.</p> <p>556. Ultra vires—Different meaning of term "ultra vires."</p> <p>557. Recovery where ultra vires contract has been performed by parties.</p> <p>558. Ultra vires contracts—Performance by one party.</p> <p>559. Executed contracts—Rule criticized.</p> <p>560. Contracts ultra vires—Estoppel.</p> <p>561. Contracts ultra vires—Cases discriminated.</p> <p>562. Contracts ultra vires—Ratification.</p> <p>563. Laches.</p> <p>564. State as proper party to raise question of ultra vires.</p> |
|--|--|

§ 540. Power of private corporation to contract generally.

—The charter of a corporation is the measure of its powers and the enumeration of these powers implies the exclusion of all others not fairly incidental to those enumerated.¹ The power to

¹ Williams v. Johnson, 208 Mass. 544, 95 N. E. 90; State v. Bankers' Trust Co., 157 Mo. App. 557, 138 S. W. 669; Allison v. Fidelity & Ins. Co., 81 Nebr. 494, 116 N. W. 274, 129 Am. St. 694; Somerville Water Co. v. Borough of Somerville, 78 N. J. Eq. 199, 78 Atl. 793; Cook v. American Tubing & Co., 23 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; Victor v. Louise Cotton Mills, 148 N. Car. 107, 61 S. E. 648, 16 L. R. A. (N. S.) 1020n; Doty v. American Tel. & Tel. Co. (Tenn.), 130 S. W. 1053; Thomas v. West New Jersey R. Co., 101 U. S. 781, 25 L. ed. 950; State v. Clement Nat. Bank, 84 Vt.

167, 78 Atl. 944; National Car Advertising Co. v. Louisville & C. R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010n. See also, German Ins. Co. v. Commonwealth, 141 Ky. 606, 133 S. W. 793. It was formerly the custom to create a corporation by a special act of the legislature; this special act created, determined and limited the powers of the corporation. As a general rule the various states now provide for the incorporation of artificial persons under general laws and where this is true the charter of a corporation signifies its articles of incorporation together with the general laws applicable to such corpora-

make such contracts as are reasonably necessary in order to carry out its legitimate purpose resides in every corporation, and is co-extensive with its corporate powers.² Any agreement outside or beyond the scope of the powers so conferred is ultra vires and invalid.³ It has been held, for instance, that a railroad company is not authorized to practice medicine or surgery and that any contract it might make to do so would be ultra vires.⁴

A good example of ultra vires contracts is found in contracts of guaranty or suretyship. A corporation does not have the power to become a guarantor or surety, or otherwise lend its credit to another, unless the power so to do is expressly conferred by its charter or unless such action is reasonably necessary or is usual in the conduct of its business. As a general rule the power to act as surety does not fall within the implied or incidental powers of a corporation.⁵ Thus, an accommodation indorsement will be ultra vires the corporation when not authorized by its

tion and by which its powers are determined. See *Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. 304; *McLeod v. Medical College*, 69 Nebr. 550, 96 N. W. 265, 98 N. W. 672. See also, *Marion Trust Co. v. Bennett*, 169 Ind. 346, 82 N. E. 782, 124 Am. St. 228, for the construction to be put on a statute which provides that corporations shall not be created by special act, as applied to a corporation already created. "It is well settled that the charter of a corporation formed under a general law consists of its articles of incorporation and the laws governing such corporation." *Westport Stone Co. v. Thomas (Ind.)*, 93 N. E. 406; *Attorney-General v. Great Eastern R. Co.*, L. R. 5 App. Cas. 473. See also, *Thomas v. West Jersey R. Co.*, 101 U. S. 78, 25 L. ed. 950; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Oklahoma Portland Cement Co. v. Anderson*, 28 Okla. 650, 115 Pac. 767; *Green Bay & M. R. Co. v. Union Steam-Boat Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413; *Supreme Lodge v. Weller*, 93 Va. 605, 25 S. E. 891. One who, in his dealings with a company which exercises the franchise of a corporation, has recognized

it as a corporation and dealt with it as such will not as a general rule be permitted to question the corporate capacity of his debtor. *Omaha Cattle Loan Co. v. Shelly*, 89 Nebr. 502, 131 N. W. 926. The existence of a de facto corporation cannot be inquired into collaterally. *Color Oil & C. Co. v. Franzell*, 128 Ky. 715, 109 S. W. 328, 36 L. R. A. (N. S.) 456.

² *McKiernan v. Lenzen*, 56 Cal. 61; *Choctaw & C. R. Co. v. Bond*, 160 Fed. 403, 87 C. C. A. 355; *Portland Lumbering & Mfg. Co. v. East Portland*, 18 Ore. 21, 22 Pac. 536, 6 L. R. A. 290n; *Forty-Acre Spring Live Stock Co. v. West Texas & C. Trust Co.*, (Tex. Civ. App.), 111 S. W. 417; *Thomp. on Corp.* (2d ed.), § 2137.

³ See, ante, § 272, *Artificial Persons or Corporations* in chapter on Parties and post, § 556 et seq., *Ultra Vires*, this chapter.

⁴ *Youngstown Park & C. St. R. Co. v. Kessler*, 84 Ohio St. 74, 95 N. E. 509, Ann. Cas. 1912B, 933.

⁵ *Spencer v. Alki Point Trans. Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. 1058. See also, *Richeson v. National Bank of Mena*, 96 Ark. 556, 132 S. W. 913; *W. C. Bowman Lumber Co. v. Pierson* (Tex. Civ. App.), 139 S. W. 618.

charter.⁶ It has been stated that a private corporation might, the directors and stockholders assenting, issue accommodation paper, provided corporate creditors are paid.⁷ But if this is true why may not a corporation do any act or engage in any business, without regard to its charter, provided the stockholders and directors assent and it does not interfere with creditors' rights? A corporation is an artificial person created by the state; it cannot be given powers ultra its charter through the assent of its stockholders and directors.⁸ Of course, some corporations are expressly given power to make and execute contracts of suretyship or the like and are organized for that very purpose. There is also one class of corporations generally held to have the incidental or implied right to enter into contracts of guaranty or suretyship of a certain character. They are such as are incorporated to manufacture and sell spirituous liquors. It is held that they may enter into contracts of guaranty or suretyship on behalf of their customers or prospective customers for the reason that such contracts enable them to carry out the purpose for which they are created.⁹

§ 541. Express power.—This rule that a corporation has only such powers as may be granted by its charter or those necessarily implied therefrom applies to every class of corporations.¹⁰

⁶ *Simmons Nat. Bank v. Dille* Foundry Co., 95 Ark. 368, 130 S. W. 162; *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, 30 C. C. A. 409; *Johnson v. Johnson Bros. (Maine)*, 80 Atl. 741; *Carlaftes v. Goldmyer Co.*, 72 Misc. (N. Y.) 75, 129 N. Y. S. 396; *Cook v. American Tubing & Co. (R. I.)*, 65 Atl. 641, 9 L. R. A. (N. S.) 193 and note; *McC Campbell v. Fountain Head R. Co.*, 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. 731; *Haupt v. Vint*, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518n.

⁷ 1 *Cook on Corp.* (6th ed.), § 3; *Murphy v. Arkansas & L. Land & Imp. Co.*, 97 Fed. 723; *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 61 Atl. 167; *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303. See also, *Lyon, Potter & Co. v. First Nat. Bank*, 85 Fed. 120, 29 C.

C. A. 45; *In re Prospect Worsted Mills*, 126 Fed. 1011.

⁸ See *Cook v. American Tubing Co.*, 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

⁹ *Timm v. Grand Rapids Brew. Co.*, 160 Mich. 371, 125 N. W. 357, 27 L. R. A. (N. S.) 186n; *Fuld v. Burr Brewing Co.*, 45 N. Y. St. 649, 18 N. Y. S. 456; *Holm v. Claus Lipsius Brew. Co.*, 21 App. Div. (N. Y.) 204, 47 N. Y. S. 518; *Kochler & Co. v. Reinheimer*, 26 App. Div. (N. Y.) 1, 49 N. Y. S. 755; *Munoz v. Brassel* (Tex. Civ. App.), 108 S. W. 417. *Contra*, *Filon v. Miller Brew. Co.*, 60 Hun (N. Y.) 582, 38 N. Y. St. 602, 15 N. Y. S. 57. See also, *In re Liquor Dealers' Supply Co.*, 177 Fed. 197, 101 C. C. A. 367.

¹⁰ *Gulf C. & S. F. R. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156, 35 Am. & Eng. Railway Cases 94.

A corporation's charter is its express grant of power and it can do no act nor make any contract either within or without the state which creates it except such are authorized by its charter, and those acts must also be done by such officers or agent and in such manner as the charter may require.¹¹ Nor can the express powers of a corporation be enlarged by implication.¹²

§ 542. Incidental and implied powers.—This latter statement must not be misunderstood, however. The powers of a corporation cannot be enlarged by implication but it may nevertheless have implied powers. The doctrine of implied powers arises not only naturally but from necessity. Consequently it is usually said that a corporation possesses only such powers as are expressly granted it by its charter or such powers as are necessarily implied therefrom to enable it to carry into effect the objects and purposes of its creation and the powers expressly granted.¹³ In every express grant there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty in any particular case is to determine whether the power of a corporation to do an act can be implied or not.¹⁴ An incidental power has

¹¹ *Talmadge v. North America Coal &c. Co.*, 3 Head. (Tenn.) 337; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. ed. 274; *Runyan v. Coster's Lessee*, 14 Pet. (U. S.) 122, 10 L. ed. 382; *Tombigbee R. Co. v. Kneeland*, 4 How. (U. S.) 16, 11 L. ed. 855. "A clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." *Central Transportation Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478.

¹² *People v. Illinois Cent. R. Co.*, 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. 181; *Victor v. Louise Cotton Mills*, 148 N. Car. 107, 61 S. E. 648, 16 L. R. A. (N. S.) 1020n.

¹³ *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348; *McQuaig v. Gulf Naval Stores Co.*,

56 Fla. 505, 47 So. 2, 131 Am. St. 160; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302; *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 149 Iowa 141, 126 N. W. 190; *Bankers' Union &c. v. Crawford*, 67 Kans. 449, 73 Pac. 79, 100 Am. St. 465; *Leggett v. New Jersey Mfg. & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. 612. "A corporation being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629. See also, *Richeson v. National Bank of Mena*, 96 Ark. 556, 132 S. W. 913. See ante, § 272, Parties under subtitle Artificial Persons or Corporations.

¹⁴ *Wilwaukee Trust Co. v. Germania Ins. Co.*, 106 La. Ann. 669, 31

been defined as "one that is directly and immediately appropriate to the execution of the specific powers granted, and not one that has a slight or remote relation to it."¹⁵ The foregoing definition would indicate that the terms "incidental" and "implied" powers are used interchangeably and this is true, but it is believed that there is a valid distinction which should be drawn between the two. What are termed incidental powers may more properly be said to be matters that are incident to the existence of the corporation; things that have to do with the body itself and have nothing to do with the execution of the corporate franchise or the conduct of the business in which the corporation is engaged. The term "implied powers," or the powers which the corporation takes by implication, on the other hand, has nothing to do with the corporate existence as such, but are concerned wholly with reference to the execution of its corporate franchise and are the powers necessary to be used by it in the execution of its corporate business.¹⁶ A corporation's implied power confers upon it the right to make all contracts requisite for the purpose for which it was created.¹⁷

A business corporation has implied power to do that which

So. 298; *North Side R. Co. v. Worthington*, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. 778; *Moore v. Sun Printing & Publishing Assn.*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. 240.

¹⁵ *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83; *Hood v. New York & N. H. R. Co.*, 22 Conn. 1; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497n, 17 Am. St. 319; *State v. Newman*, 51 La. Ann. 833, 25 So. 408, 72 Am. St. 476; *Franklin Co. v. Lewiston Inst. &c.*, 68 Maine 43, 28 Am. Rep. 9n; *Buffett v. Troy &c. R. Co.*, 40 N. Y. 168. See also, *West Maryland R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 62 Atl. 351, 3 L. R. A. (N. S.) 887n, 111 Am. St. 362.

¹⁶ See 3 *Thomp. Corp.* (2d ed.), § 2105. "The early text writers and some of the older cases enumerated at least five powers, as necessarily incident to every corporation: (a) Perpetual succession, by which is meant the power of admitting members in place of those removed by

death or by the transfer of shares, and the continuation as a legal entity notwithstanding such change of membership; (b) to sue and be sued, implead and be impleaded, grant and receive by its corporate name; (c) to purchase, hold and convey real and personal property; (d) to have a common seal and change the same at pleasure; (e) to make by-laws. To these may be added another power incident to certain classes of corporations, that of removing members." 3 *Thomp. on Corp.* (2d ed.), § 2104.

¹⁷ *Deringer's Admr. v. Deringer's Admr.*, 5 *Houst. (Del.)* 416, 1 Am. St. 150; *McQuaig v. Gulf Naval Stores Co.*, 56 Fla. 505, 47 So. 2, 131 Am. St. 160; *People v. Illinois Cent. R. Co.*, 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. 181; *Allison v. Fidelity Mutual Fire Ins. Co.*, 81 *Nebr.* 494, 116 N. W. 274, 129 Am. St. 694. A corporation possesses such powers as may fairly be regarded as incidental to the objects for which it was created. Attorney-

is reasonably necessary or usually incident to the prosecution of such business and may foster its legitimate business but it cannot exercise abnormal or extraordinary power to do so.¹⁸ It has been held that a corporation organized to conduct a mining and smelting business has implied power to mine and sell coal.¹⁹ A private corporation with express power to buy and hold real estate and erect buildings for specified purposes and to do other things essential thereto has the incidental power after erecting a building to permit an adjoining owner to use the wall of such building as a party wall.²⁰ A contract made by a mining corporation to advance a specified sum of money for the construction of a tunnel to drain its mine is not ultra vires. Such contracts come within the implied or incidental powers of the corporation.²¹ Where the charter of a land company gave it powers to acquire

General v. Great Eastern R. Co., L. R. 5 App. Cas. 473; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Thomas v. West Jersey R. Co., 101 U. S. 78, 25 L. ed. 950; Green Bay & M. R. Co. v. Union Steam-Boat Co., 107 U. S. 98, 27 L. ed. 413, 2 Sup. Ct. 221.

¹⁸ North Side R. Co. v. Worthington, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. 778.

¹⁹ Hunter W. Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521.

²⁰ Odd Fellows' Hall Assn. v. Hegele, 24 Ore. 16, 32 Pac. 679.

²¹ Sutro Tunnel Co. v. Segregated Belcher Mining Co., 19 Nev. 121, per Hawley, J.: "In applying these principles, the courts have held that a corporation, created for the purpose of mining and transportation of coal, had the power to purchase and use a steamboat for the purpose of conveying its coal to market (Callaway M. & M. Co. v. Clarke, 32 Mo. 305), that a corporation, created for the purpose of raising and smelting lead ore, had power to purchase smelting works, and assume a contract entered into by their vendors providing means for the transportation of their ores, when smelted, to market (Moss v. Averell, 10 N. Y. 455), that a corporation created for the purpose of carrying on an iron furnace is au-

thorized to carry on a supply store in connection with that business (Searight v. Payne, 6 Lea (Tenn.) 283), that railroad corporations have the right to own and control steamboats for the purpose of transporting their freight and passengers across navigable waters on the line of their routes, and also at the end of their roads separating them from the substantial termini of their routes (Wheeler v. San Francisco & A. R. Co., 31 Cal. 65), that where power is given to a railroad corporation to transport persons and property beyond the termini of its road, it has authority to purchase and use a steamboat for that purpose (Shawmut Bank v. Plattsburg & M. R. Co., 31 Vt. 496), that a railroad corporation, authorized to carry passengers and transport freight beyond its own lines, and to run steamboats for that purpose, may hire, either by the trip or by the season, steamboats belonging to others, or employ such steamboats to carry passengers and freight in connection with its own railroad and business, and guarantee to the proprietors that their gross earnings for the season shall not fall below a certain sum. (Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 101.)"

mining and timber lands, to take the ore and timber therefrom and manufacture them, and to acquire rights of way "to export" its products, with all powers necessary to the full use and enjoyment of the powers granted, and authorized it, "in furtherance" of those powers, to effect "a temporary or permanent consolidation" with any railroad company, it was held that the land company had power to acquire stock of a railway company and guarantee its bonds and dividends on its preferred stock, in order to secure the construction of a railroad necessary to the success of the land company, thus accomplishing all that a complete consolidation could accomplish, with less risk and responsibility.²²

²² *Marbury v. Kentucky Land Co.*, 62 Fed. 335, per curiam: "In this case, looking to the manifest necessity there was for the construction of a railroad in order to make the land company's project a success, and looking to the emphatic recognition of that necessity by the Kentucky legislature in permitting either a temporary or permanent consolidation with a railroad company, we think that the power to secure the construction of a proper railroad by taking its stock and guarantying its bonds was fairly within the incidental powers conferred in such ample language, because it accomplished all that a complete consolidation could accomplish without so much risk or responsibility for the land company.

"In *Branch v. Jesup*, 106 U. S. 468, 478, 1 Sup. Ct. 495, it was held that a power in a railroad company to incorporate its capital stock with the stock of another company included as a lesser power the right to sell its road and franchises.

"In *Hill v. Nisbet*, 100 Ind. 341, authority conferred upon a railroad corporation by statute to buy a railroad, or to consolidate with another corporation owning it, it was held to include the power to buy stock in the latter corporation. See also, *Ryan v. Railway Co.*, 21 Kans. 365; *Wehrhane v. Railroad Co.*, 4 N. Y. St. 541.

"In *Smead v. Railroad Co.*, 11 Ind. 104, a railroad company was chartered for the specific purpose of constructing a railroad from Indianapolis to the Ohio state line, to connect there with a certain Ohio railroad. It

was given power to make such contracts and agreements with the connecting road for the transportation of freight and passengers and for the use of its road as to the board of directors might seem proper. Under this general power it was held that the Indiana corporation might give its bills and promissory notes to the Ohio corporation to enable the Ohio corporation to change its gage, and thus make the connection between them more efficient.

"In *Low v. Railroad Co.*, 52 Cal. 53, a railroad company with power to lease the road of another company was held to be authorized to guarantee the bonds of the lessor corporation.

"The foregoing cases illustrate how a more extensive power has been held to include a less power of the same character. Other cases may be referred to to illustrate how powers not included within any express power have yet been held to be fairly incidental to the main and express objects of a corporation.

"In the cases of *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 14 Sup. Ct. 339, it was held that a company organized under the laws of Texas 'for the purchase, subdivision, and sale of land in cities,' which owned a large amount of land near the city of Fort Worth, separated from the city by the Trinity River, had the power, as fairly incidental to the main object of its corporation, to make a contract with a bridge company to pay one-third of the cost of a bridge to be built over Trinity River

Likewise, it is well recognized that corporations, other than those organized for governmental purposes, have the right to contract debts or borrow money in order to accomplish the purposes of their organization. This power is limited only by provisions of their charters or statutes.²³

to connect its land with the city, even though the bridge was to be public property.

"In *Vandall v. Dock Co.*, 40 Cal. 83, where a corporation was organized for the purpose of buying, improving, selling and otherwise disposing of real estate, it was held that the corporation might properly appropriate a portion of its funds to a railroad running in the neighborhood, for the purpose of increasing the facilities and lessening the cost of transportation to its property.

"In *Watt's Appeal*, 78 Pa. St. 370, a corporation owning a very large body of lands had power by its charter to aid in the development of minerals and other materials and to promote a settlement and clearing of the country. It was held that the building of sawmills and an hotel for the accommodation of those having business in connection with carrying out the prime object of the corporation was within the corporate powers.

"In *Whetstone v. University*, 13 Kans. 320, it was held by the Supreme Court of Kansas, Mr. Justice Brewer delivering the opinion, that a town-site corporation, organized for the purpose of locating and laying out a town site and making improvements therein, with power to acquire and convey at pleasure all such real and personal estate as might be necessary and convenient to carry into effect the objects of the corporation, had the power to donate a few of its lots for the purpose of procuring the erection of a school building within a short distance of the property.

"The cases last cited are all of them stronger cases than the one at bar, for in all of them the courts were obliged by construction to go outside and permit the investment of the property of the company in a business not expressly authorized by the charter. Here we keep within the letter of the charter, for here the company has the

right to embark its entire capital and risk it all by consolidation with a railway company in the business of building and running a railroad, and we only hold that, having such a power, it has the right to do less than that, and risk only a part of its funds by lending its credit to such a railway company, and retaining control of it by owning its entire stock."

²³ *Alabama &c. Ins. Co. v. Central Agr. &c. Assn.*, 54 Ala. 73; *Taylor v. Agricultural &c. Assn.*, 68 Ala. 229; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *St. Joseph's Polish &c. Soc. v. St. Hedwig's Church*, 4 Pennw. (Del.) 141, 53 Atl. 353; *Humphreyville Copper Co. v. Sterling*, Fed. Cas. No. 6872; *Memphis & L. R. Co. v. Dow*, 19 Fed. 388; *Grommes v. Sullivan*, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419; *Ward v. Johnson*, 95 Ill. 215; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412; *Thompson v. Lambert*, 44 Iowa 239; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588, 26 Ky. L. 401, 81 S. W. 927, 111 Am. St. 302; *Heironimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. 333; *Hart v. Missouri State Mut. Fire & Marine Ins. Co.*, 21 Mo. 91; *Hayward v. Graham Book & Stationery Co.*, 59 Mo. App. 453; *Richards v. Merrimac & C. R. Co.*, 44 N. H. 127; *Lucas v. Pitney*, 27 N. J. L. 221; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318; *Town of Hacketts-town v. Swackhamer*, 37 N. J. L. 191; *Mead v. Keeler*, 24 Barb. (N. Y.) 20; *Curtis v. Leavitt*, 15 N. Y. 9; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Hope Mut. Life Ins. Co. v. Perkins*, 38 N. Y. 404, 2 Abb. Dec. 383; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Coats v. Donnell*, 94 N. Y. 168; *Hays v. Galion Gas Light & Coal*

It is frequently stated that a corporation can have and exercise implied power only from necessity or where such power is necessary to the enjoyment of that specially granted.²⁴ The term, "necessity," as here used does not mean absolute necessity but it does mean that the implied power shall be one which is needful, suitable, and proper to accomplish the object of the grant; one that is directly and immediately appropriate to the execution of the specific powers and not one that has but a slight indirect or remote relation to the specific purposes of the corporation.²⁵ From the foregoing it has been deduced as a general rule that the powers of a corporation in effecting its authorized objects are as broad and comprehensive as those of an individual when not expressly prohibited.²⁶ Moreover, the contracts of a corporation, within the scope of its general powers, which are not contrary to the express provisions of its charter, are presumed to be within its powers,²⁷ and the burden is upon one denying their validity to prove the facts which render them *ultra vires*.²⁸ But

Co., 29 Ohio St. 330; Union Bank v. Jacobs, 6 Humph. (Tenn.) 515; Moss v. Harpeth Academy, 7 Heisk. (Tenn.) 283; Burr's Exr. v. McDonald, 3 Grat. (Va.) 215; Rockwell v. Elkhorn Bank, 13 Wis. 653.

²⁴ Downing v. Mount Washington Road Co., 40 N. H. 230.

²⁵ People v. Illinois Central R. Co., 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. 181; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. 319, 8 L. R. A. 497; Nicollete Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. 334; Ellerman v. Chicago &c. Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287. "Necessary" when used in defining the powers of corporations, does not mean what is simply indispensable, but also what is useful, convenient, and proper to carry into effect the franchises granted." People v. Pullman Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366. The above quotation was taken from the dissenting opinion of that case but the prin-

ciple itself is not affected by the majority opinion.

²⁶ Herrick v. Humphrey Hardware Co., 73 Nebr. 809, 103 N. W. 685, 119 Am. St. 917. See also, Riche v. Ashbury R. Carriage & Iron Co., L. R. 9 Exch. 224; Tennessee River Transp. Co. v. Kavanaugh, 93 Ala. 324, 9 So. 395; Thompson v. Lambert, 44 Iowa 239; Baltimore v. Baltimore & O. R. Co., 21 Md. 50; Booth v. Robinson, 55 Md. 419; Hand v. Clearfield Coal Co., 143 Pa. St. 408, 22 Atl. 709; Fitzgerald &c. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36.

²⁷ Stockton v. American Tobacco Co., 55 N. J. Eq. 352, 36 Atl. 971. See also, South Wales R. Co. v. Redmond, 10 C. B. (N. S.) 675; Taylor v. Chester &c. R. Co., L. R. 2 Exch. 356, 384; Baltimore v. Baltimore &c. R. Co., 21 Md. 50; Rider Life Raft Co. v. Roach, 97 N. Y. 378.

²⁸ Gorder v. Plattsmouth Canning Co., 36 Nebr. 548, 54 N. W. 830. And see also, Alabama Gold Life Ins. Co. v. Central &c. Assn., 54 Ala. 73; Wierman v. International Bldg. &c. Union,

a corporation has no implied power to enter into contracts in aid of purposes other than those for which it was chartered.²⁹

§ 543. **Implied contracts.**—Not only does a corporation have certain implied powers but it may be liable on an implied contract. A corporation may be bound by inferences and facts and corporate acts, which point to the existence of an implied agreement as their rational explanation, as well as by formal vote.³⁰ Thus, a corporation may be liable for the reasonable value of money expended and work and material furnished for its benefit where it accepted the benefits.³¹

§ 544. **Seal.**—Blackstone laid down the rule “that a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal.”³² There are cases which would seem to support this doctrine.³³ The modern doctrine of the English courts has been stated as follows: “The general rule of law is,

67 Ill. App. 550; *Gould v. Fuller*, 79 Minn. 414, 82 N. W. 673; *Elkins v. Camden &c. R. Co.*, 36 N. J. Eq. 241; *Morris &c. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542, 6 *Thomp. Corp.* (2d ed.), § 7746; *Curtis v. Gokey*, 68 N. Y. 300; *Ohio &c. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

²⁹ *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100; *American Wood Working Mach. Co. v. Norment*, 157 Fed. 801, 85 C. C. A. 165; *State v. Corning State Sav. Bank*, 136 Iowa 79, 113 N. W. 500; *Attorney-Gen. v. New York &c. R. Co.*, 198 Mass. 413, 84 N. E. 737; *Allison v. Fidelity &c. Ins. Co.*, 81 Nebr. 494, 116 N. W. 274, 129 Am. St. 694; *Victor v. Louise Cotton Mills*, 148 N. Car. 107, 61 S. E. 648, 16 L. R. A. (N. S.) 1020n; *Morgan v. Missouri &c. R. Co.*, 50 Tex. Civ. App. 420, 110 S. W. 978; *Germantown Farmers' Mut. Ins. Co. v. Dhein*, 43 Wis. 420, 28 Am. Rep. 549. The limit of a corporation's implied power is marked out in the case of *Pittsburg R. Co. v. Pittsburg*, 226 Pa. 498, 75 Atl. 681, in which it is said: “The doctrine of implied power is not to be stretched to permit that to be done by a corporation which the Leg-

islature has previously said shall not be done, even if without such implied power the grant of some particular franchise should be valueless.” See also, *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Green Bay &c. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221. And it must be true that there may be, in some instances at least, an implied as well as an express prohibition.

³⁰ *North Anson Lumber Co. v. Smith*, 209 Mass. 333, 95 N. E. 838. See also, *Gowen Marble Co. v. Tarrant*, 73 Ill. 608; *Canal Bridge v. Gordon*, 1 Pick. (Mass.) 297; *Goodwin v. Union Screw Co.*, 34 N. H. 378; *New York &c. R. Co. v. New York*, 1 Hilt. (N. Y.) 562.

³¹ *Mahoney v. Hartford Inv. Corp.*, 82 Conn. 280, 73 Atl. 766. See also, *Greensburg v. S. D. Childs & Co.*, 242 Ill. 110, 89 N. E. 679. See also, post, § 544, Seal.

³² 1 Bl. Comm. 475.

³³ See *Winne v. Bampton*, 3 Atk. 473; *Taylor v. Dullage Hospital*, 1 P. Wms. 655; *Tanner &c. Engine Co. v. Hall*, 22 Fla. 391; *Waller v. Bank of Kentucky*, 3 J. J. Marsh. (Ky.) 201; *South Missouri &c. Co. v. Jeffries*, 40 Mo. App. 360.

that a corporation contracts under its common seal; as a general rule, it is only in that way that a corporation can express its will, or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."⁸⁴

In the United States it is now well settled that it is no longer the law that a corporation is bound by its contracts only when made under its corporate seal. Unless it is required by its charter or general statutes applicable to such corporation to attach a seal, a corporation may bind itself in a matter within its corporate charter powers, by a contract not under seal or entered into without the use of its seal in all cases where individuals can bind themselves without the use of the seal.⁸⁵ This is true of con-

⁸⁴ Church v. Imperial &c. Co., 6 Ad. & El. 846, 3 N. & P. 35, 1 W. W. & H. 137, 7 L. J. Q. B. 118, quoted in note in 50 Am. St. 152. See also, Henderson v. Australian Royal Mail Steam Nav. Co., 5 El. & Bl. 409; Australian &c. Mail Steam Nav. Co. v. Marzetti, 11 Ex. 228; Reuter v. Electric Tel. Co., 6 El. & Bl. 341; South of Ireland Colliery Co. v. Waddle, L. R. 3 C. P. 463, L. R. 4 C. P. 617; Brown v. Belleville, 30 U. C. Q. B. 373.

⁸⁵ Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687; B. S. Green Co. v. Blodgett, 159 Ill. 169, 42 N. E.

176, 50 Am. St. 146, where many cases are cited and reviewed, and it is said in the note, presumably by Mr. Freeman, that "in this country the rule is well nigh, if not absolutely, universal." Hamilton v. Newcastle & D. R. Co., 9 Ind. 359; Christian Church v. Johnson, 53 Ind. 273; Globe Accident Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291; Muscatine Water Co. v. Muscatine Lumber Co., 85 Iowa 112, 52 N. W. 108, 39 Am. St. 284; Crawford v. Longstreet, 43 N. J. L. 325; Grubbs v. National Life Maturity Ins. Co., 94 Va. 589, 27 S. E. 464; 2 Thomp.

tracts in writing³⁶ such as promissory notes of a corporation,³⁷ or the indorsement or transfer thereof,³⁸ the execution of an appeal bond with the usual scroll,³⁹ or an order of merchandise.⁴⁰ So the appointment of an agent⁴¹ with authority to collect and se-

Corp. (2d ed.), § 1920; 1 Elliott R. R. (2d ed.), § 345. "The old doctrine, that corporations can only be bound by the act under their corporate seal, has been long exploded. They have become numerous, and their operations extend into almost every enterprise of the country, demanding such powers and facilities within their sphere of action as belong to natural persons in the prosecution of the like enterprises; and being intangible and invisible beings, created by law, they can exercise them through natural persons only. Unless they may be bound in the ordinary affairs of the corporation by the acts and admissions of their officers, so far as relates to the business usually transacted through such officers, they would enjoy an immunity incompatible with the rights of individuals, and destructive of the objects of their creation." *Chicago &c. R. Co. v. Coleman*, 18 Ill. 299, 68 Am. Dec. 544. See also, *Bank of Columbia v. Patterson's Admr.*, 7 Cranch (U. S.) 299, 3 L. ed. 351.

³⁶ *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 42 N. E. 176, 50 Am. St. 146.

³⁷ *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664. The attachment of the corporate seal does not necessarily make the note a sealed instrument. It must appear on the face of the paper that it was intended to be executed as a specialty. *Smith v. Woman's Med. Col. &c.*, 110 Md. 441, 72 Atl. 1107.

³⁸ *Everett v. United States*, 6 Port. (Ala.) 166, 30 Am. Dec. 584; *Ramboz v. Stansbury*, 13 Cal. App. 649, 110 Pac. 472; *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; *Garvey v. Colcock*, 1 Nott. & McC. (S. Car.) 231.

³⁹ *Sarmiento v. Davis Boat &c. Co.* (Mich.), 63 N. W. 205, per Grant. J.:

"The sole objection is that no corporate seal was attached to the bond. In reply to this motion, Mr. Davis has filed an affidavit, showing that his authority was so extensive as to authorize the signing of the bond. The usual scroll as a seal was affixed to the bond. Mr. Davis is shown to be the general manager and to have entire control of all the business of the corporation. He is therefore presumed to have authority to execute the bond. The only statute cited by counsel for the complainants upon which they rely to show the requirement of the use of the corporate seal is Act No. 162, Pub. Acts 1893, which reads as follows: 'Any corporation, joint stock company or partnership association, limited, may have a common seal which it may alter at pleasure, and that such seal affixed to any instrument purporting to be executed by any such corporation, joint stock company or partnership association, limited, foreign or domestic, shall be prima facie proof of the due adoption of said seal, and that it was affixed to said instrument by due authority, and that said instrument was in fact lawfully executed by such corporation, joint stock company or partnership association, limited.' This act does not require the corporate seal, but only makes it prima facie proof of due authority whenever it is attached. It would be impracticable to require every railroad or vessel corporation, doing business in many counties of the state, where it has litigation, and also in other states, to use its corporate seal in every such case."

⁴⁰ Especially where the merchandise is received and retained. *W. B. Mershon & Co. v. Morris*, 148 N. Car. 48, 61 S. E. 647.

⁴¹ *Leekins v. Nurdyke & Marmon Co.*, 66 Iowa 471, 24 N. W. 1; *Goodwin v. Union Screw Co.*, 34 N. H. 378; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Hand v. Clearfield Coal Co.*, 143 Pa.

cure debts,⁴² or to act as organizer for a fraternal order,⁴³ execute agreements to sell or convey real estate,⁴⁴ and chattel mortgages⁴⁵ have been upheld when not under seal. The transfer of a corporation's good will need not be under seal.⁴⁶ Implied contracts of every character⁴⁷ and delegations of authority to its officers or agent, which in the case of natural persons need not be under seal,⁴⁸ need not be evidenced by the corporate seal. Many other illustrations might be added, but it is considered unnecessary. It is not to be inferred from the foregoing, however, that the corporate seal may always be dispensed with. Thus it is a general rule with few exceptions that corporations must still use the seal in conveyances of real estate.⁴⁹ This is demonstrated in a recent decision in which many authorities are reviewed.^{49a}

St. 408, 22 Atl. 709; *Bank of Columbia v. Patterson's Admr.*, 7 Cranch (U. S.) 299, 3 L. ed. 351.

⁴² *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

⁴³ *Stevens v. Knights of Modern Maccabees* (Mo.), 132 S. W. 757.

⁴⁴ *Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

⁴⁵ *Duke v. Markham*, 105 N. Car. 131, 10 S. E. 1017, 18 Am. St. 889.

⁴⁶ *Myott v. Greer*, 204 Mass. 389, 90 N. E. 895.

⁴⁷ *New Athens v. Thomas*, 82 Ill. 259; *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359.

⁴⁸ *Board of Education v. Greenbaum*, 39 Ill. 609; *Fleckner v. United States Bank*, 8 Wheat. (U. S.) 338, 5 L. ed. 631.

⁴⁹ *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Miners' Ditch Co. v. Zellerbach & Co.*, 37 Cal. 543, 99 Am. Dec. 30; *Savings Bank v. Davis*, 8 Conn. 191; *Kinzie v. Chicago*, 2 Scam. (Ill.) 187, 33 Am. Dec. 443; *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. 54; *Allen v. Brown*, 6 Kans. App. 704, 50 Pac. 505; *Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367; *Zoller v. Ide*, 1 Nebr. 439; *Flint v. Clinton Co.*, 12 N. H. 430; *Tenney v. East Warren Lumber Co.*, 43 N. H. 343; *Osborne v. Tunis*, 25 N. J. L. 633; *Hatch v. Barr*, 1 Ohio 390; *Tiffin v. Shawhan*, 43 Ohio St. 178, 1 N. E. 581; *Eagle Woolen Mills Co. v. Monteith*, 2 Ore. 277; *Thayer v.*

Nehalem Mill Co., 31 Ore. 437, 51 Pac. 202; *McElroy v. Nucleus Assn.*, 131 Pa. St. 393, 18 Atl. 1063; *Shropshire v. Behrens*, 77 Tex. 275, 13 S. W. 1043; *In re St. Helen Mill Co.*, 3 Sawy. (U. S.) 88, 21 Fed. Cas. 12222; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Baltimore & C. R. Co. v. Gallahue's Admr.*, 12 Grat. (Va.) 655, 65 Am. Dec. 254.

^{49a} *Garrett v. Belmont Land Co.*, 94 Tenn. 459, 29 S. W. 726, where it is said: "None of the cases to which we have been cited hold that the use of a seal is not required in conveyances of land. See *Taylor on Corporations*, § 248; *Morawetz on Private Corporations* (2d ed.), § 338; *Wat. Corp.* 89, 90; *Muscatine Waterworks Co. v. Muscatine Lumber Co.*, 85 Iowa 112, 52 N. W. 108; *Gottfried v. Miller*, 104 U. S. 521; *Merrick v. Road Co.*, 11 Iowa 74-76; *Cary-Halidy Lumber Co. v. Cain*, 70 Miss. 628, 13 So. 239. These conveyances did not involve conveyances of real estate, and none of the citations are authority for the proposition that a corporation can execute a deed without using a seal. But we think the contrary is held, more or less directly, in the following, as well as other, authorities: *Spel. Priv. Corp.*, 95; *Beach on Private Corporations*, § 376, and § 742, as to mortgages; *Jones on Mortgages*, § 128; 1 *Wat. Corp.* 303, § 95; *Boone on Corporations*, § 54; 3 *Washburne on Real Property*, p. 288, § 7; *Leggett v.*

Moreover, it is held that the seal must be affixed by some one authorized to affix it⁵⁰ or who purports to act for the company⁵¹

Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728, 746, note; 4 Am. & Eng. Encyc. of Law, p. 240; 2 Am. & Eng. Encyc. of Law, p. 910; Osborne v. Tunis, 25 N. J. L. 633, 658; Duke v. Markham, 105 N. Car. 138, 10 S. E. 1017, 18 Am. St. 889, note; Miner's Ditch Co. v. Zellerbach, 37 Cal. 543; Hutchins v. Byrnes, 9 Gray (Mass.) 367; Flint v. Clinton Co., 12 N. H. 430; Tenney v. Lum-ber Co., 43 N. H. 343; Hatch v. Barr, 1 Ohio 390; Bank v. Davis, 8 Conn. 191; Isham v. Iron Co., 19 Vt. 230; Zoller v. Ide, 1 Nebr. 439; Brinley v. Mann, 2 Cush. 337; Koehler v. Iron Co., 2 Black 715, 721. By the code of Tennessee of 1858 it is provided (Mill. & V., § 2478) that 'the use of private seals in written contracts, except the seals of corporations, is abolished, and the addition of a private seal to an instrument of writing hereafter made shall not affect its character in any respect whatever.' Did the act change the rule as to conveyances by corporations in Tennessee so as to dispense with the necessity of a seal? There is certainly nothing in the act to so indicate, but the fact that seals of corporations are excepted by its provisions is an indication that the seal was to be used by corporations after the act was passed, as had been done before its passage, at least in some cases. Statutes similar to this have been passed in Alabama, Arkansas, Delaware, Florida, Kentucky, Iowa, Kansas, Maryland, Minnesota, Mississippi, Nebraska, North Carolina, Ohio, Indiana, Texas, Pennsylvania, West Virginia. Nevertheless, in most of these states corporations are still required to use their seals in making conveyances, as in Ohio, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Pennsylvania, Nebraska, Kansas, Texas. See 3 Washburne on Real Property, p. 288. And not only must the deed be sealed, but the seal must be affixed by some one authorized to affix it. 3 Washburne on Real Property, p. 289. * * * We are of opinion that this act (Mill. & V. Code, § 2784) does not change the rule of the

common law requiring corporations to use their seals in all conveyances of real estate, and a conveyance not under seal, made by a corporation, does not vest a legal title in the grantee, except it may be cases of corporations created under the act of 1875, and which have no common seal, in which case that act provides that in such corporations, having no common seal, the signing of the name of the corporation by any duly authorized agent shall be legal and binding. See Act 1875, ch. 142, § 5; Mill & V. Code, § 1704. The corporation now in question was not created under the act of 1875, but under the acts of congress providing for national banks, and we are not called upon to say whether, under this act of 1875, a corporation may convey without seal in any case. That question is in no way involved in this case. We are of opinion that the deed in question in this case was not properly signed or sealed, and hence did not vest the legal title to the lots in controversy in complainants, but only operated to create in them an equitable interest and title. Pomeroy on Equity Jurisprudence, § 418; Devlin on Deeds, § 246; Beardsley v. Knight, 10 Vt. 185, 33 Am. Dec. 193; Frost v. Wolf, 77 Texas 455, 14 S. W. 440; Allis v. Jones, 45 Fed. 148; Brinkley v. Bethel, 9 Heisk. (Tenn.) 786." St. Joseph's Society v. St. Hedwig's Church, 3 Pennew. (Del.) 229, 50 Atl. 535.

⁵⁰Garrett v. Belmont Land Co., 94 Tenn. 459, 29 S. W. 726, 1 Wilgus Cases 1138.

⁵¹Norris v. Dains (Ohio), 39 N. E. 660, Dickman. C. J.: "In Hutchins v. Byrnes, 9 Gray (Mass.) 367, it was objected that the assignment was not so executed by the treasurer as to be the act and deed of the corporation. The objection was not sustained, as the plaintiffs claimed to hold the mortgage by an assignment which purported in the body thereof to be from the corporation, the Bristol County Savings Bank. 'The assignment,' says the court, 'was made in the name and as the act of the

and does it in the name of the company rather than as an individ-

corporation, according to the rule laid down in *Combes' Case*, 9 Coke, 75, and always adhered to in England and in this commonwealth.' And in *Haven v. Adams*, 4 Allen 80, where the mode of execution by the corporation was called in question, the objection was unavailing. In the body of the mortgage it was expressed to be the deed of the corporation, to which they had caused their seal to be affixed, and the name of their president to be signed. Chapman, J., in pronouncing the opinion, said: 'The question is whether the deed purports to be the deed of the principal, or the deed of the agent executed by him in behalf of the principal. In the first case it is held to convey their property, because it is their deed; in the latter case, it does not convey their property, because it is his deed.' In Ohio there is no general statute prescribing the mode in which deeds of conveyances are to be executed by corporations. In *Sheehan v. Davis*, 17 Ohio St. 571, the deed sets forth that: 'This indenture, made this second day of July, in the year 1855, between the Albany City Bank of the first part, and Charles Butler, of the city of New York, of the second part, witnesseth, etc., concluding: 'In witness whereof the said party of the first part have caused their corporate seal to be hereunto attached, and these presents to be signed by their cashier.' It was held that a deed of conveyance by the banking corporation was properly executed, but this court emphasized the fact that 'in this case the deed throughout purports to be the deed of the corporation.' The deed did not, as in *Elwell v. Shaw*, 16 Mass. 42, purport to be the deed of the attorney, but purported on its face to be the deed of the principal. For collation of other authorities in line with the foregoing views, see 1 *Hare & Wallace's Leading Cases*, 575; 4 *Am. and Eng. Encyc. Law*, pp. 238-242; 5 *Am. and Eng. Encyc. of Law*, p. 440, and cases cited. Subjecting the assignment claimed to have been made by the Scipio Iron and Coal Mining Company to the plaintiff in error to the test of the cases we have cited, we do not think it can properly

be held to be the act of that company, and it was therefore properly withheld by the court from the jury, when offered in evidence by the plaintiff. Section 4110 of the revised statutes of Ohio provides that: 'No deed of real estate executed by any person acting for another, under a power of attorney, duly executed, acknowledged, and recorded, shall be held to be invalid or defective because he is named therein, as such attorney, as the grantor instead of his principal; nor because his name, as such attorney, is subscribed thereto, instead of the name of the principal.' But it cannot be claimed that the assignment under consideration in the case at bar was made under a power of attorney, executed, acknowledged, and recorded as provided by the above section of the statutes."

In *Brinley v. Mann*, 2 Cush. (Mass.) 337, a deed from the New England Silk Company, a corporation, was set up as a muniment of title. "The formal parts of one of the deeds, to which the objection referred, are as follows: Know all men by these presents, that the New England Silk Company, a corporation legally established, by Christopher Colt, Jr., their treasurer, of Dedham, etc., in consideration, etc., do hereby give, grant, sell, and convey, etc.

"In witness whereof, I, the said Christopher Colt, Jr., in behalf of said company, and as their treasurer, have hereunto set my hand and seal, this, etc. (Signed and sealed.) "Christopher Colt, Jr., Treasurer of New England Silk Company."

"The certificate of acknowledgment stated that, Christopher Colt, Jr., treasurer, etc., acknowledged the above instrument to be his free act and deed."

"In the other deed, Christopher Colt, Jr., describes himself, in the concluding recital, as 'treasurer of the New England Silk Company, and duly authorized for that purpose,' and, in the certificate of acknowledgment, it is stated, that, 'in his said capacity,' he acknowledged the instrument to be his act and free deed." The case was an action to try title. The defendant

ual acting for himself. This general rule was stated and applied in a recent case, but it is not always applied with strictness.^{51a}

It has been held under statutes which provide that no deed or conveyance or other contract in writing should be deemed invalid for want of seal, that an unsealed conveyance by a private

claimed by intermediate conveyances under the deed of the New York Silk Company. The plaintiff's title was based on a judgment and the levy of an execution on the land as the property of the New England Silk Company. The levy was made after the execution of the deeds. The court said: "On examining the deeds to Colt, we are of opinion that they conveyed no title to him. Both of these deeds were executed by C. Colt, jr., in his own name, were sealed with his seal, and were acknowledged by him as his acts and deeds. In one of them, it is true, he declared that he acted in behalf of the company, and as their treasurer; and in the other he declared himself to be their treasurer and to be duly authorized for the purpose of executing it. But this, as we have seen, was not enough. He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be deeds of the company. 1 Crabb on Real Property, §§ 703, 705, 4 Kent's Com. (3d ed.), 451; Stinchfield v. Little, 1 Greenl. 231; Savings Bank v. Davis, 8 Conn. 191." In Fowler v. Shearer, 7 Mass. 14, Chief Justice Parsons says: "It is not enough for the attorney in the form of the conveyance, to declare that he does it as an attorney; for he being in the place of the principal, it must be the act and deed of the principal." In Elwell v. Shaw, 16 Mass. 42, the deed was executed by an attorney in fact, in his own name, and not in the name of his principal, reciting his power and authority. The court held the deed to be insufficient. It was said that: "It is important that the forms, respecting the transfer of real estate, should be strictly observed. * * * A seal, although it may seem an unmeaning ceremony, and not at all necessary to explain the intention of the contracting par-

ties, is nevertheless an essential part of the deed." It was further said that "the authority of Combes's Case is not at all shaken by more modern decisions." In Combes's Case, 9 Coke 75a, the rule is very explicitly stated: "When any one has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives authority."

^{51a}In Danville Seminary v. Mott, 136 Ill. 289, 294, 28 N. E. 54, real estate, the property of the Danville Seminary, was conveyed by the "board of trustees of the Danville Seminary," and the seal of the latter corporation was not affixed to the deed. The court says: "A deed of conveyance by a corporation must be executed in the corporate name and under the corporate seal. A corporation, like an individual, may adopt any seal which is convenient to the occasion; it must, however, be shown to have been so adopted, and it must be affixed as the seal of the corporation, by an officer or agent duly authorized." See also, Clark v. Hodge, 116 N. Car. 761, 21 S. E. 562. See, however, in this connection the case of Barber v. Stromberg-Carlson Telephone Mfg. Co., 81 Nebr. 517, 116 N. W. 157, 129 Am. St. 703, in which it is said: "The rule that, where the charter provides that a corporate contract shall be signed by certain officers, instruments not so signed are unenforceable, is so harsh and inconvenient that it has been widely departed from and practically abandoned." Citing 2 Cook on Corporation (5th ed.), § 725. When a seal is attached it will be presumed to have been attached by competent authority. Wilson v. New (Nebr.), 95 N. W. 502.

corporation is valid.⁵² So the want of a seal to a mortgage executed by a corporation was held not to affect its validity when it was not shown that the corporation had a seal at the time.⁵³ And the Supreme Court of Georgia has said that there is no case in the reports of that state where it has been decided that a seal was necessary to the validity of a deed and that under the statute an instrument containing a covenant need not be under seal.⁵⁴ On the other hand in some jurisdictions it has been said that while the seal is not essential to the validity of a chattel mortgage of the corporation still in its absence there is no presumption that the act was a corporate act and the burden is on the party relying on the mortgage to show that the officer or agent had authority to execute it.⁵⁵ But it is generally held that where a deed or other conveyance or contract purporting to have been executed by a corporation is signed and acknowledged in its behalf by the president and secretary thereof, with the corporate seal attached, the presumption is that it was executed by authority of such corporation, and the burden of proof is upon one who denies such authority.⁵⁶ Courts which administer the prin-

⁵² *Ismon v. Loder*, 135 Mich. 345, 97 N. W. 769.

⁵³ *Turner v. Kingston Lumber & Co.* (Tenn. Ch. App.), 59 S. W. 410.

⁵⁴ *Atlanta R. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436, 110 Am. St. 215.

⁵⁵ *American Sav. & Loan Assn. v. Smith*, 122 Ala. 502, 27 So. 919; *Duke v. Markham*, 105 N. Car. 131, 10 S. E. 1017, 18 Am. St. 889. See also, *Salfield v. Sutter & Co. Imp. & Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105; *Barney v. Pforr*, 117 Cal. 56, 48 Pac. 987; *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024; *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580. The North Carolina Code, § 683, provides that every contract of a corporation by which a liability may be incurred exceeding one hundred dollars shall be in writing and under the corporate seal or signed by an officer of the company authorized thereto. Under this statute it has been held in a suit against a corporation for work and labor done at a specified rate amounting to more than one hundred

dollars, under a contract not in writing, that the plaintiff cannot force defendant to continue the contract, as to the unexecuted part but is entitled to receive a fair value for labor performed which has been accepted by defendant. *Roberts v. Demens Wood Working Co.*, 111 N. Car. 432, 16 S. E. 415. See also, *Clowe v. Imperial Pine Product Co.*, 114 N. Car. 304, 19 S. E. 153.

⁵⁶ *West Side Auction House Co. v. Connecticut Mut. Life Ins. Co.*, 186 Ill. 156, 57 N. E. 839; *Degnan v. Thoroughman*, 88 Mo. App. 62; *Grubbs v. National Life Maturity Ins. Co.*, 94 Va. 589, 27 S. E. 464; *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501; *Gorder v. Plattsmouth Canning Co.*, 36 Nebr. 548, 54 N. W. 830, per Post, J., "The signatures of the officers, with the corporate seal attached, is prima facie evidence that the mortgages were executed by authority of the company, and the burden of proving want of authority is upon the intervenors. *Angell and Ames on Private Corporations*, § 217; *Boone on Cor-*

ciples of equity will generally hold unsealed instruments good if the omission of the seal was due to mistake or inadvertence,⁵⁷ and rather than hold an instrument void may require the corporation to affix its seal.⁵⁸

§ 545. Power to take and hold land.—As a general rule corporations have the capacity and the implied power to take and hold real property the same as individuals except only so far as they may be restricted by the objects of their creation and the limitations of their charter.⁵⁹ This being true they may acquire

porations, § 50; *Blackshire v. Iowa Homestead Co.*, 39 Iowa 624; *Whitney v. Union Trust Co.*, 65 N. Y. 567; *Davis v. Jenney*, 1 Metc. (Mass.) 221; *Williamsburg City Fire Ins. Co. v. Frothingham*, 122 Mass. 391; *Murphy v. Welch*, 128 Mass. 489; *Hamilton v. McLaughlin*, 145 Mass. 20, 12 N. E. 424; *Morris v. Keil*, 20 Minn. 531, Gil. 474; *Musser v. Johnson*, 42 Mo. 74." And see also, *Bissell v. Railroad Co.*, 22 N. Y. 259. In the case of *Monument National Bank v. Globe Works*, 101 Mass. 57, the court said: "Where want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defeat, and the defense of ultra vires is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of authority depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed." See also, 3 *Elliott Ev.*, § 1933.

⁵⁷ *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 607; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 21 N. E. 168, 39 Alb. L. Jour. 471; *Bernards v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. ed. 956.

⁵⁸ *Missouri & C. R. Co. v. Miami County*, 12 Kans. 482.

⁵⁹ *Torrent Fire Eng. Co. No. 5 v. Mobile*, 101 Ala. 559, 14 So. 557; *Pettit v. Stuttgart & C. Institute*, 67 Ark. 430, 55 S. W. 485; *Natoma Water & C. Co. v. Clarkin*, 14 Cal. 544; *Cockrill v. Abeles*, 86 Fed. 505, 30 C. C. A. 223; *Brown v. Bradford*, 103 Iowa 378, 72 N. W. 648; *Hurst v. American Assn.*, 105 Ky. 793, 20 Ky. L. 1624, 49 S. W. 800; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114, 33 Am. Dec. 481; *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) 232; *Bank of Michigan v. Niles, Walk. (Mich.)* 99, 1 Smith's Cas. 493, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243; *Northwestern & C. Exch. Co. v. Chicago & C. R. Co.*, 76 Minn. 334, 79 N. W. 315; *Tallaway & C. Mfg. Co. v. Clark*, 32 Mo. 305; *Thompson v. West*, 59 Nebr. 677, 82 N. W. 13, 49 L. R. A. 337; *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68, 40 Atl. 218; *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322n; *Reynolds v. Stark Co.*, 5 Ohio 204; *Kelly v. People's Transp. Co.*, 3 Ore. 189; *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13; *Russell v. Texas & C. R. Co.*, 68 Tex. 646, 5 S. W. 686; *Blanchard's Gun-stock & C. Factory v. Warner*, 1 Blatchf. (U. S.) 258, Fed. Cas. 1521; *Smith v. Sheeley*, 12 Wall. (U. S.) 358, 20 L. ed. 430; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378n; 1 *Cumming's Cas.* 76; *Rivanna Nav. Co. v. Dawsons*, 3 Grat. (Va.) 19, 46 Am. Dec. 18; *Hastings v. Anacortes Packing Co.*, 29 Wash. 224, 69 Pac. 776. "The common law right to take an estate in fee, incident to a corporation, (at common law) is un-

the fee to real estate.⁶⁰ When there is nothing in its charter or the general law applicable thereto to prevent it from so doing a corporation may hold the title to property as a tenant in common.⁶¹ But it would seem that corporations cannot hold as joint tenants.⁶²

Under the modern doctrine a corporation may also hold real estate in trust if such trust is not repugnant to or inconsistent with the purposes for which the corporation was created, and even where this latter circumstance exists it furnishes no ground to declare the trust void and a new trustee may be substituted.⁶³ But while corporations have power to acquire real estate, the several states have, however, generally adopted constitutional or

limited except by its character and by statute." *Mallett v. Simpson*, 94 N. Car. 37, 55 Am. Rep. 595. Corporations with reference to their power to take and hold real estate have been classified as follows: those whose charter or law of creation forbids that they shall acquire and hold real estate; second, those whose charter or law of creation is silent as to whether they may or may not acquire and hold title to real estate; third, corporations whose charter, or law of creation, authorizes them in some cases and for some purpose to hold the title to real estate; fourth, corporations whose charter or law of creation, confers upon them a general power to hold real estate. *Hayward v. Davidson*, 41 Ind. 212. A corporation is presumed to have the right to take and hold real estate. *People v. Larue*, 67 Cal. 526, 8 Pac. 84; *Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 936.

⁶⁰ *Nicoll v. New York & C. R. Co.*, 12 N. Y. 121; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684; *Rives v. Dudley*, 3 Jones Eq. (N. Car.) 126, 67 Am. Dec. 231; *Mallett v. Simpson*, 94 N. Car. 37, 55 Am. Rep. 595; *Carter v. Ridge Turnpike Co.*, 22 Pa. Super. Ct. 162; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378. See also, *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

⁶¹ See *Dewitt v. San Francisco*, 2 Cal. 289; *Williams v. Jenkins*, 11 Ga. 595; *Haven v. Mehlgarten*, 19 Ill. 91;

Estell v. University of the South, 12 Lea (Tenn.) 476.

⁶² *Justice Windham's Case*, 5 Coke 7a; *Weston v. Keighley*, Finch 82; *Willion v. Berkley*, 1 Plow. 223; *Bennet v. Holbech*, 2 Saund. 317; *Dewitt v. San Francisco*, 2 Cal. 289; *Hackett v. Multnomah R. Co.*, 12 Ore. 124, 6 Pac. 659, 53 Am. Rep. 327; *Telfair v. Howe*, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; *Estell v. University of the South*, 12 Lea (Tenn.) 476.

⁶³ *Green v. Rutherford*, 1 Ves. Jr. 462; *Attorney-General v. Clarendon*, 17 Ves. Jr. 491; *Attorney-General v. Launderfield*, 9 Mod. 287; *First Congregational Soc. v. Atwater*, 23 Conn. 34; *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Deringer's Admr. v. Deringer's Admr.*, 5 Houst. (Del.) 416, 1 Am. St. 150; *Williams v. Western Star Lodge &c.*, 38 La. Ann. 620; *Phillips Academy v. King*, 12 Mass. 546; *Winslow v. Cummings*, 3 Cush. (Mass.) 358; *Holland v. Craft*, 3 Gray (Mass.) 162; *White v. Rice*, 112 Mich. 403, 70 N. W. 1024; *Minnesota Land &c. Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; *Sinking Fund Comms. v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 433; *Wade v. American Colonization Soc.*, 7 Sm. & M. (Miss.) 663, 45 Am. Dec. 324; *Attorney General v. Dublin*, 38 N. H. 459; *Mason's Exrs. v. Methodist Episcopal Church*, 27 N. J. Eq. 47; *In re Howe*, 1 Paige (N. Y.) 214; *Farmers' Loan &c. Co. v. Perry*, 3 Sandf. Ch. (N. Y.) 339; *Farmers'*

statutory restrictions on the power of corporations in this respect.⁶⁴ Limitations of this character usually provide that corporations shall have power "to acquire, by purchase or otherwise, and to hold, enjoy, improve, lease, incumber and convey all real and personal property necessary to the purposes of its organization, subject to the limitations hereafter declared."⁶⁵

§ 546. Power to take by a mortgage and to mortgage real estate.—Aside from corporations that are authorized by statute to loan money and secure the same by mortgage it may be said that whenever a corporation has the power to become a creditor it has the incidental or implied power to take a mortgage on land to secure such debt except as such power may be limited by a statute. Thus, railroad corporations have been held to have power to take mortgages to secure payment of subscriptions to

Loan &c. Co. v. Harmony &c. Ins. Co., 51 Barb. (N. Y.) 33, affd. 41 N. Y. 619; *Sheldon v. Chappell*, 47 Hun (N. Y.) 59; *Wetmore v. Parker*, 52 N. Y. 450; *Liggett v. Ladd*, 23 Ore. 26, 31 Pac. 81; *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445; *Ex parte Greenville Academies*, 7 Rich. Eq. (S. Car.) 471; *Lincoln Sav. Bank v. Ewing*, 12 Lea (Tenn.) 598; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699n; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Vidal v. Philadelphia*, 2 How. (U. S.) 127, 11 L. ed. 205; *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. 336, affg. 3 Woods (U. S.) 443; *Protestant Episcopal &c. Soc. v. Churchman*, 80 Va. 718.

⁶⁴ See *Leggett v. New Jersey Mfg. & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728n; *Gilbert v. Hole*, 2 S. Dak. 164, 49 N. W. 1.

⁶⁵ *Rev. Laws Minn. 1905*, § 2852, subd. 4. See *Burns Ind. Stat. 1908*, § 4091 (relative to foreign corporations doing business in the state); *First M. E. Church v. Dixon*, 178 Ill. 260, 52 N. E. 887; *Belcher &c. Refining Co. v. St. Louis &c. Elevator Co.*, 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801 (construing similar statute); *Crawford v. Longstreet*, 43 N. J. L. 325 (construing similar statute). The constitution of South Dakota

provides "that no corporation shall engage in any business other than that expressly authorized in its charter nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business." Constitution of South Dakota, art. 17, § 7. See also, *German Ins. Co. v. Commonwealth*, 141 Ky. 606, 133 S. W. 793, in which it is held that under a statute providing that a corporation cannot hold real estate for over five years except such as is proper and necessary for carrying on its business, a corporation may in good faith acquire real estate for a proper use in the transaction of its business and hold the same for more than five years. A transfer of real estate to a corporation without power under its charter to take title thereto is not void, but voidable only, and is valid until directly assailed by the state. *Knowles v. Northern Texas Tract Co.* (Tex. Civ. App.), 121 S. W. 231. See also, *Ultra Vires*. "It is undoubtedly well settled that no person except the state can raise the objection that a corporation is holding real estate in excess of its corporate powers." *Plummer v. Chesapeake &c. R. Co.*, 143 Ky. 102, 136 S. W. 162. See also, *McQuaide v. Enterprise Brew. Co.* (Cal. App.), 111 Pac. 927; *McKinley-Lanning Loan &c. Co. v. Gordon*, 113 Iowa 481, 85

their capital stock.⁶⁶ The converse of this is also true as a general rule. Express power to mortgage their property is now in the majority of instances conferred upon corporations by statute.⁶⁷ A corporation may also have an implied power to mortgage its property. The power to mortgage is implied if the right is the natural result of the power either to borrow money or incur indebtedness.⁶⁸ When not expressly denied to a corporation the

N. W. 816; *Southern Lumber Co. v. Holt*, 129 La. 273, 55 So. 986. See, however, *In re McGraw's Estate*, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, *affd.* 136 U. S. 152, 34 L. ed. 427, 10 Sup. Ct. 775; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Louisville Property Co. v. Nashville*, 114 Tenn. 213, 84 S. W. 810.

⁶⁶ *Scott v. Farmers' & C. Nat. Bank* (Tex. Civ. App.), 66 S. W. 485 (street railway company); *Clark v. Farrington*, 11 Wis. 306; *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Cornell v. Hichens*, 11 Wis. 353; *Andrews v. Hart*, 17 Wis. 297. See also, *State Security Bank v. Hoskins*, 130 Iowa 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376n.

⁶⁷ *Stagg v. Medway Navigation Co.*, 50 Weekly Rep. 446; *Farmers' Loan & C. Co. v. Chicago & C. R. Co.*, 68 Fed. 412; *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719; *New Briton Nat. Bank v. Cleveland Co.*, 91 Hun (N. Y.) 447, 71 N. Y. St. 157, 36 N. Y. S. 387, *affd.* 158 N. Y. 722, 53 N. E. 1128; *Central Gold Mining Co. v. Platt & Sons*, 3 Daly (N. Y.) 263; *Flynn v. Coney Island & C. R. Co.*, 26 App. Div. (N. Y.) 416, 50 N. Y. S. 74; *Galveston & C. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. ed. 199. The foregoing cases have to do with the construction of such statutes.

⁶⁸ *First Nat. Bank v. Winchester*, 119 Ala. 168, 24 So. 351, 72 Am. St. 904; *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 42 So. 64; *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597; *Richmond Standard Steel & C. Co. v. Allen*, 148 Fed. 657, 78 C. C. A. 389; *Deepwater R. Co. v. Western Pocahontas Coal & C. Co.*, 152 Fed. 824; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 45 N. E. 410, 56 Am. St. 187; *Wright v. Hughes*, 119

Ind. 324, 21 N. E. 907, 12 Am. St. 412; *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575; *Warfield v. Marshall County Canning Co.*, 72 Iowa 666, 34 N. W. 467, 2 Am. St. 263; *Bell & C. Co. v. Kentucky & C. Co.*, 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, 20 Ky. L. 1684, 21 Ky. L. 133, *modifying* 20 Ky. L. 1089, 48 S. W. 440; *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588, 81 S. W. 927, 111 Am. St. 302; *Bramblet v. Commonwealth & C. Lumber Co.*, 26 Ky. L. 1176, 83 S. W. 599; *Swift v. Smith*, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; *Evans v. Boston Heating Co.*, 157 Mass. 37, 31 N. E. 698; *Brooks v. West Springfield*, 193 Mass. 190, 79 N. E. 337; *Hoskins v. Rochester Sav. & Loan Assn.*, 133 Mich. 505, 95 N. W. 566; *Wood v. Meyer* (Miss.), 7 So. 359; *Richards v. Merimack & C. R. Co.*, 44 N. H. 127; *Rutherford & C. Elec. Co. v. Franklin Trust Co.*, 58 N. J. Eq. 584, 43 Atl. 1098; *Brown v. Citizens' Ice & C. Storage Co.* (N. J. L.), 66 Atl. 181; *Tschetianian v. City Trust Co.*, 186 N. Y. 432, 79 N. E. 401; *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. Car. 143, 20 S. E. 366; *Benbow v. Cook*, 115 N. Car. 324, 20 S. E. 453, 44 Am. St. 454; *Burt v. Rattle*, 31 Ohio St. 116; *Curtze v. Iron Dyke & C. Min. Co.*, 46 Ore. 601, 81 Pac. 815; *Sprigg v. Commonwealth Title Ins. & C. Co.*, 206 Pa. 548, 56 Atl. 33; *Waters-Pierce Oil Co. v. United States & C. Trust Co.*, 44 Tex. Civ. App. 397, 99 S. W. 212; *Jones v. New York Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. ed. 1030, 1 Keeners' Cas. 656, 1 Cumming's Cas. 326; *Murray v. Farmville & C. R. Co.*, 101 Va. 262, 43 S. E. 553; *Virginia Passenger & C. Co. v. Fisher*, 104 Va. 121, 51 S. E. 198; *Kidder v. Beavers*, 33 Wash. 635,

power to mortgage property as security for an indebtedness is regarded as incidental to its power to acquire and hold real estate and under the common-law rule such power may be exercised by the directors or other governing body in the same manner and to the same extent as an individual.⁶⁹

§ 547. Power to hold and convey personal and real property.—It is so well settled that corporations have the power to acquire and hold personal property for the legitimate purposes of their incorporation that this power is seldom if ever expressly conferred except where the object of the corporation is to deal in some particular species of personal property.⁷⁰ This power includes not only the power to purchase but also the power to take by gift or bequest.⁷¹ Under this power it has been held that a corporation may become the assignee of a bond⁷² and that a corporation authorized to manufacture and sell glass might have the power to buy from another manufacturer for the purpose of keeping up its stock and supplying customers while its factories were undergoing repairs.⁷³ A purchase of bottles by a corporation which is authorized to purchase all articles of merchandise

74 Pac. 819; Lehigh Valley Coal Co. v. West Depere Agri. Works, 63 Wis. 45, 22 N. W. 831.

⁶⁹ Union Water Co. v. Murphy's Flat &c. Co., 22 Cal. 620; Bensiek v. Thomas, 66 Fed. 104, 13 C. C. A. 457; Aurora Agri. &c. Soc. v. Paddock, 80 Ill. 263; Thompson v. Lambert, 44 Iowa 239; Bell &c. Co. v. Kentucky &c. Co., 106 Ky. 7, 20 Ky. L. 1684, 21 Ky. L. 133, 50 S. W. 2, 51 S. W. 180; Curtis v. Leavitt, 15 N. Y. 9; Hunt v. Memphis Gaslight Co., 95 Tenn. 136, 31 S. W. 1006; White Water Valley &c. Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154. For a complete discussion of a corporation's power to take and hold land see vol. 3, Thompson on Corporations (2d ed.), § 2365 et seq.

⁷⁰ See Blanchard's Gun-Stock &c. Factory v. Warner, 1 Blatchf. (U. S.) 258, Fed. Cas. 1521; Wheeler v. San Francisco &c. R. Co., 31 Cal. 46, 89 Am. Dec. 147; Rosenbaum v. Horton, 89 Iowa 692, 57 N. W. 609; Lyndeborough Glass Co. v. Massachusetts

Glass Co., 111 Mass. 315, 1 Keener's Cas. 477; Callaway Min. &c. Co. v. Clark, 32 Mo. 305; Adams Min. Co. v. Senter, 26 Mich. 73; Bennington Iron Co. v. Rutherford, 18 N. J. L. 467; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 19, 46 Am. Dec. 18.

⁷¹ Dickson v. United States, 125 Mass. 311, 28 Am. Rep. 230; Phillips Academy v. King, 12 Mass. 546; Wade v. American Colonization Soc., 7 Sm. & M. (Miss.) 663, 45 Am. Dec. 324; Chamberlain v. Chamberlain, 43 N. Y. 424; Theological Sem. &c. v. Kellogg, 16 N. Y. 83; Perin v. Carey, 24 How. (U. S.) 465, 16 L. ed. 701; Rivanna Nav. Co. v. Dawsons, 3 Grat. (Va.) 19, 46 Am. Dec. 18; Protestant &c. Soc. v. Churchman, 80 Va. 718; Lewisburg Baptist University v. Tucker, 31 W. Va. 621, 8 S. E. 410.

⁷² Bennington Iron Co. v. Rutherford, 18 N. J. L. 467.

⁷³ Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, 1 Keener's Cas. 477.

has been held not ultra vires.⁷⁴ Corporations have also been held to have the right to purchase a patent where it was necessary and proper in the conduct of their business,⁷⁵ or to purchase more raw material than might be required at any one time, and thus obtain the advantage of a low price⁷⁶ but an ordinary corporation cannot purchase raw material for a resale or speculation.⁷⁷ Corporations not expressly authorized cannot speculate by dealing in futures of stock exchange.⁷⁸ The power to sell and dispose of property for lawful purposes is necessarily attendant to a corporation as an incident of ownership.⁷⁹ Thus it is well settled that a corporation, without special authority, may dispose of its lands, goods and chattels, or any interest in the same, as it deems expedient, and, in the course of its legitimate business, may make a bond,⁸⁰ notes and mortgage⁸¹ or draft; and also may make composition with creditors or an assignment for their benefit with preference, except when restrained by law.⁸² So an assignment

⁷⁴ *Jebeles & Colias Confectionery Co. v. Hutchinson & Son*, 171 Ala. 106, 54 So. 618.

⁷⁵ *In re British &c. Cork Co., L. R. 1 Eq. 231*; *Blanchard's Gun-Stock &c. Factory v. Warner*, 1 Blatchf. (U. S.) 258, Fed. Cas. 1521.

⁷⁶ *National Shoe & Leather Bank's Appeal*, 55 Conn. 469, 12 Atl. 646.

⁷⁷ *Chewacla Lime Works v. Dis- mukes*, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352.

⁷⁸ *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482, 1 Smith's Cas. 500.

⁷⁹ "As a general rule corporations may, I think, be said to have an incidental power to dispose of their property, real and personal, either by sale absolute, or by mortgage or other mode of security, for any debt which they may rightfully contract, to the same extent as natural persons, except so far as that power may be restrained by their charter, by considerations connected with the purposes of their creation, or limited by express provision or just implication of some statute, or by the general policy of the state to be deduced from its legis-

lation." *Joy v. Jackson &c. Plank Road Co.*, 11 Mich. 156. "It is well settled that a corporation, without special authority, may dispose of land, goods, and chattels, or of any interest in the same, as it deems expedient, and in the course of their legitimate business may make a bond, mortgage, note or draft; and also may make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law." *White Water &c. Canal Co. v. Vallette*, 21 How. (U. S.) 414, 16 L. ed. 154. This applies to real estate. *Knowles v. Northern Tex. Tract. Co.* (Tex. Civ. App.), 121 S. W. 231.

⁸⁰ *Central Trust Co. v. Western &c. R. Co.*, 89 Fed. 24.

⁸¹ *Farmers' Bank v. Ohio &c. Steamboat Co.*, 108 Ky. 447, 22 Ky. L. 132, 56 S. W. 719; *Bishop v. Kent & S. Co.*, 20 R. I. 680, 41 Atl. 255.

⁸² *White Water Canal Co. v. Vallette*, 21 How. (U. S.) 414. This language is quoted with approval by the Tennessee court in *Adams v. Railroad Co.*, 2 Coldw. (Tenn.) 645-660. As was said in a subsequent case in respect to *Adams v. Railroad Co.*, "The simple question presented was, 'Had the Mayor and Alderman of the City of Memphis the power, under

made by a corporation is not open to collateral attack⁸³

Numerous cases might be cited in support of the text but the rule is so well settled as to render it unnecessary. A private corporation generally has the power to sell and dispose of all its property, unless it be its franchise of existence, in the absence of legislative or charter restrictions,⁸⁴ except when it will be fraudulent as to creditors.⁸⁵ But it is held that the franchise, the right of being a corporation, cannot be sold in the absence of statutory authority even at an execution or judicial sale, so as to confer the same privilege upon the purchaser.⁸⁶ So the sale or lease and the agreement made in connection therewith must not have for its purpose the furtherance of an unreasonable restraint of trade, the prevention of competition and the establishment of a monopoly.⁸⁷

In the United States it is held generally that in the absence of

their charter, to mortgage their real property or estate, for corporation purposes?" And the court decided it had. *McKinney v. Memphis &c. Hotel Co.*, 12 Heisk. (Tenn.) 104, 120.

⁸³ *In re The Prussia*, 100 Fed. 484.

⁸⁴ *Metcalf v. American School Co.*, 122 Fed. 115; *Central Trust Co. v. Western &c. R. Co.*, 89 Fed. 24; *Benbow v. Cook*, 115 N. Car. 324, 20 S. E. 453, 44 Am. St. 454; *Cohen v. Big Stone Gap Iron Co.*, 111 Va. 468, 69 S. E. 359, Ann. Cas. 1912A, 203. "All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except so far as they are restrained by statute. Under this general power a corporation may dispose of the whole of its property for any lawful purpose." *Tash v. Ludden* (Nebr.), 129 N. W. 416. See also, *Tanner v. Lindell R. Co.*, 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534, and note at p. 548. The franchise to be a corporation cannot be alienated without the consent of the state. *Jennings v. Dark* (Ind.), 92 N. E. 778. "When a strictly private corporation finds it cannot profitably continue operations, * * * it may lawfully make a lease of its entire property for a term of years." *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 87 Pac. 315, 15 L. R. A. (N. S.) 846. See, however, *In re Timmis*, 200 N. Y. 177, 93 N. E. 522. All of its property

with the exception of its franchise may be sold at judicial sale. *Stewart v. Jones*, 40 Mo. 140; *Overton Bridge Co. v. Meanes*, 33 Nebr. 857, 51 N. W. 240, 29 Am. St. 514; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. 626, 32 Atl. 537, 47 Am. St. 935; *Chautauqua County Nat. Bank's Appeal*, 170 Pa. 1, 32 Atl. 539.

⁸⁵ "A transaction whereby one corporation sells and transfers all its property and franchises, except the franchise to be a corporation, to another corporation, upon an agreement that the proceeds or consideration of the sale should be distributed to the stockholders of the selling corporation, and where the proceeds are so distributed in accordance with such agreement entered into between the two corporations, is, as to creditors of the selling corporation, not only fraudulent, but unlawful." *Cooper v. Utah Light & R. Co.*, 35 Utah 570, 102 Pac. 202.

⁸⁶ *Hall v. Sullivan R. Co.*, 21 Law. Rep. 138; *Stewart v. Jones*, 40 Mo. 140; *Chautauqua County Nat. Bank's Appeal*, 170 Pa. 1, 32 Atl. 539; *City Water Co. v. State*, 88 Tex. 600, 32 S. W. 1033.

⁸⁷ *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 15 L. R. A. (N. S.) 846n, 87 Pac. 315, affd. 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. 572. See also, *In re Timmis*, 200 N. Y. 177, 93 N. E. 522.

a plain statutory prohibition or such prohibition in the articles of organization of the corporation, a corporation may, so long as it acts in good faith and without intent to injure creditors or stockholders, lawfully purchase its own stock either as to stockholders or present or future creditors.⁸⁸ However, if the corporation is insolvent the purchase will not be sustained,⁸⁹ and the same is true if made with the intent to injure its creditors or defeat them in the collection of their claims, or if it has such effect.⁹⁰ A corporation may also be forbidden by a statute to purchase its own shares of stock.⁹¹ Thus banking corporations are frequently prohibited from purchasing their own shares of stock.⁹² In England and in some states of this country it is held that in the absence of special statutory authority a corporation does not have

⁸⁸ *Draper v. Blackwell*, 138 Ala. 182, 35 So. 110 (but see *contra* *Hall v. Alabama Terminal & Improv. Co.*, 143 Ala. 464, 39 So. 285, 2 L. R. A. (N. S.) 130, 5 Am. & Eng. Ann. Cas. 363); *Copper Belle Min. Co. v. Costello* (Ariz.), 95 Pac. 94, rehearing in (Ariz.) 95 Pac. 803; *American Alkali Co. v. Campbell*, 113 Fed. 398; *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357, certiorari denied without opinion in 199 U. S. 605, 50 L. ed. 330, 26 Sup. Ct. 746; *In re S. P. Smith Lumber Co.*, 132 Fed. 618, *affd.* without opinion in 140 Fed. 988, 72 C. C. A. 682; *In re Castle Braid Co.*, 145 Fed. 224; *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. 387; *West v. Averill Grocery Co.*, 109 Iowa 488, 80 N. W. 555; *Tierney v. Butler*, 144 Iowa 553, 123 N. W. 213; *Lindsay v. Arlington Co-op. Assn.*, 186 Mass. 371, 71 N. E. 797; *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 74 Pac. 938, 101 Am. St. 569; *Fremont Carriage Mfg. Co. v. Thompson*, 65 Nebr. 370, 91 N. W. 376; *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576 (assumed to be true without discussion); *Moses v. Soule*, 63 Misc. (N. Y.) 203, 118 N. Y. S. 410; *Adam v. New England Inv. Co.*, 33 R. I. 193, 80 Atl. 426; *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S.

W. 24; *Rogers v. Ogden Bldg. & Sav. Assn.*, 30 Utah 188, 83 Pac. 754; *United States Mineral Co. v. Camden*, 106 Va. 663, 56 S. E. 561, 117 Am. St. 1028; *Atlanta & Cheese Assn. v. Smith*, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137; *Pabst v. Goodrich*, 133 Wis. 43, 113 N. W. 398, 14 Am. & Eng. Ann. Cas. 824; *Gilchrist v. Highfield*, 140 Wis. 476, 123 N. W. 102. When the corporation has this power it may borrow money on mortgage to pay for them. *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133. It cannot by purchases of its own stock reduce the amount thereof below the minimum fixed by its charter. *Dalton Grocer Co. v. Blanton*, 8 Ga. App. 809, 70 S. E. 183.

⁸⁹ *Tiger v. Rogers Cotton & Gin Co.*, 96 Ark. 1, 130 S. W. 585, 30 L. R. A. (N. S.) 694n; *McGregor v. Fitzpatrick*, 133 Ga. 332, 65 S. E. 859, 25 L. R. A. (N. S.) 50n.

⁹⁰ *Hall v. Henderson*, 126 Ala. 449, 28 So. 531, 61 L. R. A. 621, 85 Am. St. 53. See also, cases cited ante, note 85.

⁹¹ *Scham v. Brandt* (Md.), 82 Atl. 551; *Johnson v. Bush*, 3 Barb. Ch. (N. Y.) 207; *Gillet v. Moody*, 3 N. Y. 479.

⁹² *McGregor v. Fitzpatrick*, 133 Ga. 332, 65 S. E. 859, 25 L. R. A. (N. S.) 50n; *German Sav. Bank v. Wulfe-kuhler*, 19 Kans. 60.

the right to purchase shares of its own stock, either for the purpose of reissuing or retiring them.⁹³ All authorities concede that a corporation may acquire its own stock to secure a debt due to the corporation from a stockholder.⁹⁴ In sales of its own stock, a contract of a corporation limiting the liability of its stockholders to a portion of the par value of their stock is void both as to creditors and an assignee in bankruptcy. The relation of a stockholder who has not paid for his stock to the corporation is the ordinary one of debtor.⁹⁵

§ 548. Power of one corporation to purchase and hold stock in another corporation.—The prevailing doctrine of this country is that one corporation cannot, unless expressly authorized, make a valid subscription to, or purchase the capital stock of other corporations or otherwise become a stockholder therein except in payment of or as security for a debt, or unless the circumstances are such that the transaction is a necessary or reasonable means of carrying out or effectuating the object of the corporation acquiring such stock.⁹⁶ A corporation may, how-

⁹³ *Trevor v. Whitworth*, L. R. 12 App. Cas. 409; *Bellerby v. Rowland &c. Steamship Co.* (1902), 2 Ch. 14; *Hall & Farley v. Alabama Terminal & Improvement Co.* (Ala.), 56 So. 235; *Hall & Farley v. Alabama Terminal & Improvement Co.*, 143 Ala. 464, 39 So. 285, 2 L. R. A. (N. S.) 130, 5 Am. & Eng. Ann. Cas. 363; *McGregor v. Fitzpatrick*, 133 Ga. 332, 65 S. E. 859, 25 L. R. A. (N. S.) 50n; *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70; *Scham v. Brandt* (Md.), 82 Atl. 551; *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142; *Merchants' Nat. Bank v. Overman Carriage Co.*, 17 Ohio C. C. 253, 9 Ohio C. D. 738. See also, *Clark v. E. C. Clark's Machine Co.*, 151 Mich. 416, 115 N. W. 416, which lays down the rule that "the assets of a corporation cannot be used by it in the purchase of its outstanding stock to the exclusion of subsequent creditors."

⁹⁴ *Union Nat. Bank v. Hunt*, 7 Mo. App. 42; *Taylor v. Exporting Co.*, 6 Ohio 176; *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558. See also, cases cited ante, note 88.

⁹⁵ *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. 308; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203. See 4 *Thomp. on Corp.* (2d ed.), § 3911, citing many cases. It is held in Indiana that an agreement to accept a certain per cent. as payment in full is binding on the corporation and will be binding on a creditor who has knowledge of such agreement and if it is contained in the recorded articles of incorporation this public record is notice to creditors. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307.

⁹⁶ *Lanier Lumber Co. v. Rees*, 103 Ala. 622, 16 So. 637, 49 Am. St. 57; *McAlester Mfg. Co. v. Florence Cotton &c. Co.*, 128 Ala. 240, 30 So. 632; *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Glengary Consol. Min. Co. v. Boehmer*, 28 Colo. 1, 62 Pac. 839; *Mechanics' &c. Sav. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; *Rothchild v. Memphis &c. R. Co.*, 113 Fed. 476, 51 C. C. A. 310; *Central R.*

ever, have express⁹⁷ or implied⁹⁸ authority to subscribe for or to take and hold shares of stock in another corporation.

Co. v. Collins, 40 Ga. 582; Military &c. Assn. v. Savannah &c. R. Co., 105 Ga. 420, 31 S. E. 200; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497n, 17 Am. St. 319; Dunbar v. American Tel. &c. Co., 224 Ill. 9, 79 N. E. 423, 115 Am. St. 132; New Orleans &c. Steamship Co. v. Ocean Dry Dock Co., 28 La. Ann. 173, 26 Am. Rep. 90; Franklin Co. v. Lewiston Inst. for Savings, 68 Maine 43, 28 Am. Rep. 9n; Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85; Woodberry v. McClurg, 78 Miss. 831, 29 So. 514; MacGinniss v. Boston &c. Min. Co., 29 Mont. 428, 75 Pac. 89; State v. People's &c. Bank, 197 Mo. 574, 94 S. W. 953; Bank of Commerce v. Hart, 37 Nebr. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. 479; Pearson v. Concord R. Co., 62 N. H. 537, 13 Am. St. 590; Coler v. Tacoma R. &c. Co., 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. 786; In re Delaware River &c. R. Co., 76 N. J. L. 163, 68 Atl. 1104; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. 448; Franklin Bank v. Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594; Valley R. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; McMillan v. Carson Hill &c. Min. Co., 12 Phila. (Pa.) 404, 35 Leg. Int. (Pa.) 163; Marble Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252n, 36 Am. St. 71; McCampbell v. Fountain Head R. Co., 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. 731; Clark v. Memphis St. R. Co. (Tenn.), 130 S. W. 751; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; De La Vergne Refrigerating &c. Co. v. German Sav. Inst., 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. 20; First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306; Denny Hotel Co. v. Gilmore, 6 Wash. 152, 32 Pac. 1004. "If a corporation can purchase any portion of the capital stock of another corporation it can purchase the whole, and invest all its funds in that way, and thus be

enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and the manufacturing corporation could become a banking corporation. This the law will not allow." Franklin Co. v. Lewiston Inst. for Sav., 68 Maine 43, 28 Am. Rep. 9. This rule prohibits subscriptions for stock of another company. Merchants' &c. Co. v. Streuby, 91 Miss. 211, 44 So. 791, 124 Am. St. 651. Exceptions exist to the general rule. See Elliott Priv. Corp. (4th ed.), § 191.

⁹⁷Windmuller v. Standard Distilling Co., 114 Fed. 491; Ingraham v. National Salt Co., 130 Fed. 676, 65 C. A. 54; Atchison &c. R. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596; Greene v. Middlesborough Town & Lands Co., 121 Ky. 355, 28 Ky. L. 303, 89 S. W. 228; Oil City Land &c. Co. v. Porter, 99 Ky. 254, 18 Ky. L. 151, 35 S. W. 643; MacGinniss v. Boston &c. Min. Co., 29 Mont. 428, 75 Pac. 89; Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842; Rubino v. Pressed Steel Car Co. (N. J. Eq.), 53 Atl. 1050; Dittman v. Distilling Co., 64 N. J. Eq. 537, 54 Atl. 570; White v. Syracuse &c. R. Co., 14 Barb. (N. Y.) 559; In re Buffalo &c. R. Co., 74 N. Y. St. 345, 37 N. Y. S. 1048; Oelbermann v. New York & N. R. Co., 77 Hun (N. Y.) 332, 59 N. Y. St. 881, 60 N. Y. St. 876, 29 N. Y. S. 545, 7 Misc. (N. Y.) 352, 27 N. Y. S. 945; Motter v. Kennett Tp. Elec. Co., 212 Pa. 613, 62 Atl. 104; Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

⁹⁸Miner's Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300n; Hill v. Nisbet, 100 Ind. 431; Calumet Paper Co. v. Scotts Investment Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. 362; Iowa Lumber Co. v. Foster, 49 Iowa 25, 31 Am. Rep. 140; Ryan v. Leavenworth &c. R. Co., 21 Kans. 365; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N.

As exceptions to the general rule that a corporation cannot acquire stock in another corporation it is said that it may acquire stock in the usual course of its business as it may other property. Thus it may take the stock of another corporation in payment or satisfaction of a debt,⁹⁹ or take such stock in payment of property sold to a corporation.¹ One corporation may also take the stock of another corporation as collateral security for a debt, or, what is equivalent, for the purpose of securing an existing indebtedness.² The foregoing rule applies to national

Y. 252, 27 N. E. 831, 24 Am. St. 448. The fact that one corporation owns a majority or all of the stock of another corporation does not vacate or destroy the charter or corporate rights of the latter corporation. It retains its separate corporate entity, and has all the powers and rights which it would otherwise have if its stock were in the hands of a number of individual holders. *Color Oil &c. Co. v. Franzell*, 128 Ky. 715, 109 S. W. 328, 36 L. R. A. (N. S.) 456. The fact that one railroad controls another by owning a majority of its stock and has made it a part of a system, does not render it liable for the contracts of the controlled road if the latter is in fact a legally distinct and separate organization. *Stone v. Cleveland &c. R. Co.*, 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770, and note.

⁹⁹ *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Taylor County Court v. Baltimore &c. R. Co.*, 35 Fed. 161; *Citizens' State Bank v. Hawkins*, 71 Fed. 369, 18 C. C. A. 78, 34 U. S. App. 423; *White v. Marquardt (Iowa)*, 70 N. W. 193; *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591, 103 N. W. 958; *First National Bank v. National Exch. Bank*, 39 Md. 600; *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493; *Hill v. Shilling*, 69 Nebr. 152, 95 N. W. 24; *Westminster Nat. Bank v. New England Elec. Works*, 73 N. H. 465, 62 Atl. 971, 3 L. R. A. (N. S.) 551n, 111 Am. St. 637; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 27 N. E. 831, 24 Am. St. 448, 1 Keener's Cas. 730; *Tourtlot v. Whithed*, 9 N. Dak. 407, 84 N. W. 8; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350,

38 Am. Rep. 594; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624n. But see *Buckeye Marble &c. Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252n, 36 Am. St. 71; *Fleckner v. Bank*, 8 Wheat. (U. S.) 338, 5 L. ed. 631; *First National Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679, 51 How. Pr. (N. Y.) 320; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. 613.

¹ *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300n; *Taylor v. North Star &c. Min. Co.*, 79 Cal. 285, 21 Pac. 753; *Leathers v. Janney*, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624n; *Hibernia Ins. Co. v. St. Louis & N. O. Transport Co.*, 4 McCrary (U. S.) 432, 13 Fed. 516.

² *Asiatic Banking Corp.*, In re, L. R. 4 Ch. 252; *Exchange Bank v. Fletcher*, 19 Can. Sup. Ct. 278; *Geddes v. La Banque Jacques Cartier*, 24 Lower Can. Jurist 135; *Montreal Bank v. Geddes*, 3 Leg. News (Lower Can.) 146; *Memphis &c. R. Co. v. Woods*, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605n, 16 Am. St. 81; *Kennedy v. California Sav. Bank*, 101 Cal. 495, 35 Pac. 1039, 40 Am. St. 69; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Citizens' State Bank v. Hawkins*, 71 Fed. 369, 18 C. C. A. 78, 34 U. S. App. 423; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415; *Metcalf v. American School Furn. Co.*, 122 Fed. 115; *Calumet Paper Co. v. Scotts Inv. Co.*, 96 Iowa 147, 64 N. W. 782, 59 Am. St. 362; *United States Trust Co. v. Brady*, 20 Barb. (N. Y.) 119; *Milbank v. New York &c. R. Co.*, 64 How. Pr.

banks.³ The purpose of the general rule first stated would seem to be to prevent a deliberate and permanent investment of a corporation's assets in the stock of another corporation.⁴

§ 549. Power to appoint agents.—The very fact that a corporation is an artificial person makes it impossible for it to act except through agents. Corporations must have the power to make contracts appointing necessary agents as an incident to their existence. The board of directors and managing officers are themselves only agents of the corporation.⁵ The power to select or appoint the directors rests with the stockholders.⁶ The directors and trustees have as a general rule the right to select managing officers and to appoint such agents as they may desire or delegate their power to a managing officer.⁷ No formalities are required in the appointment of agents unless provided for by charter.⁸ Corporations have implied powers to employ agents

(N. Y.) 20; *Talmage v. Pell*, 7 N. Y. 328; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624n; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. 831; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416, 1 Hughes (U. S.) 101, 21 Fed. Cas. 12801. See, however, *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594.

³ *Kennedy v. California Sav. Bank*, 101 Cal. 495, 35 Pac. 1039, 40 Am. St. 69; *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. 206; *Westminster Nat. Bank v. New England Elec. Works*, 73 N. H. 465, 62 Atl. 971, 3 L. R. A. (N. S.) 551n, 111 Am. St. 637; *Fulton v. National Bank*, 26 Tex. Civ. App. 115, 62 S. W. 84; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679.

⁴ See *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 20 So. 981, 59 Am. St. 105; *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493.

⁵ Including the president. *Lloyd & Co. v. Matthews*, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376n, 114 Am. St. 346. See, however, *American Soda Fountain Co. v. Stolzen-*

bach, 75 N. J. L. 721, 68 Atl. 1078, 127 Am. St. 822, which lays down the rule that an officer exercises the corporate powers of the institution in the only way in which they can be exercised at all. "He acts directly and in chief, and not by delegation."

⁶ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Southern Electric Securities Co. v. State*, 91 Miss. 195, 44 So. 785, 124 Am. St. 638; *State v. McCollough*, 3 Nev. 202.

⁷ See *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Coleman v. West Virginia Oil & C. Co.*, 25 W. Va. 148. The stockholders have no power to make such selections where the charter vests it in the directors. *Walsenburg Water Co. v. Moore*, 5 Colo. App. 144, 38 Pac. 60; *In re, St. Helen Mill Co.*, 3 Sawy. (U. S.) 88, 21 Fed. Cas. No. 12222. But in the absence of charter provision or by-law to the contrary, the regular officers must, as a general rule, be chosen by the body of the corporators. *State v. Ancker*, 2 Rich. L. (S. Car.) 245; *Angell & Ames Corp.*, § 277.

⁸ *Sherman v. Fitch*, 98 Mass. 59; *Roberts v. Demens Woodworking Co.*, 111 N. Car. 432, 16 S. E. 415; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. ed. 552.

for purposes expressly or impliedly conferred by charter.⁹ Thus it has been held that a corporation can employ an attorney to prosecute and defend actions for or against it, regardless of the nature of the transactions involved.¹⁰ It may also make valid agreements to compensate an agent for obtaining subscriptions for its stock.¹¹

A corporation cannot appoint an agent to accomplish a purpose expressly or impliedly foreign to the object of its incorporation.¹² If the corporation could not carry on a particular business it could not do it indirectly through the appointment of trustees or agents who should continue the business for its benefit.¹³ An agent's authority to act for a corporation may be implied.¹⁴ But the fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other,

⁹ Metropolitan Coal &c. Assn. v. Scrimgeour (1895), 2 Q. B. 604; Alabama &c. R. Co. v. Kidd, 29 Ala. 221; Arapahoe Cattle &c. Co. v. Stevens, 13 Colo. 534, 22 Pac. 823; Garrison v. Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Kitchen v. Cape Girardeau & S. L. R. Co., 59 Mo. 514; Sistare v. Best, 88 N. Y. 527. "Corporations act exclusively by agents." Cushman v. Cloverdale Coal &c. Co., 170 Ind. 402, 84 N. E. 759, 127 Am. St. 391.

¹⁰ Pixley v. Western Pacific R. Co., 33 Cal. 183, 91 Am. Dec. 623; National Bank v. Earl, 2 Okla. 617, 39 Pac. 391.

¹¹ Cincinnati R. Co. v. Clarkson, 7 Ind. 595. See also, Chicago &c. R. Co. v. James, 24 Wis. 388.

¹² In re Phoenix Life Assur. Co., 1 Hem. & M. 433; George v. Nevada Central R. Co., 22 Nev. 228, 38 Pac. 441.

¹³ Williams v. Johnson, 208 Mass. 544, 95 N. E. 90. "The practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent law-

yers to practice for it, as that would be an evasion which the law will not tolerate." In re Co-Operative Law Co., 198 N. Y. 479, 92 N. E. 15, 139 Am. St. 839. To same effect, In re Certain Lands in City of New York, 128 N. Y. S. 999.

¹⁴ Metzger v. Southern Bank, 98 Miss. 108, 54 So. 241. See also, Panhandle Tel. &c. Co. v. Kellogg Switchboard & Supply Co. (Tex. Civ. App.), 132 S. W. 963. A corporation is bound by the acts of its agent within the apparent scope of his authority. Curtis Land &c. Co. v. Interior Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. 1068. To same effect, Winer v. Bank of Blytheville, 89 Ark. 435, 117 S. W. 232, 131 Am. St. 102; Stevens v. Selma Fruit Co. (Cal. App.), 123 Pac. 212. A person who contracts with a corporation is not bound to know of a by-law limiting the power of the agent to make the customary contracts appertaining to the business he is authorized to contract. Barber v. Stromberg-Carlson Tel. Mfg. Co., 81 Nebr. 517, 116 N. W. 157, 129 Am. St. 703.

nor merge them into one, so as to make the contract of one corporation binding upon the other.¹⁵

§ 550. Power to appoint agent—Ratification.—It is also well settled that when a corporation accepts or ratifies a contract, which is within the scope of its powers, made by an unauthorized person, it becomes the contract of the corporation.¹⁶ A corporation, like a natural person, may ratify any act which it can perform.¹⁷ The doctrine that one cannot ratify an agreement made by another who was not at the time acting, and did not profess or assume to be acting, on behalf of a principal, applies to a corporation.¹⁸

§ 551. Power to act as agent.—A corporation may or may not have the power to act as an agent according to the nature and character of its business. Certain classes of corporations may be expressly empowered to act in the capacity of agents.¹⁹ The general rule has been stated as follows: "Within the scope of its corporate powers, unless there are express provisions in its charter, or constating instruments to the contrary, a corporation may act as agent, either for an individual, a partnership or another corporation. Many of the great corporations of the country are organized for this express purpose under statutes or charters conferring and defining their powers and the methods of executing them; but even in other cases, authority so to act

¹⁵ *Richmond &c. Co. v. Richmond &c. R. Co.*, 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

¹⁶ *Rowley v. Stack-Gibbs Lumber Co.*, 19 Idaho 107, 112 Pac. 1041. See also, *Stevens v. Knights of Modern Maccabees (Mo.)*, 132 S. W. 757.

¹⁷ *Rowley v. Stack-Gibbs Lumber Co.*, 19 Idaho 107, 112 Pac. 1041. "Ratification can only be made by one who has power to make the contract in the first instance." *Cushman v. Cloverland Coal &c. Co.*, 170 Ind. 402, 84 N. E. 759, 127 Am. St. 391. (The above case is one in which medical services to be rendered an injured employé were contracted for.)

¹⁸ *Schlesinger v. Forest Products Co. (N. J.)*, 76 Atl. 1024, 30 L. R. A.

(N. S.) 347. See also, *Florida Coca Cola Bottling Co. v. Richer*, 136 Ga. 411, 71 S. E. 734. "A corporation is governed, like an individual, by the same principles as to the ratification of the acts of its agents and as to estoppel in pais." *Metzger v. Southern Bank*, 98 Miss. 108, 54 So. 241. To same effect, *Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. (N. J.)*, 73 Atl. 254; *Knowles v. Northern Texas Tract Co. (Tex. Civ. App.)*, 121 S. W. 232. For a good discussion of the general principles governing ratification see *Thompson v. Labouringman's &c. Co.*, 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311.

¹⁹ *Frostburg Mutual Bldg. Assn. v. Lowdermilk*, 50 Md. 175.

might be implied as auxiliary to their main purposes."²⁰ Thus a bank has been held to have the power to enter into a contract of agency and to undertake to sell certain stock at a stated price within a given time.²¹ A corporation cannot, however, act as an agent for another in transactions wholly outside the purposes of its charter.²² But there are some apparent exceptions to the rule. Thus it has been held that a bank may, as an incident to its power to collect collaterals, act as the debtor's agent in making sale of the collaterals.²³ Nor does the rule apply to corporations organized for the express purpose of acting in the capacity of agents.²⁴ It has also been held that where a corporation acted as agent for an undisclosed principal it must be regarded as principal and liable as such, but that this did not defeat the right to set up the defense of *ultra vires*, and that the corporation could not be held liable as agent if the agreement was one it could not have entered into as principal.²⁵ At this point it might not be out of place to again mention that corporations as a general rule have no power to enter into partnership relations with individuals or other corporations, or to make agreements which will create a partnership.²⁶

§ 552. Power to make extra-territorial contracts.—The extra-territorial contracts of a corporation will be held valid if they are: first, within the scope of the powers conferred upon such corporation by the law of the state of its organization; secondly, if permitted, or, rather, not prohibited, by the law of the state within which the contract is made or where it is to be

²⁰ Mechem on Agency, § 64. See also, *State v. Michel*, 112 La. 4, 36 So. 869; *Killingsworth v. Portland Trust Co.*, 18 Ore. 351, 23 Pac. 66, 7 L. R. A. 638, 17 Am. St. 737; *McWilliams v. Detroit &c. Mills Co.*, 31 Mich. 274.

²¹ *Gause v. Commonwealth Trust Co.*, 44 Misc. (N. Y.) 46, 89 N. Y. S. 723.

²² *Westinghouse Mach. Co. v. Wilkinson*, 79 Ala. 312; *Farmers' &c. Nat. Bank v. Smith*, 77 Fed. 129, 23 C. C. A. 80, 40 U. S. App. 690; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482, 1 Keener's Cas. 819; *Peck-Williamson Heating &c. Co. v. Board*

of Education &c., 6 Okla. 279, 50 Pac. 236; *First Nat. Bank v. Hoch*, 89 Pa. St. 324, 33 Am. Rep. 769.

²³ *Anderson v. First Nat. Bank*, 5 N. Dak. 451, 67 N. W. 821.

²⁴ *Snow &c. Co. v. Hall*, 19 Misc. (N. Y.) 655, 44 N. Y. S. 427.

²⁵ *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482, 1 Keener's Cases 819.

²⁶ "It is familiar law that a corporation cannot enter into a partnership." *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90. See ante, § 483, *Partnership. Who May be Partners.*

performed.²⁷ It is well settled that on the principle of comity corporations may make contracts outside the state of their creation. A corporation may generally make and take contracts in any other state unless prohibited by the laws of the latter commonwealth.²⁸ Thus a deed of land belonging to a Missouri corporation, executed by its directors, to a corporation organized under the laws of England, although executed and delivered in England, has been held valid.²⁹ Where the validity of a contract of a foreign corporation is questioned it will not be presumed, in the absence of proof, that there is a restriction in its charter or in the laws of the state of its creation prohibiting it from making such contract.³⁰ The contract of a foreign corporation will be presumed valid.³¹

§ 553. Extra-territorial contracts—What law governs.—
As a general rule, the contract of a foreign corporation is gov-

²⁷ See, generally, *Mumford v. American Life Ins. & Co.*, 4 N. Y. 463; *Bard v. Poole*, 12 N. Y. 495; *New York & C. Derrick v. New Jersey Oil Co.*, 3 Duer. (N. Y.) 648; *Bank v. Earle*, 13 Pet. (U. S.) 519, 10 L. ed. 274; *Connecticut & Ins. Co. v. Cross*, 18 Wis. 109. "Natural persons, through the intervention of their agents, are continually making contracts in countries in which they do not reside. and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permissible by the laws of the place?" *Bank of Kentucky v. Schuylkill Bank*, 1 Par. Eq. Cas. (Pa.) 180, 225. The above statement is, however, slightly misleading. A natural person with capacity to contract may enter into any agreement not prohibited by public policy or the laws of the state where it is made, while a corporation is created for a specific purpose and can only contract within the limits of its charter, as this is the law of its being and measures

the extent of its capacity in this respect. *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129.

²⁸ *Wood Hydraulic & C. Min. Co. v. King*, 45 Ga. 34; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114, 33 Am. Dec. 481; *Frazier v. Willcox*, 4 Rob. (La.) 517; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Williams v. Creswell*, 51 Miss. 817; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129; *People v. Priest*, 126 N. Y. S. 472; *Stoney v. American Life Ins. Co.*, 11 Paige (N. Y.) 635; *Bard v. Poole*, 12 N. Y. 495; *Milnor v. New York & C. R. Co.*, 53 N. Y. 363; *Kerchner v. Gettys*, 18 S. Car. 521; *Ohio & C. Trust Co. v. Merchant's Ins. & C. Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Tombigby R. Co. v. Kneeland*, 4 How. (U. S.) 16, 11 L. ed. 855; *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 465.

²⁹ *Missouri Lead Min. & Smelting Co. v. Reinhard*, 114 Mo. 218, 21 S. W. 488, 35 Am. St. 746.

³⁰ *Boulware v. Davis*, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601; *New York & C. Derrick Co. v. New Jersey Oil Co.*, 3 Duer. (N. Y.) 648.

³¹ *Ames v. Kruzner*, 1 Alaska 598; *Southern Lumber Co. v. Holt*, 129 La. 273, 55 So. 986. See also, *Chicago & C.*

erned by the laws of the state where the contract is executed (*lex loci contractus*), and its validity determined thereby.³² If a foreign corporation is permitted to enter another state the validity of its contracts with citizens of that state must be determined by the rules that apply to like contracts between citizens and domestic corporations.³³ The law of the forum controls as to the remedy.

§ 554. Foreign corporation subject to the laws of the state in which it seeks to do business.—Moreover, the state may fix the terms on which a foreign corporation not engaged in interstate commerce may enter to do business.³⁴ Thus the statutes of some states declare the contracts of a foreign corporation made without having complied with the statutory provisions of such state to be absolutely void.³⁵ By the statutes of other states such

Trust Co. v. Bashford, 120 Wis. 281, 97 N. W. 940. See cases cited, ante, note 30.

³² See, generally, Allegheny Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724; Washington Nat. Bldg. & C. Assn. v. Stanley, 38 Ore. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. 793; Commonwealth v. Biddle, 139 Pa. St. 605, 21 Atl. 134, 11 L. R. A. 561; National & C. Loan Assn. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. 532. See also, Holder v. Aultman, Miller & Co., 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. 269.

³³ Security & C. Assn. v. Elbret, 153 Ind. 198, 54 N. E. 753.

³⁴ Queen City Fire Ins. Co. v. Bashford (S. D.), 130 N. W. 44. Such statutory restrictions do not apply to transactions constituting interstate commerce. F. A. Patrick & Co. v. DesChamp (Wis.), 129 N. W. 1096. See also, Ulmer v. First Nat. Bank, 61 Fla. 460, 55 So. 405; Hannis Distilling Co. v. City of Baltimore, 114 Md. 678, 80 Atl. 319. But it has been held that a foreign railroad company may be compelled to incorporate in the state before it will be permitted to "acquire the right of way for, or purchase or hold land for, its depots, tracks or other purposes." Plummer v. Chesapeake & C. R. Co., 143 Ky. 102, 136 S. W. 162.

³⁵ Electric Lighting Co. v. Rust, 117

Ala. 680, 23 So. 751; Hanchey v. Southern Home Building & Loan Assn., 140 Ala. 245, 37 So. 272; Rockford Ins. Co. v. Rogers, 9 Colo. App. 121, 47 Pac. 848; Pittsburgh Const. Co. v. West Side Belt R. Co., 154 Fed. 929, 83 C. C. A. 501, 11 L. R. A. (N. S.) 1145; McCanna & Co. v. Citizens' Trust & C. Co., 76 Fed. 420, 24 C. C. A. 11, 35 L. R. A. 236; Diamond Glue Co. v. United States Glue Co., 103 Fed. 838; Hoskins v. Rochester Sav. & Loan Assn., 133 Mich. 505, 95 N. W. 566; Tri-state Amusement Co. v. Forest Park & C. Amusement Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688n, 111 Am. St. 511; Chicago & C. Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344; United Shoe Mach. Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567; Amalgamated Zinc & C. Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 S. W. 31; Blevins v. Fairly, 71 Mo. 259; Ehrhardt v. Robertson Bros., 78 Mo. App. 404; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636; Pioneer Sav. & C. Co. v. Eyer, 62 Nebr. 810, 87 N. W. 1058; Allegheny Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724; Meyers Mfg. Co. v. Wetzel (Tenn. Ch. App.), 35 S. W. 896; Booth & Co. v. Weigand, 30 Utah 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693n; Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, 89 N. W. 904; Chicago & C. Trust Co. v.

contracts are voidable.³⁶ Many other statutes merely impose a penalty on the corporation for failure to comply with the statutes; such enactments do not as a general rule affect the validity of contracts.³⁷ Still other statutes do not affect the validity of contracts made in the state by a foreign corporation which has not complied with its statutory provisions but merely suspend the remedy and prevent any action thereon until compliance.³⁸

Bashford, 120 Wis. 281, 97 N. W. 940; Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. (N. S.) 680n, 116 Am. St. 54; Hanna v. Kelsey Realty Co., 145 Wis. 276, 129 N. W. 1080, 140 Am. St. 1075. See United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 132 S. W. 1133. The above case holds that the court will lend its aid to the protection of the rights of the parties when it can do so without giving effect to the void contract. Emerich Co. v. Sloane, 46 Misc. (N. Y.) 513, 95 N. Y. S. 39.

³⁶ Ames v. Kruzner, 1 Alaska 598; Mutual Benefit &c. Ins. Co. v. Winne, 20 Mont. 20, 49 Pac. 446.

³⁷ Sherwood v. Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. 695; State &c. Ins. Assn. v. Brinkley Stave &c. Ins. Assn., 61 Ark. 1, 31 S. W. 157, 54 Am. St. 191, 29 L. R. A. 712; Utley v. Clark-Gardner Lode Min. Co., 4 Colo. 369; Kindel v. Beck & Pauli Lith. Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311n; Pangborn v. Westlake, 36 Iowa 546; Penneyacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 8 L. R. A. 236n, 20 Am. St. 395; Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. 580; Clark v. Middleton & Riley, 19 Mo. 53; Connecticut River &c. Ins. Co. v. Whipple, 61 N. H. 61; Washburn Mill Co. v. Bartlett, 3 N. Dak. 138, 54 N. W. 544, 1 Smith's Cas. 515; Union &c. Ins. Co. v. McMillen, 24 Ohio St. 67; Wright v. Lee, 2 S. Dak. 596, 51 N. W. 706, 4 S. Dak. 237, 55 N. W. 931; Edison General Elec. Co. v. Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315n, 40 Am. St. 910; Toledo &c. Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. 925; Thompson v. National Mut. &c. Loan Assn., 57 W. Va. 551, 50 S. E. 756. See, however, Dudley v. Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. 55;

Dundee Mortgage &c. Co. v. Nixon, 95 Ala. 318, 10 So. 311; Pennsylvania Ins. Co. v. Baulere, 143 Ill. 459, 33 N. E. 166; Cassady v. American Ins. Co., 72 Ind. 95; State v. Briggs, 116 Ind. 55, 18 N. E. 395; Franklin Ins. Co. v. Louisville &c. Packet Co., 9 Bush (Ky.) 590; Buxton v. Hamblen, 32 Maine 448; Reliance &c. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59; Seamans v. Temple Co., 105 Mich. 400, 53 N. W. 408, 28 L. R. A. 430, 55 Am. St. 457; Seamans v. Christian &c. Mills Co., 66 Minn. 205, 68 N. W. 1065; American Ins. Co. v. Smith, 73 Mo. 368; Barbor v. Boehm, 21 Nebr. 450, 32 N. W. 221; Stewart v. Northampton &c. Ins. Co., 38 N. J. L. 436; Pennington & Kean v. Townsend, 7 Wend. (N. Y.) 276; Manhattan Ins. Co. v. Ellis, 32 Ohio St. 388; Bank of British Columbia v. Page, 6 Ore. 431; Thorne v. Travelers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89; Law Guarantee &c. Co. v. Jones, 103 Tenn. 245, 58 S. W. 219; Lycoming &c. Ins. Co. v. Wright, 55 Vt. 526; Ætna &c. Ins. Co. v. Harvey, 11 Wis. 394.

³⁸ Crefeld Mills v. Goddard, 69 Fed. 141; Goddard v. Crefeld Mills, 75 Fed. 818, 21 C. C. A. 530; Sullivan v. Beck, 79 Fed. 200; Caesar v. Capell, 83 Fed. 403; Simplex Dairy Co. v. Cole, 86 Fed. 739; Eastern Bldg. &c. Assn. v. Bedford, 88 Fed. 7; Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288, 76 C. C. A. 172; Wood Mowing &c. Mach. Co. v. Caldwell, 54 Ind. 270, 23 Am. Rep. 641; Domestic Sewing Mach. Co. v. Hatfield, 58 Ind. 187; American Ins. Co. v. Pettijohn, 62 Ind. 382; Daly v. National Life Ins. Co., 64 Ind. 1; Singer Mfg. Co. v. Brown, 64 Ind. 548; Johnson v. State, 65 Ind. 204; Behler v. German Mut. &c. Ins. Co., 68 Ind. 347; American &c. Ins. Co. v. Wellman, 69 Ind. 413; Singer Mfg.

In some jurisdictions the decisions relative to the power of a corporation to make extra-territorial contracts are in great confusion. Thus the Supreme Court of Indiana has said: "There is one line of decisions which holds that a contract entered into by a citizen of the state with a foreign corporation which has not complied with the statute, by the terms of which the citizen has bound himself to the corporation, is void, while another line of decisions hold that such contract is not void, but that the right to enforce it is suspended until the corporation has complied with the statute."³⁹ It is well settled, however, that a foreign corporation which has been sued upon its contract cannot plead as a defense, its failure to comply with the statutes.⁴⁰ But while the corporation may not set this up as a defense, it is entitled to defend any action brought against it. To prevent it from so doing would be to deny it equal protection of the laws and to deprive it of its property without due process of law.⁴¹ The Supreme

Co. v. Effinger, 79 Ind. 264; Elston v. Piggott, 94 Ind. 14; Security &c. Assn. v. Elbert, 153 Ind. 198, 54 N. E. 753; National &c. Ins. Co. v. Pursell, 10 Allen (Mass.) 231; Carson-Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; Neuchatel Asphalte Co. v. New York, 155 N. Y. 373, 49 N. E. 1043; Davis Provision &c. Co. v. Fowler, 20 App. Div. (N. Y.) 626, 47 N. Y. S. 205, *affd.*, 163 N. Y. 580, 57 N. E. 1108; Providence Steam &c. Co. v. Connell, 86 Hun (N. Y.) 319, 67 N. Y. St. 196, 33 N. Y. S. 482; Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073. In Illinois a foreign corporation cannot sue notwithstanding there is a subsequent compliance. Erie &c. Nav. Co. v. Central R. Equipment Co., 152 Ill. App. 278.

³⁹ Phenix Ins. Co. v. Pennsylvania Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405.

⁴⁰ Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala. 538; Berry v. Knights Templars &c. Indemnity Co., 46 Fed. 439; Diamond Plate Glass Co. v. Minneapolis &c. Ins. Co., 55 Fed. 27; Sparks v. National Masonic Acc. Assn., 73 Fed. 277; In re Naylor Mfg. Co., 135 Fed. 206; Ray v. Home &c. Investment & Agency Co., 98 Ga. 122, 26 S. E. 56; Watertown Fire Ins. Co. v.

Rust, 141 Ill. 85, 30 N. E. 772, *affg.*, 40 Ill. App. 119; Pennypacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 8 L. R. A. 236n, 20 Am. St. 395; Sparks v. National Masonic Acc. Assn., 100 Iowa 458, 69 N. W. 678; Clay Fire Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346; Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943; Williams v. Bank, 71 Miss. 858, 16 So. 238, 42 Am. St. 503; Evans v. Lee, 11 Nev. 194; Marshall v. Reading &c. Ins. Co., 78 Hun (N. Y.) 83, 60 N. Y. St. 820, *affd.*, 149 N. Y. 617, 44 N. E. 1125, 29 N. Y. S. 334; Franzen v. Zimmer, 90 Hun (N. Y.) 103, 70 N. Y. St. 407, 35 N. Y. S. 612; Union &c. Ins. Co. v. McMillen, 24 Ohio St. 67; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343; Swan v. Watertown &c. Ins. Co., 96 Pa. St. 37; Watertown Fire Ins. Co. v. Simons, 96 Pa. St. 520; Kilgore v. Smith, 122 Pa. St. 48, 15 Atl. 698; Hoge v. Dwelling-House Ins. Co., 138 Pa. St. 66, 20 Atl. 939; Lasher v. Stimson, 145 Pa. St. 30, 23 Atl. 552; Ehrman v. Teutonia Ins. Co., 1 McCrary (U. S.) 123, 1 Fed. 471.

⁴¹ American De Forrest &c. Co. v. Superior Court, 153 Cal. 533, 96 Pac. 15, 126 Am. St. 125. See also, Rib Falls Lumber Co. v. Lesh &c. Lum-

Court of Alabama has in a number of cases laid down the rule that where a contract between a foreign corporation and a citizen of that state has been fully executed the court will not lend its aid to either party to be relieved of its effect, thus treating the contract as illegal because made in violation of the statutes and the parties as being in *pari delicto*.⁴²

§ 555. **Contracts made before incorporation.**—A corporation can do no act and make no contract until it is brought into existence as such either *de jure* or *de facto*. Consequently the promoters of a corporation rather than the corporation are personally liable for the contracts made by them or by agents authorized by them preliminary to its organization.⁴³ They cannot bind the corporation by their contracts made before the organization of the company,⁴⁴ except so far as it adopts or ratifies their acts either directly,⁴⁵ or in some cases by accepting the benefits of con-

ber Co., 144 Wis. 362, 129 N. W. 595.

⁴² *Sherwood v. Alvis*, 83 Ala. 115, 3 So. 307, 3 Am. St. 695; *Craddock v. American &c. Mortgage Co.*, 88 Ala. 281, 7 So. 196; *Long v. Georgia Pacific R. Co.*, 91 Ala. 591, 8 So. 706, 24 Am. St. 931; *Gamble v. Caldwell*, 98 Ala. 577, 12 So. 424; *Russell v. Jones*, 101 Ala. 361, 13 So. 145; *Shahan v. Tethero*, 114 Ala. 404, 21 So. 951; *Kindred v. New England Mortgage Sec. Co.*, 116 Ala. 192, 23 So. 56. As to what constitutes doing business in a state see *Parsons-Willis Lumber Co. v. Stuart*, 182 Fed. 779; *Neyens v. Worthington*, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142; *Saxony Mills v. Wagner*, 94 Miss. 233, 47 So. 899, 23 L. R. A. (N. S.) 834n; *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127; *Sucker State Drill Co. v. Wirtz*, 17 N. Dak. 313, 115 N. W. 844, 18 L. R. A. (N. S.) 134; *Berger v. Pennsylvania R. Co.*, 27 R. I. 583, 65 Atl. 261, 9 L. R. A. (N. S.) 1214n; *A. Booth & Co. v. Weigand*, 30 Utah 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693n; *Southwestern Slate Co. v. Stevens*, 109 Wis. 606, 120 N. W. 408, 29 L. R. A. (N. S.) 92, 131 Am. St. 1074.

⁴³ *Sandusky Coal Co. v. Walker*, 27 Ont. 677; *Colorado Land &c. Co. v.*

Adams, 5 Colo. App. 190, 37 Pac. 39; *Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 854; *Carmody v. Powers*, 60 Mich. 26, 26 N. W. 801. See also, *Weiss v. Arnold Print Works*, 188 Fed. 688.

⁴⁴ *Caledonian Ry. v. Helensburgh*, 2 Macq. H. L. Cas. 391; *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 164; *Perry v. Little Rock &c. R. Co.*, 44 Ark. 383, 25 Am. & Eng. R. Cases 44; *New York &c. R. Co. v. Ketchum*, 27 Conn. 170; *Rockford &c. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; *Tuttle v. George A. Tuttle Co.*, 101 Me. 287, 64 Atl. 496; *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. 193; *Carmody v. Powers*, 60 Mich. 26, 26 N. W. 801; *Hill v. Gould*, 129 Mo. 106, 30 S. W. 181; *Munson v. Syracuse &c. R. Co.*, 103 N. Y. 58, 8 N. E. 355, 29 Am. & Eng. R. Cas. 377. A promoter cannot bind the corporation by contract made in obtaining a subscription before the organization of the corporation. *Joy v. Manion*, 28 Mo. App. 55.

⁴⁵ *Payne v. New South Wales &c. Navigation Co.*, 10 Exch. 283; *Hutchinson v. Surrey Consumers' &c. Assn.*, 11 C. B. 689; *Bloom v. Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293;

tracts made for it,⁴⁶ and impliedly adopting it,⁴⁷ for the reason that a corporation cannot be a party to a contract made before its organization.⁴⁸ And strictly speaking, it is probably true for this reason that it cannot in a technical sense ratify such a contract, so as to relate back to a time prior to its corporate existence, but should rather be regarded as binding itself by a new contract as of the date of the alleged ratification or adoption.⁴⁹

§ 556. Ultra vires—Different meanings of term, “ultra vires.”—This is a subject about which much confusion has arisen mainly because the term, “ultra vires”, has been loosely applied and used in different senses. In its proper and strict sense a contract which is beyond the scope of the powers granted by the act of incorporation or outside the objects for which it was created as defined by the laws of its organization and limited by the

Colorado Land &c. Co. v. Adams, 5 Colo. App. 190, 37 Pac. 39; Stanton v. New York &c. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110n; Cotting v. Grant &c. R. Co., 65 Fed. 545; Wood v. Whelen, 93 Ill. 153; Low v. Connecticut &c. R. Co., 45 N. H. 370, 46 N. H. 284; Oaks v. Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84. See also, American Home Life Ins. Co. v. Jenkins (Tex. Civ. App.), 138 S. W. 424. It has been held that the president and general manager may adopt and ratify a contract made by himself for the corporation before it was legally created, for service for the company which he would have authority to engage if no previous contract existed. Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544. See also, Arapahoe &c. Co. v. Platt, 5 Colo. App. 515, 39 Pac. 584.

⁴⁶ Edwards v. Grand Junction R. Co., 1 Myl. & C. 650; Stanley v. Chester &c. R. Co., 9 Sim. 264; Moore &c. Co. v. Towers &c. Co., 87 Ala. 206, 6 So. 41, 13 Am. St. 23; Stanton v. New York &c. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110n; Coyote Gold &c. Co. v. Ruble, 8 Ore. 284; Schreyer v. Turner &c. Co., 29 Ore. 1, 43 Pac. 719; Bell's Gap &c. R. Co.

v. Christy, 79 Pa. St. 54. See also, Continental Trust Co. v. Toledo &c. Co., 86 Fed. 929; Frankfort &c. Co. v. Churchill, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; Battelle v. Northwestern Cement &c. Co., 37 Minn. 89, 33 N. W. 327; Seymour v. Spring Forest &c. Assn., 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Bommer v. American Spiral &c. Co., 81 N. Y. 468; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Hall v. Vermont & M. R. Co., 28 Vt. 401. See, however, Richard Brown &c. Co. v. Bambrick &c. Co. (Mo. App.), 131 S. W. 134. Compare McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. 653.

⁴⁷ See further on this subject ante, § 532.

⁴⁸ Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171, 65 N. E. 54.

⁴⁹ See Toledo & Ind. Trac. Co. v. Toledo & C. I. R. Co., 171 Ind. 213, 86 N. E. 54; McArthur v. Times Print. Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. 653; New Brighton &c. R. Co. v. Pittsburg &c. R. Co., 105 Pa. St. 13; Washington & I. R. Co. v. Cœur D'Alene R. &c. Co., 160 U. S. 77, 40 L. ed. 346, 16 Sup. Ct. 231, and Massachusetts cases cited in other notes to this section. See ante, § 532.

statutes authorizing its existence is *ultra vires*.⁵⁰ That is to say, a corporation is an artificial person with limited and defined powers. A contract outside the limits of these powers is *ultra vires*. In many cases the term, "*ultra vires*," is used as if synonymous with the word, "illegal."⁵¹ But as the New York Court of Appeals has pointed out, "The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated."⁵² The term *ultra vires* has also been used with reference to contracts of a class which the corporation had a right to execute but with respect to which there has been some irregularity or defect in the actual exercise of the power in some particular or through some undisclosed circumstance affecting the individual contract in issue.⁵³ In other words the term *ultra vires* has been used to express either that the act of the directors or officers is in

⁵⁰ See *Great Eastern &c. R. Co. v. Turner*, L. R. 8 Ch. 149; *Citizens' State Bank v. Hawkins*, 71 Fed. 369, 18 C. C. A. 78, 34 U. S. App. 423; *Kadish v. Garden City &c. Assn.*, 151 Ill. 531, 38 N. E. 236, 42 Am. St. 256; *National &c. Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 120 Am. St. 621; *Matthews v. Skinner*, 62 Mo. 329, 21 Am. Rep. 425, revd. 98 U. S. 621, 25 L. ed. 188; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482; *Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co.*, 131 U. S. 371, 33 L. ed.

157. See also, *Oakland Electric Co. v. Union Gas & Electric Co. (Me.)*, 78 Atl. 288, for a good discussion of the subject.

⁵¹ *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497n, 17 Am. St. 319. See also, *Franklin v. Lewiston Inst.*, 68 Maine 43; *State v. Nebraska Distilling Co.*, 29 Nebr. 700, 46 N. W. 155.

⁵² *Bissell v. Michigan Southern &c. R. Co.*, 22 N. Y. 258. To same effect, *Scham v. Brandt (Md.)*, 82 Atl. 551; 1 *Elliott on Railroads* (2d ed.), §§ 368, 369; 3 *Thompson on Corporations* (2d ed.), § 2767; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504.

⁵³ *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 120 Am. St. 621; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310.

excess of their authority as agents of the corporation or that the act of the majority of the stockholders is in violation of the rights of the minority or that the act has not been done in conformity with the requirements of the charter, or that the act is one that the corporation itself has not been sanctioned to do as being in excess of the corporate powers. However, the mere fact that an agent of a corporation exceeds his authority does not make the contract *ultra vires*, as to the corporation. The agent may exceed his authority and yet the contract will not be outside the scope of the corporation's powers as defined in its charter.⁵⁴

Because the term *ultra vires* has been used in these several different senses it has led to confusion and important differences in practical results. Thus, where the act done by the directors or officers is simply beyond the powers of the executive department of the corporation as the agency by which the corporation exercises its functions, and not the corporation itself, it may be made valid and binding by the acts of the board of directors or by the approval of stockholders,⁵⁵ and on the other hand where a corporation obtains money or property under a contract that is not illegal the party from whom such money or property is obtained may be aided by the courts although the contract was *ultra vires*.⁵⁶ It is held upon the same general principle that if the party

⁵⁴ For an excellent discussion of the subject see *Camden &c. R. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530, 7 Atl. 523 (opinion of DePue, J., dissenting from the result). "The term *ultra vires*, whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing

with corporations may vary, according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation." *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300n.

⁵⁵ *Camden &c. R. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530, 7 Atl. 523 (opinion of DePue, J.).

⁵⁶ *Argenti v. San Francisco*, 16 Cal. 255; *Miners' &c. Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300n; *Pullman &c. Co. v. Central &c. Co.*, 65 Fed. 158; *New Castle &c. Railroad Co. v. Simpson*, 23 Fed. 214; *Memphis &c. R. Co. v. Dow*, 19 Fed. 388; *Hazlehurst v. Savannah &c. R. Co.*, 43 Ga. 13; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *State Board &c. v. Citizens' &c. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Wapello v. Burlington &c. R. Co.*, 44 Iowa 585; *Franklin Co. v.*

contracting with the corporation retain the property obtained from the corporation, thus securing the benefit under the contract, he cannot escape payment of the value of the property so obtained on the ground that the contract was *ultra vires*.⁵⁷ But where the contract is illegal, that is a contract condemned or prohibited by law, or is *malum in se*, it is not enforceable but is to be regarded as void, for in such cases the corporation does more than perform an act in excess of its corporate powers.⁵⁸ It thus appears that in its proper sense the term *ultra vires* means contracts such as are outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature.

§ 557. Recovery where *ultra vires* contract has been performed by parties.—As has already been mentioned the doctrine of *ultra vires* as applied to corporate contracts is given a strict meaning by the Supreme Court of the United States, the courts of England, and by many courts of last resort in the

Lewiston &c. Bank, 68 Maine 43, 28 Am. Rep. 9; *Dill v. Wareham*, 7 Metc. (Mass.) 438; *Morville v. American &c. Soc.*, 123 Mass. 129, 25 Am. Rep. 40; *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339; *Manchester &c. Co. v. Concord &c. Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582; *DeGroff v. American &c. Co.*, 21 N. Y. 124; *Parish v. Wheeler*, 22 N. Y. 494; *Bissell v. Michigan &c. Co.*, 22 N. Y. 258; *Hays v. Galion &c. Coal Co.*, 29 Ohio St. 330; *Oil Creek &c. R. Co. v. Pennsylvania Transportation Co.*, 83 Pa. St. 160; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Miller v. American &c. Ins. Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; *Pennsylvania &c. Co. v. St. Louis &c. Co.*, 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. 1094; *Union Trust Co. v. Illinois Midland &c. Co.*, 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. 809; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; *Atlantic &c. Co. v. Union Pacific R. Co.*, 1 McCrary (U. S.) 541, 1 Fed. 745; *Rutland &c. R. Co. v. Proctor*, 29 Vt. 93; *Northwestern &c. Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep.

781. In many jurisdictions, however, as shown in some of the decisions above cited, there can be no recovery upon the contract itself.

⁵⁷ *Visalia Gas &c. Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. 105; *Salmon &c. Co. v. Dunn*, 2 Idaho 30, 3 Pac. 911; *Baker v. Northwestern &c. Co.*, 36 Minn. 185, 30 N. W. 464. See *Belcher &c. Refining Co. v. St. Louis &c. Elevator Co.*, 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256; *Bath Gaslight Co. v. Claffy*, 56 N. Y. 426, 26 N. Y. St. 287; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. See also, *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 Pac. 27.

⁵⁸ *Philadelphia &c. Co. v. Towner*, 13 Conn. 249. See also, *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. 203; *Cincinnati &c. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *In re Assignment Mutual &c. Ins. Co.*, 107 Iowa 143, 77 N. W. 868, 70 Am. St. 149, and elaborate note; *New York State &c. Co. v. Helmer*, 77 N. Y. 64; *Talmage v. Pell*, 7 N. Y. 328; *Root v. Godard*, 3 McClean (U. S.) 102, Fed. Cas. No.

United States. Where this is true contracts properly so termed are not voidable only but wholly void, and of no legal effect.⁵⁹ The authorities discriminate, however, between executed and executory contracts. The cases nearly all agree that a contract beyond the powers of a corporation is not enforceable so long as it remains clearly executory. In this situation neither an action for specific performance of a contract nor any damages for the failure to perform can be maintained.⁶⁰ Even where a contract with a corporation beyond its granted powers is fully executed by both parties, some cases hold that neither of them can assert its invalidity as a ground of release against it. They apply the maxim *in pari delicto potior est conditio defendentis*, and will not aid either of the parties in setting aside the contract so as to permit a recovery of amounts lost through such contract.⁶¹ Thus it has been held that a corporation which has made a purchase

12037; *Hayden v. Davis*, 3 McClean (U. S.) 276, Fed. Cas. No. 6259; *Root v. Wallace*, 4 McClean (U. S.) 8, Fed. Cas. No. 12039; *Davis v. Bank*, 4 McClean (U. S.) 387, Fed. Cas. No. 3626; *In re Jaycox*, 12 Blatch (U. S.) 209.

⁵⁹ See, ante, chapter on Parties, in § 276 entitled, Where Incapacity is such as to Make Contracts Void.

⁶⁰ *Wilkes v. Georgia Pac. R. Co.*, 79 Ala. 180; *Memphis &c. R. Co. v. Grayson*, 88 Ala. 572, 7 So. 122, 16 Am. St. 69; *First Nat. Bank v. Alexander (Ala.)*, 44 So. 866; *Coleman v. San Rafael Tpk. Rd. Co.*, 49 Cal. 517; *Anglo-American Land &c. Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89; *Screven Hose Co. v. Philpot*, 53 Ga. 625; *Hazlehurst v. Savannah &c. R. Co.*, 43 Ga. 13; *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713; *Kadish v. Garden City Equitable Loan & Bldg. Assn.*, 151 Ill. 531, 38 N. E. 236, 42 Am. St. 256; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; *State Board of Agriculture v. Citizens' St. R. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412; *Chicago &c. R. Co. v. Southern Ind. R. Co.*, 38 Ind. App. 234, 70 N. E. 843; *Thompson v. Lambert*, 44 Iowa 239; *Lithgow Mfg. Co. v. Fitch*, 5 Ky. L.

605; *Day v. Spiral Springs &c. Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Downing v. Mt. Washington &c. Co.*, 40 N. H. 230; *Camden &c. R. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530, 7 Atl. 523; *Parish v. Wheeler*, 22 N. Y. 494; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482; *Gause v. Commonwealth Trust Co.*, 44 Misc. (N. Y.) 46, 89 N. Y. S. 723; *Coppin v. Greenlees*, 38 Ohio St. 275, 43 Am. Rep. 425; *Oil Creek &c. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29; *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 40 S. W. 837; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950.

⁶¹ *Bigbee &c. Packet Co. v. Moore*, 121 Ala. 379, 25 So. 602; *Long v. Georgia Pac. R. Co.*, 91 Ala. 519, 8 So. 706, 24 Am. St. 931; *Anglo-American Land &c. Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89; *Garrison Canning Co. v. Stanley*, 133 Iowa 57, 110 N. W. 171; *Thompson v. Lambert*, 44 Iowa 239; *Milbank v. New York &c. R. Co.*, 64 How. Pr. (N. Y.) 20; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*,

beyond its powers cannot recover the money paid for the goods received and appropriated by it.⁶²

§ 558. Ultra vires contracts—Performance by one party.—

A somewhat similar doctrine is applied where the contract has been executed by one of the parties, as by the party contracting with the corporation. In which case it has been said "an ultra vires contract, one not within the scope of the corporate authority to make under any circumstances, which is no longer executory and is not tainted by fraud or clearly prohibited by statute, or condemned by sound public policy, cannot be impeached by the corporation or any one representing it."⁶³ That is to say, a corporation which has received and retained the benefits of the contract in excess of its authority but not expressly forbidden by law or contrary to sound public policy, cannot set up such want of authority to defeat a recovery on the contract⁶⁴ where the other

127 N. Y. 252, 27 N. E. 831, 24 Am. St. 448; *Parish v. Wheeler*, 22 N. Y. 494; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594; *Pannebaker v. Tuscarora Valley R. Co.*, 219 Pa. 60, 67 Atl. 923; *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *First Nat. Bank v. Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. 778; *Fayette Land Co. v. Louisville & C. R. Co.*, 93 Va. 274, 24 S. E. 1016; *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879; *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249.

⁶² *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 870, 68 Pac. 879.

⁶³ *Eastman v. Parkinson*, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921n.

⁶⁴ *Barrett v. Pollak Co.*, 108 Ala. 390, 18 So. 615, 54 Am. St. 172; *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134; *Witte v. Derby Fishing Co.*, 2 Conn. 260; *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567; *Gibson v. O'Gara Coal Co.*, 151 Ill. App. 424; *Thomas v. Citizens' Horse R. Co.*, 104 Ill. 462; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674; *Sherman Center Town Co. v. Morris*, 43 Kans.

282, 23 Pac. 569, 19 Am. St. 134; *Ewing v. Composite Brake-Shoe Co.*, 169 Mass. 72, 47 N. E. 241; *Dewey v. Toledo & C. R. Co.*, 91 Mich. 351, 51 N. W. 1063; *Erb v. Yoerg*, 64 Minn. 463, 67 N. W. 355; *Adams v. Farmers' & C. Ins. Co.*, 115 Mo. App. 21, 90 S. W. 747; *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79; *Chapman v. Iron Clad Rheostat Co.*, 62 N. J. L. 497, 41 Atl. 690; *Vought v. Eastern & C. Loan Assn.*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. 761; *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614; *Clowe v. Imperial Pine Product Co.*, 114 N. Car. 304, 19 S. E. 153; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Manhattan Hardw. Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428; *Pannebaker v. Tuscarora Valley R. Co.*, 219 Pa. 60, 67 Atl. 923; *Bishop v. Kent & C. Co.*, 20 R. I. 680, 41 Atl. 255; *Lancaster v. Southern Life Ins. Co.* (S. Car.), 71 S. E. 864; *Des Moines Mfg. & C. Co. v. Tilford Milling Co.*, 9 S. Dak. 542, 70 N. W. 839; *Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 Tex. Civ. App. 555, 107 S. W. 609; *Armstrong v. Cache Valley & C. Canal Co.*, 14 Utah 450, 48 Pac. 690; *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E.

party cannot be restored to his former status.⁶⁵ A like principle applies where the party executing the contract is the corporation and the other party raises the question of ultra vires as a defense to an action by the corporation for its enforcement.⁶⁶ Thus it has been held that one purchasing articles from a corporation and retaining the same will not be heard to object that the corporation was prohibited by law from trading in the specified articles.⁶⁷ Nor will the lessee of a corporation be allowed to escape the payment of rent for the time of his occupancy merely because the corporation had no power to execute the lease.⁶⁸

§ 559. Executed contracts—Rule criticized.—As is evidenced by the foregoing, many cases hold that after a contract has

501; *McElroy v. Minnesota &c. Horse Co.*, 96 Wis. 317, 71 N. W. 652. "While those dealing with a private corporation are charged with some degree of care to ascertain the powers of the corporation with reference to the transaction, if the transaction has some fair relation to the matter within the corporate authority, the defense of ultra vires will not in general be available to afford injustice or imposition." *McQuaig v. Gulf Naval Stores Co.*, 56 Fla. 505, 47 So. 2, 131 Am. St. 160. It has been said that a corporation may be estopped to set up the defense of ultra vires when sued on a suretyship contract when it has received direct benefits thereunder (*Richeson v. Nat. Bank of Mena*, 96 Ark. 556, 132 S. W. 912; *Wiltmer Lumber Co. v. Rice*, 23 Ind. App. 586, 55 N. E. 868), but the corporation will not be estopped when the evidence of such benefit is vague and uncertain. *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. 1058.

⁶⁵ *Camden &c. R. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530, 7 Atl. 523. The corporation cannot successfully plead ultra vires in defense of a suit on a contract and retain the benefits it derived therefrom. *Lancaster v. Southern Life Ins. Co.*, 89 S. Car. 179, 71 S. E. 864.

⁶⁶ *Ex parte Chippendale*, 4 DeG. M. & G. 19; *Fishmongers v. Robertson*, 5 Man. & G. 131, 6 Scott (N. R.) 56, 12 L. J. C. P. 185; *Bay City Bldg.*

&c. Assn. v. Broad, 136 Cal. 525, 69 Pac. 225; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Granger's Business Assn. v. Clark*, 67 Cal. 634, 8 Pac. 445; *Camp v. Land*, 122 Cal. 167, 54 Pac. 839; *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713; *Lurton v. Jacksonville Loan & Bldg. Assn.*, 87 Ill. App. 395, affd. 187 Ill. 141, 58 N. E. 218; *Smith v. State Bank*, 18 Ind. 327; *Bradley v. State Bank*, 20 Ind. 528; *Planters' Bank v. Sharp*, 4 Sm. & M. (Miss.) 75, 43 Am. Dec. 470; *Russell v. Cassidy*, 108 Mo. App. 577, 84 S. W. 171; *Coggeshall v. Sussman*, 41 Misc. (N. Y.) 384, 84 N. Y. S. 1097; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664. See also, *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 Pac. 27.

⁶⁷ *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

⁶⁸ *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664. In the above case it is said: "Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts; and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had undisturbed enjoyment of the property, would be, we think, most inequitable and unjust."

been executed, in whole or in part, a new element is introduced into the transaction. It would, they assert, be clearly unjust to permit the members of a corporation to take the benefits of a performance of the contract by the other party and then refuse performance on its part.⁶⁹ There seems to be a fallacy in this reasoning, however, in assuming that a contract may be valid although there was no power whatever to make it, and that unless the contract is upheld, the party will be remediless. The party is not without remedy because the courts decline to hold the contract valid, for it is clearly within the power of the court to do complete justice by compelling the restoration of the property or by awarding damages. It is fully agreed that in all cases where the corporation has received money or property or the fruits of labor, as a result of a performance of the contract by the other party, it should not be permitted to retain the benefits received without making reparation, but it does not necessarily follow that a contract made where there is an entire absence of power can be enforced. The members of the corporation are held by many of the courts, however, to be estopped.⁷⁰

⁶⁹ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134; *Peoria &c. R. Co. v. Thompson*, 103 Ill. 187; *State Board of Agriculture v. Citizens' Street R. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Camden &c. R. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530, 7 Atl. 523; *Oil Creek &c. R. Co. v. Pennsylvania Trans. Co.*, 83 Pa. St. 160.

⁷⁰ *Kennedy v. California Sav. Bank*, 101 Cal. 495, 35 Pac. 1039, 40 Am. St. 69; *Argenti v. San Francisco*, 16 Cal. 255; *Peoria &c. R. Co. v. Thompson*, 103 Ill. 187; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *State Board of Agriculture v. Citizens' Street R. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Louisville N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674; *Perkins v. Portland &c. R. Co.*, 47 Maine 573, 74 Am. Dec. 507; *McCluer v. Manchester &c. R. Co.*, 13 Gray (Mass.) 124, 74 Am. Dec. 624; *Dewey v. Toledo &c. R. Co.*, 91 Mich. 351, 51 N. W. 1063; *Hale v. Union Mutual Fire Ins. Co.*, 32 N. H. 295, 64 Am. Dec. 370; *Camden &c. R. Co. v. May's Landing &c.*

R. Co., 48 N. J. L. 530, 7 Atl. 523; *Cary v. Cleveland &c. R. Co.*, 29 Barb. (N. Y.) 35; *Vought v. Eastern Building &c. Assn.*, 172 N. Y. 517, 65 N. E. 496, 92 Am. St. 761. See also, *Oil Creek &c. R. Co. v. Pennsylvania &c. Co.*, 83 Pa. St. 160; *Pittsburg &c. R. Co. v. Allegheny Co.*, 79 Pa. St. 210; *Texas Western R. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98; *Rutland &c. R. Co. v. Proctor*, 29 Vt. 93; *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74, and other authorities cited in 29 Am. & Eng. Encyc. of Law (2d ed.) 57, and in note in 70 Am. St. 170; also *White v. Commercial &c. Bank*, 66 S. Car. 491, 45 S. E. 94, 97 Am. St. 803 and note, as well as Articles in 6 Cent. L. J. 5, 12 Cent. L. J. 389 and 2 Purdy's Beach Priv. Corp. §§ 888, 890, et seq. In one case it was held that where two street car companies organized under the general laws of the state, enter into a contract by which the first is to pay the second a certain rental for the use of the latter's track, the lessee cannot, while exercising and enjoying

§ 560. **Contracts ultra vires—Estoppel.**—It is held in many of the cases that a corporation may be estopped to make the defense that the contract was ultra vires,⁷¹ but this doctrine seems, if the contract is ultra vires in the strict sense, technically, if not radically unsound. It is not doubted that a corporation receiving and retaining a benefit under an ultra vires contract may be compelled to do equity, but we do not see how it is legally possible to hold that a corporation can be estopped to deny that it had no power to make the contract. If a contract is ultra vires in the true sense, that is, a contract entirely beyond and outside of the corporate powers, it cannot be made effective by an estoppel although the party contracting with the corporation may be protected from loss or injury upon equitable principles. Where the contract is

the right, refuse to pay the sum agreed upon the ground that the contract was ultra vires of its officers. *Canal & C. R. Co. v. St. Charles St. R. Co.*, 44 La. Ann. 1069, 11 So. 702. So it has been held that a corporation which accepts and uses money loaned in good faith on a mortgage upon its property, and pays interest on such money after notice of the mortgage, cannot escape liability on such mortgage by the passage of a resolution disapproving and annulling the president's authority, especially where the mortgage was executed by the president by the authority of the board of directors and no steps were taken to disaffirm the mortgage until long after its execution. *Augusta & C. R. Co. v. Kittel*, 52 Fed. 63. The cases which follow also oppose the doctrine we favor. In one case it was held that after a corporation has received the fruits which grow out of the performance of an act ultra vires, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract in order to escape the performance of an obligation it has assumed. *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412. The same general doctrine is held in other cases. *Owen Sound Steamship Co. v. Canadian Pac. R. Co.*, 17 Ont. 691, 40 Am. & Eng. R. Cas. 593. A corporation, having enjoyed the benefits of a con-

tract, cannot plead that it was ultra vires in the absence of fraud. *People's Gaslight & C. Co. v. Chicago Gaslight & C. Co.*, 20 Ill. App. 473; *First Nat. Bank v. Brooks*, 22 Ill. App. 238; *Sherman Center Town Co. v. Morris*, 43 Kans. 282, 23 Pac. 569, 19 Am. St. 134; *Sheridan Electric Light Co. v. Chatham Nat. Bank*, 52 Hun (N. Y.) 575, 24 N. Y. St. 622, 5 N. Y. S. 529; *Hubbard v. Camperdown Mills*, 26 S. Car. 581, 2 S. E. 576. This rule applies where a corporation attempts to deny the authority of an agent or officer. *Peck v. Doran & W. Co.*, 57 Hun (N. Y.) 343, 32 N. Y. St. 405, 10 N. Y. S. 401; *Lancaster County v. Cheraw & C. R. Co.*, 28 S. Car. 134, 5 S. E. 338. A railroad company cannot plead that its contract to build and operate a telegraph line was ultra vires as a defense to an action by the builder of the line for his compensation. *Pittsburg & C. R. Co. v. Shaw*, 2 Monag. (Pa.) 561, 14 Atl. 323, 13 Cent. R. 220.

⁷¹ *State Board v. Citizens' & C. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. See also, ante, § 559; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412; *Day v. Spiral Springs & C. Co.*, 57 Mich. 146, 58 Am. Rep. 352; *White v. Commercial & C. Bank*, 66 S. Car. 491, 45 S. E. 94, 97 Am. St. 803, and numerous cases cited in note in 70 Am. St. 167 et seq.

not beyond the scope of the corporate powers, but is executed in a mode different from that prescribed by law, or is executed by officers or agents without authority from the corporation, then it may be ratified or the corporation may be bound by an estoppel. Where, however, the contract is in the true sense *ultra vires* it is void and relief is granted a party against the corporation, not upon the ground of estoppel or of ratification of the contract, but upon equitable principles, and in granting relief the courts in effect treat the contract as disaffirmed.⁷²

⁷² The doctrine, which rests on solid principle, is that declared in *Central Transportation Co. v. Pullman & Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478, where it was said: "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside of the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisite to its existence or to its action, because such prerequisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws." It was also said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to main-

tain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to the law, by permitting property or money parted with on faith of the unlawful contract, to be recovered back or compensation to be made for it. In such a case, however, the action is not maintained upon the unlawful contract, nor according to its terms." Many authorities are here cited. See also, *DeLaVergne Refrigerating & Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. 20, 25. The doctrine of this case is sustained by well-reasoned cases. *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, per Lord Cranworth; *Bagshaw v. Eastern Union R. Co.*, 7 Hare 114; *Ashbury R. & Co. v. Riche*, L. R. 7 H. L. 653; *Long v. Georgia Pac. R. Co.*, 91 Ala. 519, 8 So. 706, 24 Am. St. 931; *Chicago & Co. v. People's & Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; *Steele v. Fraternal Tribunes*, 215 Ill. 190, 74 N. E. 121, 106 Am. St. 160; *Brunswick Gaslight Co. v. United Gas & Co.*, 85 Maine, 532, 35 Am. St. 385; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.*, 70 Miss. 669, 13 So. 879, 35 Am. St. 681. See *State v. Banker's Trust Co.*, 157 Mo. App. 557, 138 S. W. 669, following the case of *Central Transp. Co. v. Pullman & Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478; *Morris & Co. v. Sussex R. Co.*, 20 N. J. Eq. 542, 562; *Bank of Chillicothe v. Swayne*, 8 Ohio 257, 32 Am. Dec. 707;

§ 561. **Contracts ultra vires—Cases discriminated.**—It is believed that it will be found, upon an analysis of many of the cases often cited as holding that a corporation may be estopped to aver that it had no power to enter into the contract which is beyond its corporate capacity, that they are not, in fact, cases in which the contract was in the proper sense *ultra vires*. They are cases of the defective exercise of power, not cases where there is an entire want of power.⁷³ Some of these cases are really cases where the act was performed in violation of the corporate by-laws⁷⁴ or by an agent in excess of his authority, and not cases where the act was wholly and entirely beyond the scope of the powers conferred upon the corporation by the legislature.⁷⁵ It

Marble Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252n, 36 Am. St. 71; *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 23 S. W. 123, 34 Am. St. 815. See also, *Williamson v. Eastern Building &c. Assn.*, 54 S. Car. 582, 32 S. E. 765, 71 Am. St. 822 (gave rise to an action in tort); *Lancaster v. Southern Life Ins. Co.* (S. Car.), 71 S. E. 864 (may rescind and recover consideration parted with). An *ultra vires* contract "cannot be enforced or rendered enforceable by the application of the doctrine of estoppel." *Union Pacific R. v. Chicago R. Co.*, 163 U. S. 564, 41 L. ed. 265. See authorities cited in 29 Am. & Eng. Encyc. of Law (2d ed.) 54, 55, 56, but some of these cases hold the several contracts to be opposed to public policy, and it is said that the opinions expressed as to the effect of contracts to which this objection cannot be made may therefore be considered as mere dicta. See also, *Muncie Nat. Gas. Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302.

⁷³ This is true of the case of *Bensiek v. Thomas*, 66 Fed. 104, and of the cases of *Aurora &c. Horticultural Society v. Paddock*, 80 Ill. 263; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. The reasoning of the decision in *Sheldon &c. Co. v. Eickemeyer &c. Co.*, 90 N. Y. 607, is, we venture to say, founded on the erroneous assumption that an *ultra vires*

contract is "but the case of an agent making a contract in excess of his authority," for, as it seems to us, where the corporation itself acts and the contract is entirely outside of the scope of the powers conferred upon the corporation, the case is that of a corporation attempting to make a contract it had no power to make. We believe the conclusion reached in the case upon which we are commenting is right, but think the reasoning fallacious.

⁷⁴ *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399, 39 Pac. 679.

⁷⁵ In the case of *Missouri Pac. R. Co. v. Sidell*, 67 Fed. 464, the court pointed out the difference between cases where there is an entire absence of power and cases where the power is abused or not properly exercised. The court cited the cases of *Davis v. Old Colony Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Pennsylvania &c. Co. v. Keokuk &c. Co.*, 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. 770; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. 442; *Pennsylvania R. Co. v. St. Louis &c. R. Co.*, 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. 1094; *Zabriskie v. Cleveland &c. R. Co.*, 23 How. (U. S.) 381, 16 L. ed. 488. The court quoted with approval from *Davis v. Old Colony Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221, the following: "There is a clear distinction * * * between the exercise by a corporation of a power not conferred upon it,

may, perhaps, be true in a limited or qualified sense that where the contract is made by an agent who exceeds his authority, or is made in violation of the corporate by-laws, there is a contract *ultra vires*, but it is not true in the proper or just sense, for it is not a contract made where the corporation itself had no capacity whatever to contract, and it is only to cases where there is an entire absence of power to contract that the doctrine of *ultra vires* justly applies. Some of the decisions treat cases where the contract in question was made in some mode other than that prescribed by the charter as *ultra vires*; but this certainly is erroneous, for the defect in such cases is in the execution of a power granted; the power itself is not absent. Other cases cited as affirming that a corporation may be estopped to deny the validity of an *ultra vires* contract really decide nothing more than that the corporation must restore the property it received or make compensation, and in such cases there is no question of estoppel involved. Still other cases are placed under the doctrine of *ultra vires* where there was in fact nothing more than a failure to hold a directors' meeting, or give a notice, or do some such act in the mode prescribed by law,⁷⁶ but such cases are not justly cases within the doctrine of *ultra vires*. Whether a contract beyond the power of the corporation is absolutely void or not, however, the practical effect of the difference of opinion is confined, in the main, to the remedy, for in all jurisdictions the courts will seek to do justice, and if the contract is regarded as absolutely void, still if one party has performed it and the other retains the

varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in the particular instance, when such abuse or failure is not known to the other contracting party." See also, the following case which holds that the principle of estoppel applies only where "the making of the contract is within the scope of the franchise and the contract is sought to be avoided because there was a failure to comply with some regulations or the power was improperly exercised."

National &c. Assn. v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 72 Am. St. 245.

⁷⁶ Farmers' &c. Trust Co. v. Toledo &c. R. Co., 67 Fed. 49. The case cited holds, *inter alia*, that parties, by unreasonable delay, may lose the right to successfully complain of an irregular or unauthorized act. Allis v. Jones, 45 Fed. 148, is cited in this case. Wood v. Corry Water-Works Co., 44 Fed. 146, 12 L. R. A. 168n; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; *In re Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100; Fidelity &c. Co. v. West Pennsylvania &c. R. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. 911.

benefit, there may be an action upon the implied contract, or, in any event, proper relief will be granted by proceeding according to the view taken in the particular jurisdiction.⁷⁷

§ 562. **Contracts ultra vires—Ratification.**—The foregoing principles would render a contract which is ultra vires in the strict sense of the term incapable of ratification,⁷⁸ for if a given contract is outside the scope of the corporate powers, it is apparent that there is no power that can ratify it.⁷⁹ Being ultra vires in the true sense not even the consent of the stockholders can legalize or vitalize the transaction.⁸⁰

§ 563. **Laches.**—It is held that if there is an inexcusable delay in seeking relief the courts will refuse to interpose although

⁷⁷ *Bigbee &c. Packet Co. v. Moore*, 121 Ala. 379, 25 So. 602; *Central R. Co. v. Farmers' L. & T. Co.*, 116 Fed. 700; *Eastern Building &c. Assn. v. Williamson*, 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. 527. See also, *Grand River Bridge Co. v. Rollins*, 13 Colo. 4, 21 Pac. 897; *Eckman v. Chicago &c. R. Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; *Schrimplin v. Farmer's Assn.*, 123 Iowa 102, 98 N. W. 613; *Atkins v. Shreveport &c. R. Co.*, 106 La. 568, 31 So. 166; *Harrison v. Annapolis & E. R. R. Co.*, 50 Md. 490; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. 354; *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85; *Interstate Hotel Co. v. Woodward &c. Amusement Co.*, 103 Mo. App. 198, 77 S. W. 114; *Pittsburgh &c. R. Co. v. Altoona &c. R. Co.*, 196 Pa. St. 452, 46 Atl. 431, note in 70 Am. St. 173-175; *Mobile &c. R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29. If fully executed and performed on both sides, such ultra vires contracts are usually unassailable and are permitted to stand.

⁷⁸ *Chambers v. Falkner*, 65 Ala. 448; *San Diego &c. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788n; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. 31; *Sage v. Fargo Tp.*, 107 Fed. 383, 46 C. C. A. 361;

Wheeler v. Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. 161; *National &c. Assn. v. Home Sav. Bank*, 181 Ill. 35, 54 N. E. 619, 72 Am. St. 245; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Thompson v. West*, 59 Nebr. 677, 82 N. W. 13, 49 L. R. A. 337; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 7 Sup. Ct. 831; *Central &c. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. ed. 55; *Pittsburgh &c. R. Co. v. Keokuk Bridge Co.*, 131 U. S. 371, 33 L. ed. 157. "Such a contract is ultra vires, void, and incapable of ratification."

⁷⁹ *Webster v. Machine Co.*, 54 Conn. 394, 8 Atl. 482; *Washington &c. Co. v. Lumber Co.*, 19 Wash. 165, 52 Pac. 1067.

⁸⁰ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415. But if merely irregular and not ultra vires in the true sense, there may usually be a ratification. *Kessler v. Ensley Co.*, 123 Fed. 546; *Graves v. Saline Co.*, 161 U. S. 359, 40 L. ed. 732, 16 Sup. Ct. 526; *State v. Milling Co.*, 156 Mo. 620, 57 S. W. 1008; *Seymour v. Spring Forest &c. Assn.*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; *Bell v. Waynesboro*, 195 Pa. St. 299, 45 Atl. 930; *North Point &c. Co. v. Utah &c. Co.*, 16 Utah 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. 607.

the contract may be *ultra vires*.⁸¹ The stockholders will be granted no relief in equity unless they proceed with diligence. Thus where there had been acquiescence for seventeen years it was held no stockholder could complain.⁸² These decisions proceed upon the general doctrine that a party guilty of laches cannot successfully invoke the assistance of the court. The courts in refusing to grant relief do not affirm the validity of the contract but leave the parties where it found them because of the laches of the complainant.

§ 564. State as proper party to raise question of *ultra vires*.

—It is held in an increasingly large number of cases that whether a corporation has acted in excess of its granted powers or in the face of an express or implied statutory prohibition is a question which cannot be raised in litigation between it and a private party or between private parties, but can only be raised by the state in a direct proceeding, either to forfeit the franchise of the corporation or to subject it to punishment for the unlawful act.⁸³ The reason underlying this rule is that the doctrine of *ultra vires* had its inception in the desire for a restraining power on the actions of a corporation, but was not intended for the benefit of either party to the transaction.⁸⁴ The question is therefore declared to be one between the government and the corporation in a proceeding

⁸¹ *St. Louis &c. R. Co. v. Terre Haute Co.*, 33 Fed. 440; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. 337; *St. Louis &c. Co. v. Terre Haute Co.*, 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. 953.

⁸² *St. Louis &c. R. Co. v. Terre Haute &c. R. Co.*, 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. 953. See also, *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. 337; *Boston &c. R. Co. v. New York R. Co.*, 13 R. I. 260; *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501.

⁸³ See 3 Thompson on Corporations (2d ed.), § 2840, and numerous cases there cited.

⁸⁴ "The doctrine of *ultra vires* is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters,

and it probably is not invoked too often; but to place that power in the hands of the corporation itself or a private individual, to be used by it or him as a means of obtaining or retaining something of value which belongs to another, would turn an instrument intended to effect justice between the state and corporations into one of fraud as between the latter and innocent parties." *Zinc Carbonate Co. v. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. 845. See also, *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Wood v. Corry Water Works Co.*, 44 Fed. 146, 12 L. R. A. 168n; *Prescott National Bank v. Butler*, 157 Mass. 548, 32 N. E. 909; *State v. Thresher &c. Co.*, 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510n; *Barrow v. Nashville &c. Tpk. Co.*, 9 Humph. (Tenn.) 304.

by the former against the latter for a forfeiture of its charter. "A private person," it is said, "cannot directly or indirectly usurp this function of government."⁸⁵

⁸⁵ *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188. "That such doctrine cannot be resorted to as a weapon for attack and defense in the hands of mere private persons, and used as a ready means for embarrassing business operations by and with corporate bodies, which directly or indirectly touch and administer to human desires at every turn of the individual in modern life, while its effectiveness for all essential purposes of restraint and punishment is fully preserved, furnishes no cause for regret, but rather cause for gratification at the evidence how certainly principles, by natural growth and development, adapt the law and its administration to the ever changing need of advancing civilization, so as best to promote justice and the common welfare." *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 37 L. R. A. 138, 65

Am. St. 22. An act ultra vires the corporation can be questioned only by a person directly interested in such corporation or by the state. *Southern Lumber Co. v. Holt*, 129 La. 273, 55 So. 986. "The rules of estoppel and of the sole right of the state to complain obtain only in cases where the excessive act of the corporation is not absolutely void, but only voidable; not wrong per se, or against public policy and good morals, but wrong merely because the act is not within the scope of the powers conferred by law on the corporation. We know of no case in this state where the rules under consideration have been applied where the corporation has become a party to a contract, void for the reason that it was wrong in itself and a violation of sound public policy and good morals." *State v. Bankers' Trust Co. (Mo.)* 138 S. W. 669.

CHAPTER XIX.

PUBLIC SERVICE CORPORATIONS.

§ 570. Introductory.

- 571. Power to such corporations to contract generally.
- 572. Necessity for a consideration—Necessity for capacity to contract.
- 573. Parties bound to take notice of charter provision.
- 574. Knowledge of extraneous circumstances.
- 575. Corporations cannot contract so as to escape public duties.
- 576. Attempt to transfer franchises.
- 577. Attempt to transfer franchises—Transfer of property essential to operation.
- 578. Contracts suppressing competition or monopoly.
- 579. Not required to undermine own business.

§ 580. Different methods of fixing rates—Discrimination in favor of public.

- 581. Contracts as to location of stations and route.
- 582. Ultra vires contracts.
- 583. Leases generally.
- 584. Mortgages generally.
- 585. Traffic agreements.
- 586. Right to engage in a collateral business.
- 587. When a carrier may refuse to perform its public duty.
- 588. Ultra vires contracts—Street railway companies.
- 589. Ultra vires contracts—Gas and water companies.
- 590. Illustrative cases of doctrine to telegraph and telephone companies.

§ 570. **Introductory.**—There is a class of corporations so “affected with a public interest” that they are often called quasi public corporations,¹ although they are private corporations rather than public in the true sense.² Railroad companies, street railway companies, canal companies and turnpike companies are

¹ See *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 30; *Tipppecanoe County v. Lafayette &c. R. Co.*, 50 Ind. 85; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Zanesville v. Zanesville Gas Light Co.*, 47 Ohio St. 1, 23 N. E. 55; *Chicago R. Co. v. Iowa*, 94 U. S. 155, 25 L. ed. 94; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago &c. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. 513; *Whiting v. Sheboygan &c. R. Co.*, 25 Wis. 167, 3 Am. Rep. 30, and authorities cited in the last two notes to this section. See also, *Attorney-*

General v. Firemen's Ins. Co., 74 N. J. Eq. 372, 73 Atl. 80, 135 Am. St. 708. The above case seeks to determine just when a corporation will be considered as affected with a public interest, and reviews the subject at length.

² *Cook v. North &c. R. Co.*, 46 Ga. 618; *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. 355; *Chicago Gen. R. Co. v. Chicago City R. Co.*, 62 Ill. App. 502; *Board of Directors v. Houston*, 71 Ill. 318; *Ohio &c. R. Co. v. Ridge*, 5 Blackf. (Ind.) 78; *Ten Eyck v. Delaware &c. Canal Co.*, 18 N. J. L. 200, 37 Am. Dec. 233; *Logan v. North Carolina R. Co.*, 116

of this character. So are gas and water companies,³ telegraph and telephone companies,⁴ heating companies and the like.⁵ The

N. Car. 940, 21 S. E. 959; *Pierce v. Commonwealth*, 104 Pa. St. 150; *McCandless v. Richmond & D. R. Co.*, 38 S. Car. 103, 16 S. E. 429, 18 L. R. A. 440; *Thorpe v. Rutland & C. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625, 1 Elliott R. R. (2d ed.), § 2; 1 *Thomp. Corp.*, § 27.

³ *State v. Birmingham Waterworks Co.*, 164 Ala. 586, 51 So. 354, 27 L. R. A. (N. S.) 674n, 137 Am. St. 69; *Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. 304; *Portland Nat. Gas & Oil Co. v. State*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639; *Brunswick Gas & C. Co. v. United Gas & C. Co.*, 85 Maine 532, 27 Atl. 525, 35 Am. St. 385 and note; *State v. Butte City Water Co.*, 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. 574; *Fenton v. Tri-State Land Co. (Nebr.)*, 131 N. W. 1038 (irrigation company); *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. 841.

⁴ *Stewart-Morehead Co. v. Postal Tel. C. Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. 205; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Nebraska Tel. Co. v. State*, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113; *Western Union Tel. Co. v. Call Pub. Co.*, 44 Nebr. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. 729; *Railroad Commrs. v. Western Union Tel. Co.*, 113 N. Car. 213, 18 S. E. 389, 22 L. R. A. 570; *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. 870; *Chesapeake & C. R. Co. v. Manning*, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. 881.

⁵ *Seaton Mountain & C. Power Co. v. Idaho Springs Investment Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078; *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731. See also, the case of *Attorney-General v. Firemen's Ins. Co.*, 74 N. J. Eq. 372, 73 Atl. 80, 135 Am. St. 708; in which the business of fire insurance as conducted was said to be affected with a public interest. The court said: "To the eye of the law and in the interest of the public, it is

one and the same thing, whether a corporation be created to subserve a public interest, or whether such corporation achieve success of such a nature that the duty of regarding the interest of the public is thrust upon it. * * * If such business were still in the hands of individual underwriters, unaffected by state regulation, and confined to the writing of policies on the dwellings of prudent householders and on the stores of careful merchants, a great deal might be said in favor of the view that no public interest had attached to the making of these private contracts. We cannot, however, close our eyes to the fact that, by enormous extension of this business, by its concentration in the hands of immense corporations, by the state regulations that amount to privileges, and by its practically universal employment as a collateral security for debts, the business has become one in which the interest of the public is directly involved, certainly as much so as it is in the warehousing of grain. The collateral security of mortgage debts would alone suffice to attach a public interest to the business in question, since it vitally concerns credit as a factor in modern business.

Whatever concerns business credit ex necessitate touches a matter in which the public is directly interested." In addition to those already mentioned, the following businesses have, in proper cases, been held affected with a public interest; grain elevators (*Stewart v. Great Northern R.*, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427); public warehouses (*Nash v. Page & Co.*, 80 Ky. 539, 4 Ky. L. 477, 44 Am. Rep. 490; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. 857); grist-mills (*Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *State v. Edwards*, 86 Maine 102, 29 Atl. 947, 41 Am. St. 528; *Burlington v. Beasley*, 94 U. S. 310, 24 L. ed. 161); hacks (*Lindsay v. Mayor*, 104 Ala. 257, 53 Am. St. 44; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. 100); public wharves (*Chicago Dock & C. Co. v.*

general principles of the law of contracts, already considered, apply in the main where such corporations are parties as well as in other cases; but there are some distinctions and some peculiar applications of the rules to their contracts, which are more subject to legislative control, in some respects, than those of ordinary strictly private corporations; and they have public duties to perform that may limit the power to contract, or even require them to contract, in effect at least, in certain instances.

§ 571. Power of such corporations to contract generally.—

As with private corporations, so a corporation affected with a public interest has the implied or incidental power to enter into any and all contracts necessary to enable it to carry out the purposes of its organization, except so far as it is restrained by its charter or the general law. The presumption is in favor of the power of the corporation to make any contract which is regular on its face and is not in conflict with any prohibition of law and is within the scope of the general powers conferred upon the corporation.⁶ Within the scope of the corporate powers the right

Garrity, 115 Ill. 155, 3 N. E. 448; *Barrington v. Commercial Dock Co.*, 15 Wash. 170, 45 Pac. 748, 33 L. R. A. 116; hotels (*Bostick v. State*, 47 Ark. 126, 14 S. W. 476); theaters and other public places of amusement (*People v. King*, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. 389; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. 18); and stock yard companies (*Cotting v. Kansas City & Co.*, 82 Fed. 839). It would seem that under the broad principle applicable this list might be indefinitely extended or contracted according to circumstances; thus in primitive England when the number of people engaged in the various callings were few, which condition caused a virtual monopoly, surgeons (*Y. B. 19 Hen. VI*, 49 pl. 5); tailors (*Y. B. 22 Ed. IV*, pl. 15); blacksmiths (*Anon. Keilway*, 50 pl. 4); victualers (*Y. B. 39 Hen. VI*, 18 pl. 24); and bakers (*Lib. Assis.*, 138 pl. 44; *Mayor of Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441), were bound to serve the public generally, without discrimination.

⁶ *South Wales R. Co. v. Redmond*,

10 C. B. (N. S.) 675; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Baltimore v. Baltimore & C. R. Co.*, 21 Md. 50; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Stewart v. Erie & C. Trans. Co.*, 17 Minn. 372; *Morris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. (5 C. E. Green) 542; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Shipper v. Pennsylvania R. Co.*, 47 Pa. St. 338; *McClagherty v. Bluefield Waterworks & C. Co.*, 67 W. Va. 285, 68 S. E. 28, 32 L. R. A. (N. S.) 229. "It is a general principle of law that every corporation has by necessary implication the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or its charter." *Oakland Electric Co. v. Union Gas & C. Co. (Maine)*, 78 Atl. 288. To same effect, *S. O. & C. Co. v. Ansonia Water Co.*, 83 Conn. 611, 78 Atl. 432. See also, *Richardson Gas & C. Co. v. Altoona*, 79 Kans. 466, 100 Pac. 50, 21 L. R. A. (N. S.) 214n. The burden of proof is generally upon the person asserting the illegality or ultra vires character of a con-

to contract is much the same as that of natural persons.⁷ But as corporate powers are derivative and not inherent the authority of a corporation to contract is limited by the charter or act of incorporation.⁸ It is of course competent for the legislature to limit the power to contract and to designate the mode in which corporations may contract and where a limitation is imposed or a mode prescribed the corporation cannot rightfully make a contract beyond the limits fixed by the statute nor can it regularly contract in any other mode than that prescribed by law in cases where a specific mode is prescribed.⁹ In general, a corporation affected with a public interest has all the attributes and incidents of a private corporation, and as a general rule is accorded the same measure of legal and constitutional protection for itself and its members as is given private corporations.¹⁰ But contracts entered into by a quasi public corporation in the discharge of its public

tract made by a corporation. *Alabama Gold Life Ins. Co. v. Central Agri. &c. Assn.*, 54 Ala. 73; *Morris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. (5 C. E. Green) 542; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693. *Prima facie*, it has been said, all its contracts are valid, and it lies on those who would impeach any contract to make out that it is invalid. *Scottish North Eastern R. Co. v. Stewart*, 3 Macqueen 382.

⁷ *Fitzgerald &c. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. 36; *Tennessee &c. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395; *Hall v. Tanner &c. Co.*, 91 Ala. 363, 8 So. 348; *Gloninger v. Pittsburgh R. Co.*, 139 Pa. St. 13, 21 Atl. 211; *Hand v. Clearfield &c. Co.*, 143 Pa. St. 408, 22 Atl. 709. See also, *St. Joseph &c. R. Co. v. St. Louis &c. R. Co.*, 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

⁸ "Nothing passes by mere implication against the public." *Aurora v. Elgin &c. Tract. Co.*, 227 Ill. 485, 81 N. E. 544, 118 Am. St. 284. See ante. chap. 18, *Private Corporations*.

⁹ *New London v. Brainard*, 22 Conn. 552; *Commonwealth v. Erie &c. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *Central &c. Co. v. Pullman's &c. Car Co.*, 139 U. S. 24, 35 L. ed. 55,

11 Sup. Ct. 478, 45 Am. & Eng. R. Cas. 607; *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. ed. 184; *Zabriskie v. Cleveland &c. Co.*, 23 How. (U. S.) 381, 398, 16 L. ed. 488; *Thomas v. West Jersey &c. R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Branch v. Jesup*, 106 U. S. 468, 27 L. ed. 279, 1 Sup. Ct. 495; *Pennsylvania R. Co. v. St. Louis A. & T. H. R. Co.*, 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. 1094; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. 1055; *Green Bay &c. R. Co. v. Union &c. R. Co.*, 107 U. S. 98, 27 L. ed. 413, 2 Sup. Ct. 221; *Pittsburg C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. 770; *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409; *Perrine v. Chesapeake & D. C. Co.*, 9 How. (U. S.) 172, 13 L. ed. 92.

¹⁰ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300n; *Tinsman v. Belvidere &c. R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565; *Louisville &c. R. Co. v. Commonwealth*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. 95; *Cotting v. Stock Yards Co.*, 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30; *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625.

duty may differ fundamentally from the ordinary contract and the rules which govern it. The relation between a public service corporation and its patrons is consensual. Offer and acceptance are present. But there is this difference; the corporation must accept the application of the would-be patron if it is one he is entitled to make and if he complies with the reasonable rules of the company.¹¹ Thus, a public service corporation which furnishes two distinct kinds of service does not have the right to refuse one kind of service unless the other is also furnished when this power is not reserved to it by its charter, but must furnish one or both of such services upon proper application.¹²

§ 572. Necessity for a consideration—Necessity for capacity to contract.—Moreover it would seem that a consideration is not always absolutely necessary. Thus, should the corporation gratuitously render a particular service and there be no understanding to the contrary the company will owe the one who accepts such services the same duty that he owes to one who pays therefor.¹³ A railroad company has been held liable for negligently injuring one whom it accepted as a passenger not-

¹¹ *Danaher v. Southwestern Tel. & Co.* (Ark.), 127 S. W. 963, 30 L. R. A. (N. S.) 1027; *Stewart, Morehead & Co. v. Postal Tel. Co.*, 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. 205; *City of Chicago v. Northwestern Mutual & Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770; *State v. Marion Light & Heat Co.*, 174 Ind. 622, 92 N. E. 731; *Huffman v. Marcy Mutual Telephone Co.* (Iowa), 121 N. W. 1033, 23 L. R. A. (N. S.) 1010; *Robbins v. Bangor R. & Electric Co.*, 100 Maine 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963. See also, *Cedar Rapids & Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966, 138 Am. St. 299; *Buffalo County Tel. Co. v. Turner*, 82 Nebr. 841, 118 N. W. 1064, 130 Am. St. 699; *Poole v. Paris Mountain Water Co.*, 81 S. Car. 438, 63 S. E. 874, 128 Am. St. 923. The company may adopt reasonable rules and regulations for the conduct of its business. *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966, 138 Am. St. 299. See

also, *Mathieu v. North American Land & Co.*, 119 La. 896, 44 So. 721, 121 Am. St. 548; *Warner v. St. Louis & C. R. Co.*, 156 Mo. App. 523, 137 S. W. 275; *State v. Bluefield & C. Imp. Co.*, 67 W. Va. 285, 68 S. E. 28, 32 L. R. A. (N. S.) 229. But such regulations must be just, reasonable, and lawful, not capricious, arbitrary, oppressive or unreasonable, neither can they be discriminatory. *Seaton Mountain & C. Power Co. v. Idaho Springs Investment Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078.

¹² *Seaton Mountain & C. Co. v. Idaho Springs Invest. Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078; *State v. Butte Electric Co.*, 43 Mont. 118, 115 Pac. 44. See also, *Snell v. Clinton & C. Power Co.*, 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. 341.

¹³ *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Waterbury v. New York Cent. & C. R. Co.*, 17 Fed. 671; *Chicago M. & St. P. R. Co. v. Carpenter*, 56 Fed. 451,

withstanding such passenger claimed transportation under a pass or contract for gratuitous carriage which was illegal because contrary to the provision of a statute or the state constitution.¹⁴

It would also seem that the applicant need not have the capacity to contract, for, as has been stated by one case, "It would be a legal absurdity to compel a man to make a contract, and, at the same time, permit the other party, who is the instrument of compulsion, to avoid such contract." Thus, it has been held that an inn keeper might charge an infant for entertainment and hold his baggage for the bill.¹⁵ Nor will the public service company be permitted to excuse itself because of its own incompetency. Thus, it has been held that an inn keeper could not excuse himself from liability to a guest by pleading that he was sick and of non-sane memory at the time the guest lodged with him.¹⁶

§ 573. Parties bound to take notice of charter provision.—

The constitution of a corporation and the powers which it possesses under its constitution are presumed to be known as matters of law to its members and to all persons dealing with the corporation.¹⁷ It logically follows that parties contracting with a

5 C. C. A. 551; *Florida &c. Nav. Co. v. Webster*, 25 Fla. 394, 5 So. 714; *Union &c. Transit Co. v. Shacklet*, 119 Ill. 232, 10 N. E. 896; *Missouri Pac. R. Co. v. Aiken*, 71 Tex. 373, 9 S. W. 437; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898. "This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous." *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. ed. 291. See also, *Walling v. Potter*, 35 Conn. 183. In the above case an innkeeper was held liable for the goods of a person lodging with him as guest, notwithstanding the innkeeper was making no charge. While the formation of such relation is contractual in character, yet the duty is imposed by law and sounds in tort rather than contract. *Bretherton v. Wood*, 3 Brod. & Bing. 54; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Saltonstall v. Stockton, Taney* (U. S.) 11.

¹⁴ *McNeill v. Durham &c. R. Co.*,

135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227; *Bradburn v. Whatcom County R. & Light Co.*, 45 Wash. 582, 88 Pac. 1020, 14 L. R. A. (N. S.) 526. *Contra*, *Duncan v. Maine &c. R. Co.*, 113 Fed. 508.

¹⁵ *Watson v. Cross*, 2 Duv. (Ky.) 147. See also, *Vanderberg v. Kansas City &c. Gas Co.*, 126 Mo. App. 600, 105 S. W. 17. The above case is one in which a married woman made application to the defendant gas company for gas service. It was held that in a proper case it could not refuse. There was, however, at the time, a statute which permitted married women to contract..

¹⁶ *Cross v. Andrews, Cro. Eliz.* 622. ¹⁷ *Spence v. Mobile &c. R. Co.*, 79 Ala. 576; *Steele v. Fraternal Tribunes &c.*, 215 Ill. 190, 74 N. E. 121, 106 Am. St. 160; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Kraniger v. People's Bldg. Soc.*, 60 Minn. 94, 61 N. W. 904; *Alexander v. Cauldwell*, 83 N. Y. 480; *Hoyt v. Thompson*, 19 N. Y.

railroad company or other corporation affected with a public interest, cannot successfully aver ignorance of the nature of the powers conferred upon it by the legislature, but, nevertheless, the courts do in some measure at least depart from this general doctrine since they do protect persons who contract with the company. The doctrine, however, exerts an important influence on almost all cases. The general principle stated leads to the conclusion that the corporation is not bound by an act of the board of directors, or any other corporate agent, done in excess of the charter powers since the person dealing with the corporation is bound to know that no agent can exceed the powers of the corporation itself.¹⁸ Nobody can hold a principal bound by a contract made with his agent in excess of that agent's known powers. Much less can a corporation be held on a contract where it is one which the corporation had no power to make. The same general rule holds as to ultra vires acts of a majority of the stockholders for the majority can bind absent or dissenting stockholders only by acts done under sanction of the charter.¹⁹ This same principle prevents a public service corporation from being compelled to furnish a service which it is not authorized to perform.²⁰ Thus, it has been held that a company authorized to supply heating gas could not be compelled to furnish gas for lighting purposes.²¹

207; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482, 3 Am. R. & Corp. Cas. 285; *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. ed. 184; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. 572; *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337. See also, *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307. In *Jenkins v. Gastonia Cotton Mfg. Co.*, 115 N. Car. 535, 20 S. E. 724, it is held that where the statute requires the corporate contract to be in writing it cannot be ratified by silence. See also, *Spence v. Wilmington & C. Mills*, 115 N. Car. 210, 20 S. E. 372. These cases seem to us to go very far.

¹⁸ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. 798.

¹⁹ *Bird v. Bird's Patent & C. Sewage Co.*, L. R. 9 Ch. 358.

²⁰ *People v. St. Louis & C. Elec. R. Co.*, 122 Ill. App. 422.

²¹ *Narrin v. Kentucky Heating Co.*, 27 Ky. L. 551, 86 S. W. 676. The court said: "Obviously, unless the defendant be shown to be exercising a public franchise in the vending of gas for lighting purposes, there is no more ground for injunction shown here than if he had sought one to restrain *Peasle Gaulberg & Co.* from refusing to vend oil to him. But the petition on its face shows that as to the sale of gas for lighting purposes, the defendant was not only not exercising a public franchise, but was, by the ordinance which permitted it to do business in Louisville at all, expressly forbidden to sell gas for any other purpose than heating purposes. The plaintiff is therefore in the position

§ 574. **Knowledge of extraneous circumstances.**—But while a person dealing with the corporation is held to be affected with notice of the corporate powers as indicated by the law of its incorporation, he is not, as a rule, bound to take notice of extraneous circumstances upon which the right to exercise these powers may depend.²² There is a clearly marked distinction between cases where a party asserts he was ignorant of intrinsic facts or circumstances, and cases where he avers ignorance of the provisions of a charter or statute.²³ Although the purpose of a corporation be to do an illegal act, the person dealing with the corporation will not be affected by that act unless he has notice of it; thus if a contract in the form of negotiable corporate security is issued by a corporation having authority to issue it and such paper gives no suggestion that it was issued as accommodation paper, an innocent holder will not be affected by the fact that it was issued for accommodation and without consideration.²⁴ It would be otherwise, however, if the person who took the paper had actual knowledge of its character.²⁵ If it is within the scope of the power of the corporate agent to issue such securities, the purchaser may usually assume that they were properly issued.²⁶

of asking an injunction requiring the defendant to violate an ordinance of the city."

²² *Eastern Counties R. v. Hawkes*, 5 H. L. C. 331, 24 L. J. Ch. 601, 3 W. R. 609; *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Madison & I. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Thompson v. Lambert*, 44 Iowa 239; *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. ed. 319; *Galveston Railroad v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. ed. 199; *Gano v. Chicago & C. R. Co.*, 60 Wis. 12, 17 N. W. 15.

²³ See *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397.

²⁴ *Farmers' & C. Bank v. Sutton & C. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595; *Madison & I. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Ex parte Estabrook*, 2 Lowell (C. S.) 547, Fed. Cas. No. 4534. But see *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321; *Lafayette & C. Bank v. St.*

Louis & C. Co., 2 Mo. App. 299; *National Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *Farmers' & C. Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312.

²⁵ *National Bank v. Wells*, 79 N. Y. 498; *West St. Louis & C. Bank v. Shawnee & C. Bank*, 95 U. S. 557, 24 L. ed. 490.

²⁶ *Eastern Counties R. Co. v. Hawkes*, 5 H. L. C. 331, 24 L. J. Ch. 601, 3 W. R. 609; *London & C. R. Co. v. M'Michael*, 5 Exch. 855; *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548; *Ellsworth v. St. Louis & C. R. Co.*, 98 N. Y. 553. A corporation having power to execute negotiable paper may bind itself by becoming an indorser or guarantor of bonds received by it in the course of business, with a view to increasing the value of such bonds. *Tod v. Kentucky Union Land Co.*, 57 Fed. 47; *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392, 19 L. ed. 117.

A person who sells to a corporation property which it has power to purchase will not be affected by the circumstance that it was purchased for an unauthorized purpose if he had no knowledge of such facts.²⁷ Likewise if the corporation had general authority to borrow money the lender is not bound to supervise its application.²⁸ It must be borne in mind, however, that the rules respecting rights depending upon the ignorance of the party dealing with the corporation are subject to the further rule that he must have acted in good faith and as a reasonably prudent man or at least that his ignorance must not be due to his own fault or negligence.²⁹

§ 575. Corporations cannot contract so as to escape public duties.—As already intimated, corporations of the class here under consideration cannot make contracts unauthorized by the legislature, that would deprive themselves of the power to perform their duties to the public. The foundation principle is, that where a corporation is granted by charter a franchise in a large measure intended to be exercised for the public good, the due performance of such functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, or by which it undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy.³⁰

²⁷ See *Eastern Counties R. Co. v. Hawkes*, 5 H. L. C. 331.

²⁸ *Thompson v. Lambert*, 44 Iowa 239; *Tracy v. Talmadge*, 14 N. Y. 162, 67 Am. Dec. 132n. See also, *Auerbach v. LeSueur Mill Co.*, 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295; *Cotton v. New Providence*, 47 N. J. L. 401, 2 Atl. 253; *Mutual Benefit Life Ins. Co. v. Elizabeth*, 42 N. J. L. 235; *New Providence v. Halsey*, 117 U. S. 336, 29 L. ed. 904, 6 Sup. Ct. 764. See *Coffin v. Indianapolis*, 59 Fed. 221.

²⁹ *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. ed. 319.

³⁰ *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950, per Justice Miller. For a general discussion of the subject see, *Sammons v. Kearney Power & Co.*, 77 Nebr. 580, 110 N. W. 312. In the course of the opinion it is said: "In the case at bar we are dealing with an irrigation company—a quasi public corporation. It is also a governmental agency, but its main purpose is the administration of a public utility. To the extent of its capacity it is bound to furnish water from its canal to persons desiring to use it on equal terms and without discrimination. In this respect it stands on the same footing as a railroad company. Neither has the right or

§ 576. **Attempt to transfer franchises.**—It is a well settled and universally recognized principle that corporations which are created with special powers and privileges and charged with certain duties to the public are bound by considerations of public policy to refrain from doing any act which may disable them from performing their duties to the public.⁸¹ The application of this principle prevents a public service corporation from selling or transferring its franchise without authority from the state. Such corporations are not allowed to sell or lease their corporate powers and primary franchises without legislative authority for the reason that if they were able to do so they might thereby disable themselves from the performance of their public duties, and thus escape from the power of the court and of the legislature to enforce their performance.⁸² In accordance with this general

the power to place itself in a position where it cannot serve every person on equal terms with every other person. Neither has the right or power to bind itself by a contract which, if enforced, would render it unable to serve the public on those terms or to carry out its main purpose." To same effect, *Munroe v. Thomas*, 5 Cal. 470; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; *Evansville & C. R. Co. v. Evansville Electric R. Co.* (Ind. App.), 98 N. E. 649; *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush (Ky.) 529; *Brunswick Gas. Co. v. United Gas & C. Co.*, 85 Maine 532, 27 Atl. 525, 35 Am. St. 385 and note; *Commonwealth v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Freeman v. Minneapolis & C. R. Co.*, 28 Minn. 443, 10 N. W. 594; *Pierce v. Emery*, 32 N. H. 484; *Black v. Delaware & C. Canal Co.*, 22 N. J. Eq. 130; *Lakin v. Willamette & C. Co.*, 13 Ore. 436, 57 Am. Rep. 25; *Lauman v. Lebanon Val. R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553; *New York & Md. L. R. R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. ed. 27; *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. ed. 675; *Roper v. McWhorter*, 77 Va.

214; 1 Elliott R. R., §§ 70, 385. See also, *Visalia Gas & C. Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. 105; *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388; *State v. Anderson*, 97 Wis. 114, 72 N. W. 386. As to the right of a public service corporation to entirely abandon its franchise, see *East Ohio Gas Co. v. City of Akron*, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92.

⁸¹ See ante, § 575. See also, *Daniels v. Hart*, 118 Mass. 543; *Abbott v. Johnstown & C. R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478. And see Indiana authorities collected and cited in *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822. A corporation cannot disable itself by contract from performing its public duties, or, by agreement, compel itself to make public accommodation subordinate to its private interests. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553.

⁸² *Brunswick Gaslight Co. v. United Gas & C. Light Co.*, 85 Maine 532, 27 Atl. 525, 35 Am. St.

principle it has been stated that a railroad company cannot mortgage, lease, or sell its franchise nor any property essential to the operation of its railroad³³ in the absence of authority from the state.³⁴ The same has been held true of gas companies,³⁵ but

385, and note on 390. "By some courts it has been held that the term 'franchise,' when applied to a corporation, technically speaking, means only the franchise to be a corporation, and does not include those rights and privileges, subsidiary in their nature, acquired by the corporation, and to the existence of which corporate existence is not a prerequisite. But it is quite generally recognized by the courts that the term, when applied to corporations, has various significations, both in a legal and popular sense, and has especially two well-defined meanings; one pertaining to what is sometimes called the 'primary franchise,' the right to exist as a corporation, and the other to the different rights, privileges, and powers which are obtained and exercised by the corporation, and which are not a prerequisite to corporate existence, such as, among others, the right or privilege to occupy and use streets and public places for the operation of a system of water or gasworks, electrical lighting plants, railroads, etc. 3 Words & Phrases; 19 Cyc. 1451. Such a meaning has been given the term by this court. *Blackrock Copper M. & M. Co. v. Tingey* (Utah), 98 Pac. 180. Unless the right is given the corporation by the power creating it, the corporation may not sell the primary franchise; but, in the absence of constitutional or legislative restrictions, it may sell what has been denominated 'secondary franchises.'" *Cooper v. Utah Light & Ry. Co.* (Utah), 102 Pac. 202.

³³ *Singleton v. Southwestern R.*, 70 Ga. 464, 48 Am. Rep. 574n; *Evansville &c. R. Co. v. Evansville &c. Electric Ry.* (Ind. App.), 98 N. E. 649; *Tippecanoe County v. Lafayette &c. R. Co.*, 50 Ind. 85; *Middlesex R. Co. v. Boston & C. R. Co.*, 115 Mass. 347; *Freeman v. Minnesota &c. R. Co.*, 28 Minn. 443, 10 N. W. 594; *Pierce v. Emery*, 32 N. H. 484; *Abbott v. Johnstown &c. R. Co.*, 80

N. Y. 27, 36 Am. Rep. 572; 1 Elliott Railroads (2d ed.), §§ 70, 71, 385; *Peters v. Lincoln & N. W. R. Co.*, 2 McCreary (U. S.) 275, 12 Fed. 513; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis A. & T. R. Co.*, 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. 1094; *Oregon Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409. See opinion of Chief Justice Ruger, in *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Brooker v. Mayesville &c. R. Co.*, 119 Ky. 137, 23 Ky. L. 1022, 83 S. W. 117. But it has been held that it may, under certain circumstances, sell a terminal switch to the owner of the land on which it is laid. *Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. 64, 67 C. C. A. 190, citing *Jones v. Newport News & M. V. Co.*, 65 Fed. 736, 13 C. C. A. 95, and *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. 269.

³⁴ See, however, *Kennebec &c. R. Co. v. Portland &c. R. Co.*, 59 Maine 9. See also, *Woodruff v. Erie &c. R. Co.*, 93 N. Y. 609; *United States v. Western Union Tel. Co.*, 50 Fed. 28. It has been held that a company organized for railroad purposes may borrow money to carry on the purposes of its organization notwithstanding its charter provides that its funds are to be raised by share subscriptions. *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515. It has also been held that a railroad corporation may borrow money to construct its road. *Savannah &c. R. Co. v. Lancaster*, 62 Ala. 555.

³⁵ *Brunswick Gaslight Co. v. United Gas &c. Light Co.*, 85 Maine 532, 27 Atl. 525, 35 Am. St. 385. In connection with this latter case see, however, the case of *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588, 81 S. W. 927, 111 Am. St. 302; which in effect holds that such corporations can borrow money for the purpose of accomplishing the purpose of their organization, and that this power

there is some difference of opinion in certain phases of this question.^{35a} Moreover a special statutory exemption or privilege, such as immunity from taxation, or a right to fix and determine rates of fare, does not pass to a new corporation succeeding others by a consolidation or purchase, in the absence of

exists although not expressly granted by their charters as fully as possessed by individuals, and that they may give the customary evidence of indebtedness, in this case a mortgage. See also, in connection with this case, *Merchants' National Bank v. Citizens' Gas Light Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. 453, in which it was held that the treasurer of the defendant corporation by virtue of his office had authority to sign a note which would bind the corporation. The court said: "We do not disregard the fact that such corporations have peculiar duties to the public, and peculiar privileges, and that their operations may be regulated by public authority, and their franchises and property taken over by the municipalities in which their works are located. * * * Such notes do not bind the franchises or the property of the company any more than debts upon open account."

^{35a}In *Hunt v. Memphis Gas Light Co.* (Tenn.), 31 S. W. 1006, it is said: "It is insisted by the complainants that corporations to which are given large powers and valuable privileges, from the exercise of which it is expected the public will derive advantages, are impliedly restrained in their power of alienation, railroad companies falling in this class; and it is insisted that gas companies are quasi public corporations, and are governed by the same rules, and, in the absence of legislative authority, cannot execute a valid mortgage. Many authorities are cited by counsel for complainants, and much reliance is placed upon the case of *Portland Natural Gas & Oil Co. v. State*, an opinion by the Supreme Court of Indiana, reported in 8 Am. R. & Corp. 640 (34 N. E. 818), and the note thereto. All of these authorities have been carefully considered; and none of them support the contention of counsel for complainants

to the extent claimed. They mainly discuss the question whether or not gas companies, water companies and the like are quasi public corporations, and some of the cases so hold. Some of them place the holding upon the ground that the right of eminent domain had been conferred upon the corporation, which is not the case with regard to the *Memphis Gas Light Company*; and others, again, place the decision upon the ground of an exclusive privilege given the company to occupy the streets, alleys, lanes, etc., of a city; thus practically giving it, in such case, a monopoly of supplying the city with gas. In the case of *Gas Co. v. Williamson*, 9 Heisk. 314, it was held by this court, in 1872, that it was not the intention of the legislature, in the act incorporating the *Memphis Gas-light Company*, to confer the exclusive right to manufacture gas in that city. It thus appears that there are material differences between the case at bar and those relied upon by the complainants. None of the authorities, however, hold that a gas company is without power to execute a mortgage. * * *

"A municipal corporation is confessedly a public corporation; and, if the power to mortgage is enjoyed by a municipality, it is difficult to perceive upon what principle of public policy this power should be denied a gas company, even though it is a quasi public corporation. In 2 Cook, Stock, Stockholders and Corporation Law, § 779, at page 1261, it is said: 'A corporation, other than railroad corporations, may mortgage its real estate and personal property for the purpose of securing its bonds or other evidence of debt, unless there is some provision in its charter expressly prohibiting or regulating this right. The right to mortgage is the natural result of the right to incur a debt.' Numerous cases are cited in the note;

express direction to that effect in the statute.³⁶ Thus where a corporation leased two other street railways both of which had a right to charge a five cent fare for each passenger carried and it was attempted to assign this right to the lessee it was held that the right to charge a specified fare was a privilege personal to the lessor and could not be assigned, and that the lessor would be obliged to operate the road under such regulations and provisions as the general assembly might deem advisable.³⁷ Not only is a public service corporation denied the right to sell its franchise in the absence of authority from the state but the corporate franchise cannot be seized and sold under execution or judicial sale except when legislative authority is given so to do.³⁸

and, further on, discussing the same subject, under the title, 'Gas Companies,' the same author says: 'A gas company may give a mortgage on its plant.' § 927, p. 1262. Mr. Beach lays down the doctrine broadly that all corporations, unless restrained by their charter, have implied power to mortgage, 'the only exception being that of railroads.' 2 Beach Private Corporations, §§ 388, 389, 738, et seq. To the same effect, see Jones, Mortgages, § 124; Morawetz on Private Corporations, § 346; *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039; *Hays v. Gas Co.*, 29 Ohio St. 330. Though the authorities in other states agree in holding that a railroad corporation, owing to the peculiar relation which it bears to the public, should be denied the right to execute a mortgage, unless it has express legislative authority therefor, yet, as a matter of fact, this power is always conferred; and, indeed, it is doubtful whether a railroad could be successfully operated without the power to mortgage." It is not believed, however, that the cases on this subject are in conflict. It would seem that a quasi public corporation has the right to borrow money and give the customary evidences of indebtedness in order to enable it to accomplish the purposes of its creation. See *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588, 81 S. W. 927, 111 Am. St. 302, but such obligations do not necessar-

ily bind the franchise of the company. See *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. 453. The confusion might perhaps be obviated by the use of the terms primary and secondary franchise. The primary franchise having reference to the right to exist as a corporation, and the secondary to the other to the different rights, privileges and powers which are obtained and exercised by the corporation and which are not a prerequisite to corporate existence. Unless the right is given the corporation may not sell the primary franchise; but, in the absence of constitutional or legislative restrictions it may sell what has been denominated "secondary franchises." *Cooper v. Utah Light & Ry. Co. (Utah)*, 102 Pac. 202. A further reason for denying a public service corporation the right to transfer its franchise is that it might thus be able to create a monopoly. See, post, § 578, *Contracts Suppressing Competition or Monopoly*.

³⁶*St. Louis & C. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. 484; *Covington & C. Turnpike Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198; *People's Gas Light & Coke Co. v. Chicago*, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. 520.

³⁷*Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

³⁸*Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *Connor v. Tennes-*

§ 577. **Attempt to transfer franchises—Transfer of property essential to operation.**—By the great weight of authority a quasi public corporation such as a railroad company cannot transfer or sell any of its property or privileges which are essential to the performance of the duties which the corporation owes the public, or necessary for the exercise of its franchise, either by voluntary or forced sale without legislative authority.⁸⁹ Nor, it seems, can property necessary to the operation of a franchise granted to a corporation affected with a public interest be sold at judicial sale without such authority since the public is vitally in-

see *C. R. Co.*, 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687; *State v. Turnpike Co.*, 65 N. J. L. 73, 46 Atl. 569; *Smith v. Altoona & P. Connecting R. Co.*, 182 Pa. 139, 37 Atl. 930; *City Water Co. v. State*, 88 Tex. 600, 32 S. W. 1033. See, however, *Leonard v. Baylen Street Wharf Co.*, 59 Fla. 547, 52 So. 718, 31 L. R. A. (N. S.) 636. The court said: "As between the purchasers at an administrator's sale of a franchise and the heirs of the deceased grantee of the franchise, where the granting power interposes no claim, and it does not appear that the rights of the public have been injured by the sale of the franchise, the courts will not declare the sale illegal merely because it is of a franchise. So long as the franchise is properly used in the public interest, and no private rights are invaded, the use of the franchise by particular individuals or corporations is of concern only to the proper governmental authority." As to the right of a public service corporation to abandon its franchise see *East Ohio Gas Co. v. City of Akron*, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92. See also, *Asher v. Hutchinson Water & C. Co.*, 66 Kans. 496, 71 Pac. 813, 61 L. R. A. 52.

⁸⁹ *Atlantic & C. R. Co. v. Union Pacific & C. Co.*, 1 Fed. 745, 1 McCrary (U. S.) 541; *Cumberland Tel. & T. Co. v. Evansville*, 127 Fed. 187; *Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574n; *Hays v. Ottawa & C. R. Co.*, 61 Ill. 422; *State v. Dodge City & C. R. Co.*, 53 Kans. 377, 36 Pac. 747, 42 Am. St. 295; *Louisville Water Co. v.*

Hamilton, 81 Ky. 517; *Winchester & C. Turnpike Road Co. v. Vimont*, 5 B. Mon. (Ky.) 1; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Commonwealth v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Richards v. Merrimack & C. R. Co.*, 44 N. H. 127; *Black v. Delaware & C. Canal Co.*, 22 N. J. Eq. 130; *Logan v. North Carolina R. Co.*, 116 N. Car. 940, 21 S. E. 959; *Coe v. Columbus & C. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *In re Stewart's Appeal*, 56 Pa. St. 413; *Susquehanna Canal Co. v. Donhan*, 9 Watts. & S. (Pa.) 27, 42 Am. Dec. 315; *Youngman v. Elmira & C. R. Co.*, 65 Pa. St. 278; *Western & C. R. Co. v. Johnston*, 59 Pa. St. 290; *In re Steiner's Appeal*, 27 Pa. St. 313; *Pittsburg & C. Co. v. Allegheny County*, 63 Pa. St. 126; *Johnson Co. v. Miller*, 174 Pa. St. 605, 34 Atl. 316, 52 Am. St. 833; *Philadelphia v. Philadelphia & R. Co.*, 177 Pa. St. 292, 35 Atl. 610, 34 L. R. A. 564; *Palestine v. Barnes*, 50 Tex. 538; *Thomas v. West Jersey & C. R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis & C. R. Co.*, 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. 1094; *Oregon v. Oregonian R. Co.*, 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409; *Central Transportation Co. v. Pullman & C. Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478; *York & C. R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. ed. 27; *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. ed. 184; *Pullan v. Cincinnati & C. Air-Line R. Co.*, 4 Biss. (U. S.) 35, Fed. Cas. No. 11461; *Roper v. McWhorter*, 77 Va. 214;

terested in the continued performance by the corporation of its public duties.⁴⁰ Property not essential to the operation of the franchise may, however, be sold on execution.⁴¹

It has also been held that in a proper case courts of equity might order the sale of the franchises and property of corporations affected with a public interest to satisfy their debts.⁴² The test applied in the case of sales of property belonging to a quasi public corporation is whether or not the property in question is essential in any reasonable sense for the discharge of the corporate duties. The power of a quasi public corporation to alienate its property is now largely controlled, however, by statutory enactment in the various states.⁴³

Vermont &c. Co. v. Vermont &c. Co., 34 Vt. 1. The general doctrine was thus stated in *Black v. Delaware &c. Canal Co.*, 22 N. J. Eq. 130: "It may be considered as settled that a corporation cannot lease or alien any franchise or any property necessary to perform its obligations and duties to the state, with legislative authority."

⁴⁰*Connor v. Tennessee Cent. R. Co.*, 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; *McColgan v. Baltimore Belt R. Co.*, 85 Md. 519, 36 Atl. 1026; *Sherman County Irrig. Water &c. Co. v. Drake*, 65 Nebr. 699, 91 N. W. 512; *Coe v. Peacock*, 14 Ohio St. 187; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. 626, 32 Atl. 537, 47 Am. St. Rep. 935; *Wall v. Norfolk &c. R. Co.*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501n, 94 Am. St. 948. Compare *Gardner v. Mobile &c. R. Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. 84; *Risdon Iron & Locomotive Works v. Citizens' Trac. Co.*, 122 Cal. 94, 54 Pac. 529, 68 Am. St. 25; *McNeal Pipe & Foundry Co. v. Howland*, 111 N. Car. 615, 16 S. E. 857, 20 L. R. A. 743; *Campbell v. Western Electric Co.*, 113 Mich. 333, 71 N. W. 644.

⁴¹*Lathrop v. Middleton*, 23 Cal. 257, 83 Am. Dec. 112 (ferry boat in process of construction); *Hauns v. Central Kentucky Lunatic Asylum*, 103 Ky. 562, 45 S. W. 890 (farm stock

and agricultural implements and part of the land of the corporation sold); *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526 (real estate owned by railroad company not dedicated to corporate purposes); *Shamokin Valley R. Co. v. Livermore*, 47 Pa. 465, 86 Am. Dec. 552 (real estate). See also, *Hunt v. Bullock*, 23 Ill. 320; *Beardsley &c. v. Ontario Bank*, 31 Barb. (N. Y.) 619; *Coe v. Peacock*, 14 Ohio St. 187; *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

⁴²*Gunnison v. Chicago &c. R. Co.*, 117 Fed. 629; *Stewart v. Wheeling &c. R. Co.*, 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; *Seymour v. Milford &c. Tpk. Co.*, 10 Ohio 476; *Gleaves v. Davidson*, 4 Baxt. (Tenn.) 83; *Milwaukee & M. R. Co. v. James*, 73 U. S. (6 Wall.) 750, 18 L. ed. 854. See also, *Louisville &c. R. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916; *Lake Erie &c. R. Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. 864; *Louisville &c. R. Co. v. State*, 122 Ind. 443, 24 N. E. 350; *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

⁴³For examples of such statutes and the construction placed upon them, see *Indianapolis & Cumberland Gravel road Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Ripley v. Evans*, 87 Mich. 217, 49 N. W. 504, 36 Am. & Eng. Corp. Cas. 188; *Williams v. East Wareham &c. R. Co.*, 171 Mass. 61, 50 N. E. 646; *Simmons v. Worthington*, 170 Mass. 203, 49 N. E. 114; *McKee v. Grand Rapids & R.*

Should the directors sell all the assets of the company in a manner other than that prescribed by statute and thereby practically work its dissolution, they may be held liable for the debts of such company, notwithstanding they may have acted in good faith.⁴⁴

§ 578. Contracts suppressing competition or monopoly.—The policy of the law is to prevent the creation of monopolies and to foster fair competition.⁴⁵ The suppression of competition may be accomplished in two ways: one is by the sale and transfer of the corporate franchise; the other is by a trade agreement for the suppression of competition. In the preceding sections of this chapter it has already been mentioned that generally speaking a public service corporation cannot transfer its franchise or property essential to its operation. One of the reasons assigned for this rule is that the transfer of franchises may sometimes be illegal as tending to establish monopolies.⁴⁶

L. St. R. Co., 41 Mich. 274, 1 N. W. 873, 50 N. W. 469; *Randolph v. Larned*, 27 N. J. Eq. 557; *McNeal Pipe & Foundry Co. v. Howland*, 111 N. Car. 615, 16 S. E. 857, 20 L. R. A. 743; *Mausel v. New York C. & St. L. R. Co.*, 171 Pa. St. 606, 33 Atl. 377; *Vulcanite Paving Co. v. Philadelphia Rapid Transit Co.*, 220 Pa. 603, 69 Atl. 1117, 17 L. R. A. (N. S.) 884; *Bell v. Wood*, 181 Pa. St. 175, 37 Atl. 201; *Greensburg Fuel Co. v. Irwin Natural Gas. Co.*, 162 Pa. St. 78, 29 Atl. 274; *In re Philadelphia &c. R. Co.'s Appeal*, 70 Pa. 355; *Campbell v. Pittsburgh & W. R. Co.*, 137 Pa. St. 574, 20 Atl. 949; *Crouch v. Dakota &c. R. Co.*, 18 S. Dak. 540, 101 N. W. 722; *San Antonio &c. R. Co. v. San Antonio &c. R. Co.* (Tex. Civ. App.), 76 S. W. 782; *Texas-Mexican R. Co. v. Wright*, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200n; *Wall v. Norfolk & W. R. Co.*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501n, 94 Am. St. 948.

⁴⁴*Darcy v. Brooklyn & New York Ferry Co.*, 196 N. Y. 99, 89 N. E. 461, 134 Am. St. 827.

⁴⁵*Chicago &c. R. Co. v. Southern Indiana R. Co.*, 38 Ind. App. 234, 70 N. E. 843, citing 1 Elliott on Railroads, § 359. "A contract between

corporations charged with a public duty, such as that of common carriers, providing for the formation of a combination, having no other purpose than that of stifling competition, and providing means to accomplish that object, is illegal. The purpose to break down competition poisons the whole contract, and there is no antidote which will rescue it from legal death." *Cleveland &c. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593.

⁴⁶*Dunbar v. American Telephone &c. Co.*, 224 Ill. 9, 79 N. E. 423, 115 Am. St. 132. Of the situation in this case the court said, "While a complete monopoly or a complete restraint of competition would not necessarily result, the tendency would be in that direction which is sufficient to condemn the transaction as unlawful." *Brunswick Gas Light Co. v. United Gas Fuel & Light Co.*, 85 Maine 532, 27 Atl. 525, 35 Am. St. 385; *Southern Electric Securities Co. v. State*, 91 Miss. 195, 44 So. 785, 124 Am. St. 638. In the above case a holding company was organized to take over the stock of various public service corporations and thus control prices. The holding company was enjoined from doing any act

But it is not alone by sale or transfer of the corporate franchise or property that a public service corporation stifles competition and creates a monopoly. Such corporations may seek to accomplish this end by unfair competition as where railroads refuse to accept freight from a shipper because such patron shipped over another line also. In other words a carrier cannot demand exclusive custom.⁴⁷ Nor can a coach line refuse to receive as passengers persons who have traveled part way to their destination on a rival line.⁴⁸ Nor can a telephone company refuse service to one unless he will agree not to install the phone of a rival company.⁴⁹ Such a contract when made is void as in restraint of trade and against public policy as tending to create a monopoly⁵⁰ and a court of equity will not enjoin its breach.⁵¹ Likewise a contract entered into by a newspaper with the associated press which contained a provision to the effect that the newspaper should purchase news from no other source than the associated press has been held null and void.⁵² A court has refused to enforce a contract entered into by a landowner as against a subsequent purchaser by which he agrees that the products of a stone quarry shall be transported to market exclusively over one line of railroad. The court held that this was a

having relation to and in furtherance of the contract under which it was organized.

⁴⁷ *Chicago &c. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824.

⁴⁸ *Bennett v. Dutton*, 10 N. H. 481.

⁴⁹ *State v. Citizens' Telephone Co.*, 61 S. Car. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. 870.

⁵⁰ *Gwynn v. Citizens' Telephone Co.*, 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. 819.

⁵¹ *Central New York Tel. &c. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 211, 139 Am. St. 878.

⁵² *Inter Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 567, 75 Am. St. 184. In the above case an injunction was issued to restrain the Associated Press from refusing to furnish news to such newspaper where the ground for refusal was that it had violated the illegal provision in the contract that it would procure news from no

antagonistic agencies. The court said: "The character of appellees' business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in the contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto." See, however, *State v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. 368.

covenant which did not run with the land.⁵³ On the other hand, the Appellate Court of Indiana has assumed that a contract whereby a patron of an electric light company agreed to accept exclusive service from such company, is valid.⁵⁴ And in Pennsylvania it has been held that a contract to give all the traffic of certain mines, and furnaces, and of a railroad therefrom to another and connecting railroad which furnishes aid to develop the business is valid.⁵⁵ An agreement between two or more public service corporations whereby each agrees not to accept applications for service made by customers of the other company is another form of contract by which a public service corporation may seek to avoid performance of its public duty. It has been suggested that such a contract is sufficient ground for the revocation of the corporation's franchise.⁵⁶

The converse of the foregoing is also true. A public service corporation does not have the right or the power to enter into an agreement with its customer not to deal with other applicants.⁵⁷

⁵³ *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

⁵⁴ *Beck v. Indianapolis &c. Power Co.*, 36 Ind. App. 600, 76 N. E. 312.

⁵⁵ *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*, 171 Pa. 284, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. 807. It would seem hard to reconcile the two foregoing cases with the great weight of authority, except perhaps that in them the company offered its customer all the service he could possibly need, but it is believed that this does not furnish an adequate reason to sustain them.

⁵⁶ "By the agreement in question, when carried into effect, the patrons of one company were excluded from being supplied with gas from the other company. Each company was, by the terms of the agreement, bound to abide by and maintain the prices fixed, and each was prohibited from furnishing gas to the customers of the other. That the people of that city who desired to become consumers of gas were, by the agreement in question, deprived of the benefits that might result to them from competition between

the two companies, certainly cannot be successfully denied. The exclusion of competition, under the agreement, redounded solely to the benefit of appellee and the other company, and the enforcement of the compact between them could be nothing less than detrimental to the public. By uniting in this agreement appellee disabled or at least professed to have disabled, itself from the performance of its implied duties to furnish gas impartially to all, and thereby made public accommodations subservient to its own private interests." *State v. Portland Natural Gas &c. Co.*, 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. 314.

⁵⁷ *Cumberland &c. Telegraph Co. v. Morgans &c. R. Co.*, 51 La. Ann. 29, 24 So. 803, 72 Am. St. 442; *Sammons v. Kearney &c. Irrigation Co.*, 77 Nebr. 580, 110 N. W. 308, 8 L. R. A. (N. S.) 404n. But a railroad company may enter into a contract with an individual to develop and conduct a certain business over its line, giving such person full charge of such business and the exclusive privilege thereof "so far as permitted

Nor can it enter into an agreement to give priority or preference to one customer over others⁵⁸ unless such preference is in favor of the public.⁵⁹ Likewise it has been held that a telephone company that had granted the exclusive right to a telegraph company in the use of the telephone in handling messages could not refuse to install a telephone in the office of a rival telegraph company.⁶⁰ A covenant whereby a land owner granted an oil transportation company exclusive right of way for a pipe line for transporting oil has also been held invalid.⁶¹ A railroad company cannot give an undue or unreasonable preference to any person, firm, corporation or locality.⁶² Thus it cannot refuse to give others the same service at the same time.⁶³ It may, however, refuse to

to do so by law." *Delaware &c. R. Co. v. Kutter*, 147 Fed. 51, 77 C. C. A. 315.

⁵⁸ *Fairchance Window Glass Co. v. Star Gas Co.*, 66 Leg. Intelligencer 544; *Leavell v. Western Union Telegraph Co.*, 116 N. Car. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. 798; *Vaught v. East Tenn. Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315 and note. See also, *Western Union Telegraph Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25. Compare *Conemaugh Gas Co. v. Jackson Farm Gas Co.*, 186 Pa. St. 443, 40 Atl. 1000, 65 Am. St. 865.

⁵⁹ *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109.

⁶⁰ *State of Missouri v. Bell Telephone Co.* (1885), 23 Fed. 539; *Delaware & A. Telegraph & Telephone Co. v. Delaware*, 50 Fed. 677, 2 C. C. A. 1; *Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *State v. Nebraska Telephone Co.*, 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; *State v. Bell Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583n; *Bell Telephone Co. v. Commonwealth*, 2 Sad. (Pa.) 299, 3 Atl. 825; *Commercial Union Tel. Co. v. New England T. & T. Co.*, 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. 893; 22 Albany L. J. (N. Y.) 363. See 5 L. R. A. 161, note. See also, *Cincinnati &c. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *Cincinnati H. & D. R. R. Co. v. Bowling*

Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422. But see *American Rapid Telegraph Co. v. Connecticut Tel. Co.*, 49 Conn. 352, 44 Am. Rep. 237.

⁶¹ *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527. To same effect, *Calor &c. Co. v. Franzell*, 128 Ky. 715, 109 S. W. 328, 36 L. R. A. (N. S.) 456 and note. In the latter case an exclusive right of way was granted to a gas company. The court said: "What would be thought, for instance, of the proposition that a railroad corporation could lease from the owners a belt of land surrounding a municipality, and provide in the lease that it should have exclusive right to operate a railroad across the land in question?"

⁶² *National Car Advertising Co. v. Louisville &c. R. Co.*, 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010n. In the above case the railroad company attempted to grant the exclusive right to use its box cars for advertising purposes. *Galveston Chamber of Commerce v. Railroad Comm. of Tex.* (Tex. Civ. App.), 137 S. W. 737 (discrimination in rates). See also, *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671.

⁶³ *Memphis News Publishing Co. v. Southern R. Co.*, 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150. In the above case an agreement had been entered into whereby the railroad

accept for transportation goods tendered in an unfit condition therefor.⁶⁴

As a general rule contracts entered into by a public service corporation for a division of territory⁶⁵ are invalid and the same is generally true of most pooling arrangements.⁶⁶ Courts of equity will not enjoin the breach of a traffic agreement between

company agreed to carry on a special train only a paper published by a certain company. The court said: "It would hardly be contended that a railway making a special and exclusive contract to transport shoes manufactured by one party in a community, could strip itself of its common-law character, and decline, without any reason save the existence of said contract, to transport boxes of shoes for another manufacturer in the same community. If this be so, where is the controlling difference between such a case and the one now before us? Packages of newspapers are as much property as shoes, and the principle which controls in the one case, it seems to us, must equally apply to the other. If this be not so, by parceling out its means of transportation to the full extent of its carrying capacity, it would be possible for a railroad to build up a few in a community to the destruction of the many who equally seek shipment. This the law will not tolerate in one who holds himself out as a common carrier. As has been already said, he must accord equal privileges to all who are in like condition. He cannot foster monopolies. He will not, by making special preferential agreements, be permitted to build up one set of shippers at the expense of another. He must carry for all alike." See also, *Youghioheny & Co. Coal Co. v. Erie R. Co.*, 24 Ohio Cir. Ct. 289.

⁶⁴ *Atlantic Coast Line R. Co. v. Rice*, 169 Ala. 265, 52 So. 918, 29 L. R. A. (N. S.) 1214n, Ann. Cas. 1912B 389.

⁶⁵ *Wilmington City R. Co. v. Wilmington & C. R. Co.*, 8 Del. Ch. 468, 46 Atl. 12; *Chicago & Co. v. Peoples & Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; *South Chicago R. Co. v. Calumet R. Co.*, 171 Ill. 391, 49 N. E. 576; *Chicago I. & L. R. R. Co.*

v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843; *Keene Syndicate v. Wichita Gas, E. L. & P. Co.*, 69 Kans. 284, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. 164. See, however, *Weld v. Gas & Electric Light Comrs.*, 197 Mass. 556, 84 N. E. 101; *Ives v. Smith*, 55 Hun (N. Y.) 606, 28 N. Y. St. 917, 8 N. Y. S. 46; also, *Home Telephone Co. v. North Manchester Tel. Co.*, 47 Ind. App. 411, 92 N. E. 558, 93 N. E. 234.

⁶⁶ *In re Pooling Freight*, 115 Fed. 588; *Southern Pac. R. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 23 L. ed. 259, 19 Sup. Ct. 25; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540. "A railroad company is a quasi-public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy, and void." Citing many authorities *Chicago M. & St. P. R. Co. v. Wabash St. L. P. R. Co.*, 61 Fed. 993. See, however, *Hare v. London & C. R. Co.*, 2 Johns. & H. 80. "It is a mistaken notion, that the public is benefited by putting two railway companies against each other till one is ruined, the result being, at last, to

two railroad companies whereby one of them is restrained from competing with the other.⁶⁷ It is thus made apparent that every public service corporation must grant every proper application for service.⁶⁸

§ 579. Not required to undermine own business.—On the other hand it is not required to undermine its own business.⁶⁹ Thus, as a general rule, a railroad may⁷⁰ or may not⁷¹ at its discretion, grant to another company trackage rights.⁷² However, where a corporation is organized for the specific purpose of furnishing trackage for other railroads, such as a terminal company, it has no right to discriminate in favor of certain roads.⁷³ The

raise the fares to the highest possible standard." See also, *Averill v. Southern R. Co.*, 75 Fed. 736; *Manchester & C. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582; *Raritan River R. Co. v. Middlesex & S. Traction Co.*, 70 N. J. L. 732, 58 Atl. 332. And see generally 1 *Elliott Railroads* (2nd. ed.), §§ 365-367; 4 *Elliott Railroads*, § 1675, and post, ch. 23.

⁶⁷ *Wilmington City R. Co. v. Wilmington & C. R. Co.*, 8 Del. Ch. 468, 46 Atl. 12. See also, *Central New York Tel. & C. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 211, 139 Am. St. 878.

⁶⁸ See ante, § 575 et seq. See also, *Rogers Locomotive & Machine Works v. Erie R. Co.*, 20 N. J. Eq. 379.

⁶⁹ *Lundquist v. Grand Trunk Western R. Co.*, 121 Fed. 915. "That a number of persons should combine to carry on a business in competition with the defendant, to take from it the most profitable parts of its business; to make use of its capital and facilities for its destruction, cannot be assumed to have been considered or provided for by the company in fixing its present tariff." *Johnson v. Dominion Express Co.*, 28 Ont. 203.

⁷⁰ *Boston & C. R. Corp. v. Nashua & C. R. Corp.*, 157 Mass. 258, 31 N. E. 1067, citing *Nashua & C. R. Co. v. Boston & C. R. Co.*, 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. 1004; *Union Pac. R. Co. v. Chicago & C. R. Co.*, 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. 1173. A contract granting right

to use railroad and appurtenances is governed by ordinary rules of construction. *Chicago & C. R. Co. v. Denver & C. R. Co.*, 143 U. S. 596, 36 L. ed. 277, 12 Sup. Ct. 479, 50 Am. & Eng. R. Cas. 60. See *St. Paul & C. R. Co. v. St. Paul & C. Co.*, 44 Minn. 325, 46 N. W. 566.

⁷¹ *Michigan Central R. Co. v. Pere Marquette R. Co.*, 128 Mich. 333, 87 N. W. 271.

⁷² There would seem to be serious doubt as to whether or not a legislature may require one railroad to grant running rights to another railroad over the former's rails. See *Toledo Electric Street R. Co. v. Toledo Consolidated Steam R. Co.*, 26 Ohio Weekly Law 172, which would seem to hold that the legislature has this power when properly exercised. See, however, *In re Philadelphia M. & S. St. R. Co. Petition*, 203 Pa. St. 354, 53 Atl. 191.

⁷³ *State v. Jacksonville Terminal Co.*, 41 Fla. 363, 27 So. 221; *Union Railway of Baltimore v. Canton R. Co.*, 105 Md. 12, 65 Atl. 409; *United States v. Terminal R. Assn. (U. S.)*, 32 Sup. Ct. 507 (decided under the Sherman anti-trust act). A railroad, however, which owns its own terminal facilities and which has not dedicated them to the use of railroads generally, is not required to permit such other roads to use its trackage. *Terre Haute & C. R. Co. v. Peoria & C. R. Co.*, 167 Ill. 296, 47 N. E. 513; *Commonwealth v. Norfolk & C. R. Co. (Va.)*, 68 S. E. 351. On

same principle would seem to apply to telephone companies.⁷⁴ It has been held, however, that by statutory provision one telephone company could require another company to permit a connection with its switchboard and the use of its lines for receiving and forwarding messages through such connection from subscribers of the former company substantially as it did messages tendered by its own local subscribers, in case compensation, as provided for by statute, was made.⁷⁵ It has also been held that where one telephone company permits another to connect up with its exchange it cannot discriminate against other companies and refuse one company a privilege which it has granted to another.⁷⁶ And, furthermore, it would seem that on having established a

the same principle a railroad bridge company which owns a bridge could not be compelled to permit an electric railroad to run and operate its cars across defendant's bridge. *Evansville &c. Trac. Co. v. Henderson Bridge Co.*, 134 Fed. 973, citing *Elliott Railroads*, §§ 922, 974, 1084, the court said: "While fully recognizing the well-known doctrine that public service corporations are bound to render to the public certain services appropriate to the particular functions of the corporation, that doctrine has not been supposed to reach far enough to make the corporation serve the purposes or be subjected to the uses of a mere rival in business. One water company or one telephone company or one telegraph company or one street railway company or one railroad company, while bound appropriately to serve the general public, cannot, unless under express statutory enactment and by due process of law thereunder, be compelled to give its property to the uses and benefits of a rival, except by some form of condemnation. The rival is not, ordinarily, to be included in the term "general public." See, especially in this connection, *Elliott, Railroads*, §§ 922, 974, 1084, and cases cited. In short, it seems to me that the entire relief prayed for is beyond the power of the court to give to this complainant in its present situation." It is otherwise, however, where the bridge has been dedicated not only to the use of ordinary travel

but to its use by street railway companies in passing cars over it from one city to another. *Covington &c. Bridge Co. v. South Covington &c. St. R. Co.*, 93 Ky. 136, 14 Ky. L. 52, 9 S. W. 403, 15 L. R. A. 828.

⁷⁴*Rural Home Tel. Co. v. Kentucky &c. Tel. Co.*, 32 Ky. L. 1068, 107 S. W. 787; *In re Baldwinville Tel. Co.*, 24 Misc. (N. Y.) 221, 53 N. Y. S. 574.

⁷⁵*Billings Mutual Tel. Co. v. Rocky Mountain Bell Tel. Co.*, 155 Fed. 207, construing Montana Statute.

⁷⁶*United States Tel. Co. v. Central Union Tel. Co.*, 171 Fed. 130; *Home Tel. Co. v. Granby & Neosho Tel. Co.*, 147 Mo. App. 216, 126 S. W. 773. See, however, *Home Tel. Co. v. Larcocie Light & Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124, in which the Missouri Supreme Court States that in its opinion the dissenting opinion of Reynolds, P. J., expresses the law of the case. See also, *Cumberland Tel. &c. Co. v. Cartright Tel. Co.*, 128 Ky. 395, 108 S. W. 875. See contra, when the agreement is for the best interest of the public and made in order to extend the service. *Home Tel. Co. v. North Manchester Tel. Co.* (Ind. App.), 92 N. E. 558, 93 N. E. 234; *Cumberland Tel. &c. Tel. Co. v. State* (Miss.), 54 So. 670; *Home Tel. Co. v. Larcocie Light & Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124 and note; *United States Tel. Co. v. Middlepoint Home Tel. Co.*, 7 Ohio N. P. (N. S.) 425.

switchboard connection, the service cannot be discontinued.⁷⁷ On the principle that a public service corporation is not required to undermine its own business, it has been held that an irrigation company is not required to permit a rival company to utilize its work.⁷⁸ Nor under general legislation on the subject can one irrigation company require another to enlarge its ditches.⁷⁹ It has also been held that a water company may refuse to supply a large consumer with water where he intends to act as an intermediary and distribute the supply furnished him to various buildings, notwithstanding the buildings are owned by him.⁸⁰ Likewise, it has been held that a gas company is not required to furnish a rival company with gas.⁸¹

§ 580. Different methods of fixing rates—Discrimination in favor of public.—A public service corporation also has the right to employ different methods in fixing rates in the absence of statutory restriction. It may adopt either a flat rate or install meters⁸² or give its customers choice between the two.⁸³ In the absence of any statutory restriction it has been held that the company is not guilty of discrimination when it requires the in-

⁷⁷ *State v. Cadwallader (Ind.)*, 87 N. E. 644. See also, *Home Tel. Co. v. North Manchester Tel. Co.*, 47 Ind. App. 411, 92 N. E. 558, 93 N. E. 234.

⁷⁸ *Paxton & Hershey Irrigating Canal &c. Co. v. Farmers' & Merchants' Irrigation &c. Co.*, 45 Nebr. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. 585.

⁷⁹ *Junction Creek &c. Ditch Co. v. Durango*, 21 Colo. 194, 40 Pac. 356.

⁸⁰ *United States v. American Water Works Co.*, 37 Fed. 747. In the above case the United States wished water for the Fort Omaha reservation, a tract containing many acres on which were located officers' quarters, hospitals, warehouses and barracks. It was held that the reservation was not entitled to be supplied as a single consumer. But under proper circumstances, however, a water company may voluntarily contract to furnish

water to another who intends to act as intermediary. *Milledgeville Water Co. v. Edwards*, 121 Ga. 555, 49 S. E. 621; *Mulrooney v. Obeare*, 171 Mo. 613, 71 S. W. 1019.

⁸¹ *American Lighting Co. v. Public Service Corp.*, 132 Fed. 794; *Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122, 57 Atl. 482.

⁸² *Robbins v. Bangor R. & Elec. Co.*, 100 Maine 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963 (meter); *Goebel v. Grosse Point Waterworks*, 126 Mich. 307, 85 N. W. 744 (flat rate).

⁸³ *Sheward v. Citizen's Water Co.*, 90 Cal. 635, 27 Pac. 439; *Shaw Stocking Co. v. Lowell*, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746; *Brass v. Rathbone*, 8 App. Div. (N. Y.) 78, 40 N. Y. S. 466; *Exchange & Building Co. v. Roanoke &c. Water Co.*, 90 Va. 83, 17 S. E. 789.

stallation of a meter.⁸⁴ A gas⁸⁵ or electric light company⁸⁶ may perhaps have the right to supply gas or power at a lower cost to a manufacturer by day at a time when its equipment is largely idle and with the understanding that the supply may be curtailed in favor of other businesses when necessity demands it. Public service corporations may also charge a higher rate for more expensive service.⁸⁷ These cases merely illustrate the general principle that the law forbids all discrimination between two applicants who are similarly circumstanced and who demand the same service.⁸⁸ It must be borne in mind, however, that the law against unreasonable discrimination rests on public policy. It is forbidden because it is opposed to the interest of the public, which requires that all should be treated alike under like circumstances. Discriminations in favor of the public it seems, are not opposed to public policy.⁸⁹

§ 581. Contracts as to location of stations and route.—It has been held that contracts requiring a railroad company to establish its depot at a certain point are against public policy

⁸⁴ *Shaw v. San Diego Water Co.* (Cal.), 50 Pac. 693; *Sheward v. Citizen's Water Co.*, 90 Cal. 635, 27 Pac. 439; *Robbins v. Bangor R. & Elec. Co.*, 100 Maine 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963; *Shaw Stocking Co. v. Lowell*, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746; *Powell v. Duluth*, 91 Minn. 53, 97 N. W. 450; *Horner v. Oxford Water & Elec. Co.*, 153 N. Car. 535, 69 S. E. 607, 138 Am. St. 681; *Exchange & B. Co. v. Roanoke G. & W. Co.*, 90 Va. 83, 17 S. E. 789; *State v. Gosnell*, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33n. But the imposition of a flat rate may not be reasonable. See *Postal Cable Tel. Co. v. Cumberland Tel. Co.*, 177 Fed. 726. Compare *Ladd v. Boston*, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171.

⁸⁵ *Logansport &c. Gas Co. v. Ott*, 30 Ind. App. 93, 65 N. E. 549.

⁸⁶ *Metropolitan Elec. Supply Co. v. Ginder* (1901), 2 Ch. Div. 799.

⁸⁷ *St. Louis &c. R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711; *Western Union Tel. Co. v. Call Pub. Co.*, 44 Nebr. 326, 62 N. W. 506, 48 Am. St. 729, 27 L. R. A. 622; *Gardner v.*

Providence Tel. Co., 23 R. I. 312, 50 Atl. 1014, 55 L. R. A. 113. See also, *Tift v. Southern R. Co.*, 138 Fed. 753.

⁸⁸ See, however, *State v. Birmingham Water Works Co.*, 164 Ala. 586, 51 So. 354, 137 Am. St. 69, 27 L. R. A. (N. S.) 674n. As to the power of a municipality to regulate rates see *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966, 138 Am. St. 299. See also, *Twitchell v. Spokane*, 55 Wash. 86, 104 Pac. 150, 24 L. R. A. (N. S.) 290n, 133 Am. St. 1021. In the above case the water works were owned by the city.

⁸⁹ *New York Telephone Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109. In the above case it was held that the telephone might properly give preachers and charitable institutions a cheaper rate and not be guilty of an unjust discrimination. The opinion contains a valuable discussion of the subject of unjust discriminations and reviews a number of decisions on the subject. See also, *Superior v. Douglas County Tel. Co.* (Wis.), 122 N. W. 1023, which is to the same effect and holds that there may be dis-

and not enforceable.⁹⁰ There is, however, conflict of authority upon this question.⁹¹ If the contract is made solely to promote private interests at the expense of public welfare the contract should be held to be illegal. But if the public interests are not prejudiced or the power of the company to do what the public welfare requires is not abridged, it is believed the contract should be regarded as valid in this respect, and enforceable so long as it does not conflict with public interests,⁹² and it has been so held.⁹³ It is well settled, however, that an agreement not to

crimination in favor of the state or other public corporation.

⁹⁰ Florida Cent. R. Co. v. State, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Enid Right of Ways & Co. v. Lile, 15 Okla. 317, 82 Pac. 810; Ford v. Oregon Electric Ry. Co. (Ore.), 117 Pac. 809 (covenant by an electric railway to stop all regular trains at a private crossing). Such contracts generally void. McCowen v. Pew, 153 Cal. 735, 96 Pac. 893; Whalen v. Baltimore & C. R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130n, 129 Am. St. 423. A contract made by the officer of a railroad company by which he derives a personal advantage from the location of a station at a particular place is invalid as against public policy. Peckham v. Lane, 81 Kans. 489, 106 Pac. 464, 25 L. R. A. (N. S.) 967.

⁹¹ Bestor v. Wathen, 60 Ill. 138; Marsh v. Fairbury, P. & N. W. R. Co., 64 Ill. 414, 16 Am. Rep. 564; Louisville & C. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Williamson v. Chicago & C. R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206n; Cedar Rapids & C. R. Co. v. Spafford, 41 Iowa 292; Kansas Pac. R. Co. v. Hopkins, 18 Kans. 494; Vicksburgh & C. R. Co. v. Ragsdale, 54 Miss. 200; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; Currier v. Concord R. Co., 48 N. H. 321; Chapman v. Mad River & C. R. Co., 6 Ohio St. 119; Texas & C. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; International & C. Co. v. Dawson, 62 Tex. 260. A provision in such a contract that another depot should not be established within cer-

tain limits is illegal and void. St. Louis & C. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; St. Louis & C. R. Co. v. Mathers, 104 Ill. 257; Williamson v. Chicago & C. R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206n; St. Joseph & C. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357. See also, Mobile & O. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556.

⁹² 1 Elliott on Railroads (2d ed.), § 362. See also: "A railroad is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers; but it is under no obligation to refrain from using its property to the best advantage of the public itself." Danville & C. R. Co. v. Lybrook (Va.), 69 S. E. 1066.

⁹³ Taylor v. Florida East Coast Ry. Co., 54 Fla. 635, 45 So. 574, 16 L. R. A. (N. S.) 307n, 127 Am. St. 155; Atlanta & C. R. Co. v. Camp, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594n, 124 Am. St. 151, which quotes Elliott on Railroads, §§ 362, 386. The above case lays down the rule that the contract is made subject to the rights of the public and when the exigencies of the business of the company are such that the rights of the public come in conflict with the rights of the contracting party under the contract * * * the private rights under the contract should yield to the public right. See also, St. Louis & C. R. Co. v. Crandell, 75 Ark. 89, 86 S. W. 855, 112 Am. St. 42; Louisville & C. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Griswold v. Minneapolis & C. R. Co., 12 N. Dak.

locate a station or depot within prescribed limits where it is needed for the business of the company and for the use of the public is illegal.⁹⁴

Closely allied to those contracts which have for their object the location of stations are agreements for the establishment of sidings and the location of the main line. There is a distinction made, however, between covenants to establish and maintain stations for the public convenience and those to establish and maintain sidings, turn-outs, crossings and the like for private use merely. The validity of these latter contracts is governed by the circumstances of each particular case.⁹⁵ When the performance of a contract of this character in no way interferes with the discharge by the railroad of its duty to the public and is not otherwise invalid it will be upheld.⁹⁶ As to the selection of the route over which the railroad is to run, there is ordinarily no law which requires a railroad corporation to select any particular route for the construction of the contemplated road. In the absence of any law requiring a particular route to be selected discretion is vested in the corporation to make a selection between different routes and the railroad may for a consideration moving directly to itself, select the route running through one locality in preference to others.⁹⁷

435, 97 N. W. 538, 102 Am. St. 572; Texas &c. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268.

⁹⁴ McCowen v. Pew, 153 Cal. 735, 96 Pac. 893; Farrington v. Stucky, 91 C. C. A. 311, 165 Fed. 325; Florida Cent. R. Co. v. State, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; Marsh v. Fairbury, P. & N. W. R. Co., 64 Ill. 414, 16 Am. Rep. 564; Mobile & O. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556; Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; St. Joseph &c. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357; Currie v. Natchez &c. R. Co., 61 Miss. 725. As to the right to require a railroad company to establish and maintain a station that will not pay expenses. Chicago, Rock Island &c. R. Co. v. Nebraska State R. Com., 85 Nebr. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444 and note.

⁹⁵ Whalen v. Baltimore &c. R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130n, 129 Am. St. 423, and cases cited. See also, Scholten v. St. Louis &c. R. Co., 101 Mo. App. 516, 73 S. W. 915. A contract by a section foreman of a railroad company to procure the construction of a switch track at a specified place and which would be beneficial both to the railroad company and the public, has been held not against public policy. Wright v. Riley (Tex. Civ. App.), 118 S. W. 1134. A stipulation in a contract that no side track shall be built in a certain town renders the entire contract illegal. Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; Pueblo & A. V. R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512.

⁹⁶ McKell v. Chesapeake & O. R. Co., 186 Fed. 39, 108 C. C. A. 141.

⁹⁷ "In the absence of any agreement that the route selected, or the stations

§ 582. **Ultra vires contracts.**—In the chapter on Private Corporations, immediately preceding this, the subject of ultra vires contracts was given a rather thorough review and since the same general principles usually control the ultra vires contracts of a public service corporation the subject will not be treated at length here. In so far as the subject is here treated regard is had more particularly to contracts entered into by various kinds of corporations affected with a public interest. It must be borne in mind, however, that the defense of ultra vires will not necessarily be sustained merely because the contract is not within the express terms of the charter.⁹⁸ This does not mean, however, that it may, under its implied powers, engage in a business foreign to the purpose for which it was incorporated and which is not reasonably necessary to the proper conduct of its legitimate business. Thus, it has been held that a railroad company has no power to guarantee interest and dividends on stock and bonds necessary for

located, shall be to the exclusion of other routes or stations, they are not contrary to public policy, and that rule applies equally to both classes of contracts." *McCowen v. Pew*, 153 Cal. 735, 96 Pac. 893. To same effect, *Davis v. Williams*, 121 Ala. 542, 25 So. 704; *Farrington v. Stuckey* (Ind. Terr.), 104 S. W. 647, *affd.*, 91 C. C. A. 311, 165 Fed. 325; *Berryman v. Trustees &c. So. R. Co.*, 14 Bush (Ky.) 755; *Riley v. Louisville, H. & St. L. R. Co.*, 142 Ky. 67, 133 S. W. 971, 35 L. R. A. (N. S.) 636n (money to be advanced to build a spur track). See also, 1 *Elliott on Railroads*, § 386 and cases cited in note 179. See, however, *Enid Right of Way &c. Co. v. Lile*, 15 Okla. 382, 82 Pac. 810. Compare *Piper v. Choctaw &c. Imp. Co.*, 16 Okla. 436, 85 Pac. 965; *Guss v. Federal Trust Co. (Okla.)*, 91 Pac. 1045. Contracts whereby some individual officer or agent of the railroad company under an assumption of influence with that corporation has agreed for a consideration to secure from the corporation the location of stations or depots in a particular locality, or to secure the building of its road by a particular route are void. They are a species of bribery of the officers of the company. *McCowen v. Pew*, 153 Cal. 735, 96 Pac. 893. To

same effect, *Peckham v. Lane*, 81 Kans. 489, 106 Pac. 464, 25 L. R. A. (N. S.) 967; *McGuffin v. Coyle & Guss*, 16 Okla. 648, 85 Pac. 954, *dissenting opinion*, 86 Pac. 962, 6 L. R. A. (N. S.) 524n. By the statutes of Texas a railroad company may contract to locate its general offices and shops at a particular place. *Kansas &c. R. Co. v. Sweetwater* (Tex. Civ. App.), 131 S. W. 251; *City of Tyler v. St. Louis &c. R. Co. (Tex.)*, 91 S. W. 1, 93 S. W. 997.

⁹⁸*Oakland Electric Co. v. Union Gas &c. Co.*, 107 Maine 279, 78 Atl. 288. In the above case it was held that a corporation chartered to furnish gas and electricity, etc., to "Waterville and adjoining towns" had the right to supply electricity to the town of Oakland adjoining Waterville. The court used the following illustration: "Thus a contract by a bank for the construction of a railroad would clearly be foreign to the banking business, while a contract by a railroad company to transport passengers and freight beyond its own line would not be foreign to the railroad business, and would be upheld though the power so to contract was not expressed in the charter." *Pedkins v. Portland S. & P. Co.*, 47 Maine 573, 74 Am. Dec. 507.

the construction of a summer hotel although the operation of the hotel may increase its business.⁹⁹ Nor does a railroad company have the right, either directly or indirectly, to deal and speculate in land.¹

§ 583. Leases generally.—A railroad company when given authority to do so may lease its line to another railroad company.² And when this power is given the right of the stockholders of a railway company to lease its road, under statutes authorizing stockholders of a railway company to lease its road to another company, is not affected by the fact that before the submission of a lease to the stockholders the directors of the company had agreed on the terms thereof.³ Under a statute which empowered railroad corporations there incorporated to make “contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads,” it has been held that a railroad company so incorporated was authorized to make a lease of its road to a railroad corporation of another state, but

⁹⁹ *Western Md. R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 62 Atl. 351, 3 L. R. A. (N. S.) 887n, 111 Am. St. 362. But it has implied authority to maintain restaurants in its depots or the like for its passengers or employes in connection with its business. *Flanagan v. Great Western R. Co.*, L. R. 7 Eq. Cas. 116; *Jacksonville &c. R. Co. v. Hooper*, 160 U. S. 514, 6 Sup. Ct. 379; *Abraham &c. R. Co. v. Oregon &c. R. Co.*, 37 Ore. 495, 60 Pac. 899, 64 L. R. A. 391, 82 Am. St. 779. See also, *Green Bay &c. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221; *Prospect Park &c. R. Co. v. Williamson*, 91 N. Y. 552; 1 *Elliott Railroads* (2d ed.), § 41.

¹ *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90. See also, *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Vermont &c. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1. And see generally as to the extent to which it may acquire real estate, 1 *Elliott Railroads* (2d ed.), §§ 391-407. See also, the case of *Dela-ware &c. R. Co. v. Kutter*, 77 C. C. A. 315, 147 Fed. 51, as to the validity

of a contract entered into by a railroad with a private individual for a term of years whereby the latter was to build up, develop and conduct the business of the transportation of milk on its lines.

² *Hampe v. Pittsburg Traction Co.*, 165 Pa. St. 468, 30 Atl. 931, Mitchell, J.: “As a passenger railway its power to lease to another passenger road, under the acts of 1861 and 1870, cannot be doubted, and such power was not taken away by the possession of the additional franchise of an inclined railroad. To hold that it was would be to hold that a gift meant to be additional and cumulative in effect took away powers expressly granted in the first instance. If there were any doubt on this point, moreover, it would be conclusively settled by the express grant in the charter of ‘all the powers and privileges * * * in constructing, locating and operating any of the said planes or railways,’ contained in the general railroad act of 1849.”

³ *Jones v. Concord &c. R. Co.*, 67 N. H. 234, 30 Atl. 614, 68 Am. St. 650.

that no power was conferred upon a railroad corporation of a foreign state to make such a lease, if not authorized to do so by the laws of its own state.⁴

It has also been held that a lease is authorized by a charter provision which gives a railroad company the right to "farm out" the right of transportation.⁵ A lease of a railroad and franchise for nine hundred and ninety-nine years by one railroad corporation to another railroad corporation, which is ultra vires of one or both, will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract.⁶

A railroad company, which had equipped its road under an agreement with a car trust, leased the road and equipments to defendant railroad company, which, to induce the car trust to lease the equipments on the road, agreed to pay the balances unpaid at certain times, in consideration of which payments the car trust agreed to transfer all its interest to defendant. All the several states in which the lessor company was incorporated, except one, provided for the lease of railroads, and the laws of another state provided that the lease should not be binding until

⁴ *St. Louis &c. R. Co. v. Terre Haute R. Co.*, 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. 953.

⁵ *Hill v. Atlantic &c. R. Co.*, 143 N. Car. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606.

⁶ *St. Louis &c. R. Co. v. Terre Haute &c. R. Co.*, 145 U. S. 393, 36 L. ed. 748: "It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of ultra vires has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit." Citing *New Castle North*

Ry. v. Simpson, 21 Fed. Rep. 533; *Auburn Academy v. Strong*, 1 Hopkins Ch. (N. Y.) 278; *Union Bridge Co. v. Troy &c. R. Co.*, 7 Lan. (N. Y.) 240; *Atlantic & Pacific Telegraph Co. v. Union Pacific R. Co.*, 1 McCrary (U. S.) 541, 1 Fed. 745; *Western Union Telegraph Co. v. St. Joseph & Western R. Co.*, 1 McCrary (U. S.) 565. See also, the case of *Hill v. Atlantic &c. R. Co.*, 143 N. Car. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606, in which it is said that the above case "is directly in point and 'on all fours' with the case." It also holds that the lease is not invalidated because it extends beyond the life of the corporation so long as the corporation exists. See also, note in 9 L. R. A. (N. S.) 606 on the subject of laches or acquiescence by a stockholder as affecting his right to complain of an act by which the corporation divests itself of the title or control of its entire property.

at a meeting of the stockholders, called for that purpose, a majority assented thereto, or until the holders of a majority of the stock assented thereto in writing, and a certificate, signed by the president and secretary, was filed. No meeting of defendant's stockholders was called, but a certificate was filed, signed by the president, who owned nearly all of the stock, and, by the secretary, and the road was operated by defendant without any objection from its lessor. It was held, in an action by the car trust on its agreement, that the defendant could not plead *ultra vires* as to the lease.⁷

It has been held that statutes which provide that any railroad may lease, consolidate or merge with any other railroad, do not authorize such lease by the directors against the dissent of a minority of stockholders, so far as to affect the latter's rights. That provision is merely a legislative authorization, a concession on the part of the legislature of the power to do that which could not be done lawfully without such authority.⁸ Nor does an act which provides that railroads incorporated under the laws of the forum and of adjoining states may merge and consolidate their franchises and other property, and also provides for compensation to dissenting stockholders, authorize a lease by one company to another.⁹ Where a railroad company, by contract, express or implied, admits another company into the possession, use, and occupation, jointly with itself, of its depot, yards, yard tracks and other terminal facilities, the relation of landlord and tenant is established between the two companies, and continues, if no term be fixed by contract, so long as such joint possession,

⁷ *Humphreys v. St. Louis & Co.*, 37 Fed. Rep. 307.

⁸ *Mills v. Central Railroad Co.*, 41 N. J. Eq. 1, per Runyon, Ch.: "The legislature did not intend to affect the rights of stockholders inter se, and the act does not do so, either expressly or by implication. It was settled law when the act was passed that after shareholders had entered into a contract among themselves under legislative sanction and expended their money in the execution of the plan mutually agreed upon, the plan could not, even by virtue of the legislative enactment, be

radically changed by the majority alone, and dissentient stockholders be compelled to engage in a new and totally different undertaking because such action would impair the obligation of the dissenting stockholders' contract with their associates and the state. This was declared, by the highest tribunal of the state, to be the law, and to be as well supported by every consideration of justice and right as it was firmly imbedded in judicial decision. *Black v. Del. & Rar. Can. Co.*, 24 N. J. Eq. 455."

⁹ *Mills v. Central Railroad of New Jersey*, 41 N. J. Eq. 1, 2 Atl. 453.

use and occupation may last; and, if no amount of compensation be agreed upon, the law will imply an undertaking to pay such amount as may appear to be fair and reasonable. If, in the arrangement between the two companies, it was contemplated and understood that, as part of the means of enjoyment of the rented premises of some of the landlord's servants and rolling stock, whether continuously or only occasionally, and these were let with the premises in one and the same contract, the compensation for the whole in one gross sum—the realty element being the main consideration, and the other elements only incidental—may be treated as rent, and collected by distress warrant.¹⁰

As already shown, the general rule is that in the absence of express legislative authority a railroad company has no power to lease its franchise or road and property necessary to its operation. This rule is usually based upon public policy, but it is a power that could not well be implied in any event from the mere authority to construct and operate a railroad.¹¹

§ 584. Mortgages generally.—A railroad company may be given power under the statutes to mortgage its railroad, and any subsequent accessions or accretions properly appurtenant thereto, acquired either by itself or by any successor in title, whether the road be then maintained and the property acquired by virtue of the original franchise, or of similar franchises granted by the same state.¹² Where both constitution and the statute declare

¹⁰ *Rome R. Co. v. Chattanooga R. & C. R. Co.*, 94 Ga. 422, 21 S. E. 69. See ante, § 576 et seq. Also, *St. Louis & C. R. Co. v. Terre Haute & C. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953; *Oregon R. & C. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. 409; *Chicago & C. R. Co. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, 79 (citing 2 *Elliott Railroads*, § 429).

¹¹ See *Evansville & C. Ry. Co. v. Evansville & C. Electric Ry. (Ind. App.)*, 98 N. E. 649.

¹² *Compton v. Jessup* (1895), 68 Fed. 263, Taft, J.: "Section 3287 of the Revised Statutes of Ohio, in force at the time of the issuance of the divisional mortgages, permitted railroad companies of Ohio to issue bonds and notes, and to secure them

by a pledge of their property and income. It was held by the Supreme Court of Ohio that the power to mortgage property and income included power to mortgage after-acquired real and personal property. "The pledge is to be all the property and income. The income intended must have been the future income, and was to be produced by property in possession, and to be acquired. If the future product can be conveyed, why not that by which it is credited?" *Coe v. Columbus & C. R. Co.*, 10 Ohio St. 372-393; *Pennock v. Coe*, 23 How. (U. S.) 117, 16 L. ed. 436. We have no doubt that under these two decisions a railroad company authorized by its charter to build and op-

the rolling stock of a railroad company to be personal property, a mortgage by the company on its road and rolling stock executed and recorded as a real estate mortgage, but not executed as required by statute to make it good as a chattel mortgage, is void as to the rolling stock as between the mortgagee and the creditors of the company.¹⁸ A mortgage was made by a railroad

erate a railroad between two named points would have the power to mortgage its road then built, or to be built by itself or by any successor in title to the same railroad, whether exercising the mortgagor's franchises or similar franchises granted by the same sovereign. What is mortgaged is the property, and all accretions to the property possible within the limitations of the then charter; and it does not seem to us material whether the successor in title to the railroad acquired such accretions under the same franchises as those under which the road was first projected and constructed, or under new franchises of the same effect and character. It may be conceded that under the decision of *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357, and other cases, the consolidated corporation acquired its franchises anew from the state, and not from its predecessors in title; but the acquisition of terminal property at Toledo was as much permitted under the franchises enjoyed by the divisional mortgagors as under those under which it was actually acquired, and such terminal property would have been as properly appurtenant to the Ohio Division as to the consolidated line. The right to mortgage after-acquired property is not necessarily dependent on the right to mortgage franchises. There is nothing in the case of *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, or of *Pennock v. Coe*, 23 How. (U. S.) 117, 16 L. ed. 436, to justify such a view. The Supreme Court of Ohio, as we have seen, based its decision that power existed to mortgage after-acquired property on the provision of the statute that property and income might be pledged. Indeed, under the Ohio statute, it is doubtful whether the company had any right to mortgage its franchises. The de-

cision of the Supreme Court of the United States in *Pennock v. Coe*, 23 How. (U. S.) 117, 16 L. ed. 436, does not deal with the question of franchises, and does not make its conclusion in the case depend thereon. We are of opinion, therefore, that an Ohio railway corporation has the power to mortgage its railroad, and any subsequent accessions or accretions properly appurtenant thereto, acquired either by itself or any successor in title, whether the road be then maintained by virtue of the original franchises or the franchises newly acquired from the state." But as already shown, a railroad company has no power to mortgage its franchise, nor, according to the weight of authority, its property essential thereto, unless so empowered by legislative authority. See also, 1 Elliott R. R. (2d ed.), § 488.

¹⁸ *Radebaugh v. Tacoma &c. R. Co.*, 8 Wash. 570, 36 Pac. 461, per Hoyt, J.: "Our statute upon the subject is somewhat peculiar, and from the section which provides as to what property may be the subject of a mortgage, if it stood alone, there would be some reason for holding that the rolling stock of a railroad company was not put upon the same basis as other kinds of personal property. The section referred to is as follows: 'Section 1646. Mortgages may be made upon all kinds of personal property, and upon rolling stock of railroad company, and upon all kinds of machinery, and upon boats and vessels and on growing crops, and on portable mills and such like property.' But when the language therein used is interpreted in the light of the other sections of the chapter in which the section is found, it appears that there could have been but one intent on the part of the legislature, and that was to

company covering property to be afterward acquired by it and was duly recorded. As to all stock acquired by the company after the recording of the mortgage it was held that the lien of the mortgage attached as soon as the rolling stock came into the company's possession within the county where the mortgage was recorded and was superior to the lien of one who had subsequently leased land to the company for purposes of a depot within such county.¹⁴

put the rolling stock of a railroad upon the same footing as other personal property. Such being the intent of the legislature, is there anything in the nature of property or of the transaction covering it with a mortgage which will warrant the court in setting aside such apparent intention? Counsel for appellant argue that there is, and cite the case of *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. ed. 1111, to sustain their contention. This case, having been decided by the highest court in the land, and bearing evidence of careful consideration, is entitled to great weight; and, if the reasoning of the court in that case could be fully applied to this one, we should be content to follow it, and sustain the contention of appellant. In our opinion, however, the reasoning therein can have but little force in determining the question now under consideration. The contention there, that the mortgage which purported to cover the rolling stock was void for the reason that it was not executed and recorded as a chattel mortgage, was founded entirely upon the provision contained in the constitution of the state of Illinois, which declared, as does our own constitution, the rolling stock of railroad companies to be personal property; and the court held that that provision in itself had not so determined the fact that such rolling stock could only be mortgaged as personal property as to prevent the legislature from providing that it might be mortgaged as a part of the franchise and real estate of the corporation, and that a statute which so provided was not void because of such constitutional provision. * * * When the legislation is such as to show clearly

the intent of the legislature, the courts have no right to investigate as to whether or not public policy will be best subserved by a construction of the statute in accordance with such intention. Under the provisions of the New York statute as to mortgages of personal property there were at least as good grounds for contending that they did not apply to mortgages of the rolling stock of a railroad as under our statute, yet it has been uniformly held in the highest court of that state that the fact of the manifest inconvenience and injustice of the application of the provisions of their statute as to chattel mortgages to such rolling stock was not sufficient to warrant the court in sustaining a mortgage upon such property not executed and recorded as provided for in the statute. See *Hoyle v. Plattsburgh R. Co.*, 54 N. Y. 314; *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743. There are cases in other states to the same effect, but, the appellant having cited only the cases above referred to, and that of *Dow v. Memphis & C. R. Co.*, 20 Fed. 260, to sustain the contrary contention, and these cases, in our opinion, not being applicable to the question presented for our decision, we do not deem it necessary to enter into a further investigation of the authorities. It follows that the mortgage of appellant could not be enforced against the rights of the respondents so far as it purported to cover the rolling stock of the railroads."

¹⁴ *Manhattan Trust Co. v. Sioux City Railroad Co.* (1895), 68 Fed. 72, *Shiras, J.*: "The lien of this mortgage, therefore, as between the mortgagor and mortgagee, attached to the rolling stock as soon as the same was

§ 585. **Traffic agreements.**—Whether, as a general proposition, corporations may contract joint obligations, there is no

acquired by the railway company. Thus it is said by the Supreme Court in *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459-481: 'Had there been but one deed of trust, and had that been given before a shovel had been put into the ground toward constructing the railroad, yet it assumed to convey and mortgage the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could be safely given thereon.' *Pennock v. Coe*, 23 How. (U. S.) 117; *Jones on Mortgages*, § 153. Thus it is made clear that the mortgage or trust deed executed to the Manhattan Trust Company became a lien as between the parties thereto, from the date of delivery, upon the property then owned by the railway company, and this lien attached to the after-acquired property as soon as the same passed into the possession of the grantor in the mortgage. The lien claimed on behalf of the Trust Company of North America is based upon a lease executed by the Sioux City Terminal Railroad and Warehouse Company to the Sioux City and Northern Railway Company of the certain premises in Sioux City, Iowa, which were used by the railway company for depot purposes. This lease bears date December 14, 1889, and was acknowledged by both parties thereto on January 21, 1890. It is provided for the payment of a rental of \$90,000 per year, payable quarterly, and it is claimed that, under the provisions of section 3192 of McClain's Code of Iowa, a landlord's lien exists upon the rolling stock of the railway company which was used

on the leased premises, and that such lien is prior to that created by the mortgage. The section in question reads as follows: 'A landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution for the period of one year after a year's rent or the rent of a shorter period claimed falls due; but such lien shall not in any case continue more than six months after the expiration of the term.' Under the provisions of this section of the statute, it is the use of the personal property of the tenant upon the leased premises that creates the lien, and if the property, when such use begins, is then subject to another lien, as of a mortgage duly recorded, the latter is not displaced by, or subordinated to, the lien of the landlord. *Jarchow v. Pickens*, 51 Iowa 381, 1 N. W. 598; *Perry v. Waggoner*, 68 Iowa 403, 27 N. W. 292." As to liens in favor of those making advances for purchase of a railroad, see *Peninsular Iron Co. v. Eells*, 68 Fed. 24, 15 C. C. A. 189. As to the liens of a mortgage after a company has gone into the hands of a receiver, see *Farmers' Loan & Co. v. Northern Pacific R. Co.*, 68 Fed. 36. A contract between a railroad company and an iron company, under which the former furnishes funds for the development of the latter, and transports the ores from its mines, in consideration of which the iron company agrees to give the railroad company all its traffic, is not ultra vires nor against public policy as being in restraint of trade. *Bald Eagle & Co. R. Co. v. Nittany & Co. R. Co.*, 171 Pa. St. 284, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. 807. It would seem that the soundness of this last decision might be questioned. See ante, §§ 576-578, *Contracts Suppressing Competition*, etc. See also, ante, §§ 576-578, *Power to dispose of Franchise or Property*.

doubt of the power of two or more railway companies, whose roads form a continuous line, to enter into a joint arrangement for operating their roads as one line, and to become jointly liable for all money borrowed to be used in furtherance of the business of such continuous line.¹⁵ It has been held that a contract between two railroad companies, whose lines of road are parallel, by which certain naturally tributary territory is preserved to each, within which it shall prosecute the work of extending its branch lines without interference with or from the other, is designed to pre-

¹⁵ *Chicago &c. R. Co. v. Ayres*, 140 Ill. 644. In *North Side R. Co. v. Worthington* (Texas 1895), 30 S. W. 1055, *Gaines, C. J.*, said: "A railroad company may establish and maintain refreshment houses along its line for the accommodation of its passengers. *Flanagan v. Great Western R. Co.*, L. R. 7 Eq. 116. Such establishments are not unusual, are strictly subordinate to the main purpose for which such companies are created, and tend immediately to increase their traffic. So it has been held that a railroad corporation has the power to contract with the owner of a steam vessel to maintain a through traffic, and carry beyond its line and that it can recover of the owner of such vessel damages to goods resulting from its unseaworthiness, for which the company had had to pay. *South Wales R. Co. v. Redmond*, 10 C. B. (N. S.) 675. It is now generally recognized that a railway company may contract to carry beyond its line, and it would seem to follow that a reasonable traffic arrangement with another carrier for through transportation is legitimate. On the other hand, in *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, the performance of a contract by which the company sought to establish a line of steamships between a terminus of one of its branches and a foreign port, and by which it attempted to guarantee a dividend on the venture, was enjoined. * * *

"As illustrative of the principle which we have announced, we call attention to some cases in addition to those already cited. In *Davis v. Old Colony R. Co.*, 131 Mass. 258, it is held that it is beyond the powers

of a railway company, or of a corporation organized under the General Statutes of Massachusetts for the manufacture and sale of musical instruments, to guarantee the payment of the expenses of a musical festival. The opinion in that case is by Chief Justice Gray, and is a very able and exhaustive discussion of the question. In *Pearce v. Madison &c. R. Co.*, 21 How. (U. S.) 441, it was held that two railroad companies which had consolidated were not authorized to establish a steamboat line to run in connection with their railroads. In *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, it was decided that a railway company was not authorized by its charter to maintain a canal. In *Tomkinson v. South Eastern R. Co.*, L. R. 35 Ch. Div. 675, it was held that a proposed subscription by the company to an institution known as the 'Imperial Institute' was not prevented from being ultra vires by the fact that the establishment of the institute might benefit the company by causing an increase of passenger traffic over their line. To these cases others might be added, but they are sufficient to illustrate the doctrine that a corporation created for the purpose of carrying on a business, under a statute which merely states the nature of the business, and does not further define its powers, may exercise such powers as reasonably necessary to accomplish the purpose of its creation, and it may be such as are usually incidental in practice to the prosecution of the business, and no more. See *Che-wacla Lime Works v. Dismukes*, 87 Ala. 344, 6 So. 122; *Searight v. Payne*, 6 Lea (Tenn.) 283."

vent an unprofitable war of construction, and is not contrary to public policy, and the interstate commerce act, prohibiting railroad companies from entering into agreements for pooling freights or dividing their earnings, does not invalidate such contract, although it may prevent certain pooling provisions therein from being operative.¹⁶ When a railroad company is organized under a statute which gives it no authority to transfer its franchises, except by sale and conveyance or lease made in accordance with the statutes relating to the transfer of titles to such property, and the trustees, by a so-called "traffic agreement", in effect transfer to another railroad company the entire control and management of the property, for practically the legal lifetime of the corporation, without the consent of the minority stockholders such contract is illegal and void.¹⁷ Where a controlling interest in the stock of a railway company was purchased by another railway company, which thereby secured the election of the board of trustees, consisting of its own officers and employes, who owned no stock in their own right, and this board then executed an illegal traffic agreement, whereby the entire control of the franchises and property of the former company was surrendered to the latter, it was held that the minority stockholders in the former company could maintain a bill to annul the contract without first applying to the board of trustees for protection.¹⁸ The breach of a contract between two railroad companies, by which they agree to establish a dispatch freight line, may be enjoined, although a contract could not be specifically enforced. And where one of two railroad companies had agreed to work the other's line and carry over it certain specified traffic, it was enjoined from making a wrongful diversion of such traffic.¹⁹

It thus appears that a railroad company has the right to enter into a traffic agreement which is in violation of no positive rule of law and not in contravention of public policy.²⁰ Indeed, if it

¹⁶ *Ives v. Smith*, 55 Hun (N. Y.) 606, 28 N. Y. St. 917, 8 N. Y. S. 46.

¹⁷ *Earle v. Seattle &c. R. Co.*, 56 Fed. 909.

¹⁸ *Earle v. Seattle &c. R. Co.*, 56 Fed. 909.

¹⁹ *Beach on Injunctions*, § 446, citing *Chicago & Alton R. Co. v. New*

York &c. R. Co., 24 Fed. 516. See also, *Wolverhampton &c. R. Co. v. London &c. R. Co.*, L. R. 16 Eq. 433; *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. 423; *Singer Sewing &c. Co. v. Union Button-Hole &c. Co.*, 1 Holmes (U. S.) 253.

²⁰ See *Kinner v. Lake Shore &c. R.*

is judicious to do so and of public benefit to have joint traffic arrangements in any given case it would seem that such arrangement may be compelled by statute.²¹ Statutes authorizing railroad companies to establish a tariff of joint through rates, a copy of which must be filed with the commissioners, have been held not to empower such commissioners to establish joint through rates. Under a remedial statute authorizing commissioners to establish joint through rates, and providing that they shall be governed therein by the former act, which requires notice in the fixing of rates, a joint through rate, adopted without notice, is void. A rate fixed as to shipments passing over two or more roads is a joint rate, although the form of order provides what each road shall receive for the service.²² Such agree-

Co., 69 Ohio St. 339, 69 N. E. 614. See also, to the effect that proper traffic arrangements may be made with other companies, *Wheeler v. San Francisco &c. R. Co.*, 31 Cal. 46, 89 Am. Dec. 147; *Georgia &c. R. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315 (citing 1 Elliott R. R., § 42); *Miller v. Green Bay &c. R. Co.*, 59 Minn. 169, 60 N. W. 1006, 26 L. R. A. 443; *Manchester &c. R. Co. v. Concord &c. R. Co.*, 66 N. H. 100, 20 Atl. 383, 49 Am. St. 582.

²¹ *State v. Minneapolis &c. R. Co.*, 80 Minn. 191, 83 N. W. 60, 89 Am. St. 514n.

²² *State v. Chicago &c. R. Co.*, 90 Iowa 594, 58 N. W. 1060, per Kinne, J.: "A rate fixed to govern two or more roads, as to a shipment which passes over all of them, while in one sense a separate rate as to each, in that it fixes the rate at a certain per cent. of what each might charge for a like shipment for the same distance wholly over its own line, is nevertheless, in legal effect, a joint rate, and must be treated as such. It is said in *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98: 'And it is equally plain that the joint rates of charges cover all the charges for the transportation over two or more roads, as though they constituted one road, the rates fixed determining the whole charges. It is also plain that these joint rates consist of the separate rates of each separate road.' Now, the rate fixed by the schedule

in question was for a through shipment over two or more lines of road. That the form of the order provided that each road constituting the one line should only charge 80 per cent. of a certain other rate for the same kind of traffic did not make the rate any the less a joint rate, because the rate and schedule in question applied only to through joint shipments; and a rate applicable only to a continuous shipment over two or more lines of road must, of necessity, be a joint rate, no matter what the form or phraseology of the order fixing it may be. Any other holding would result in authorizing the railroad commissioners to establish, promulgate, and have in effect, at the same time, and applicable to the same road, two different schedules of rates for the same identical service. Suppose two or more railroad companies mutually agreed that, for all through shipments over their respective lines each company should have, as its proportion of the entire charge, 80 per cent. of what it might lawfully charge for a like shipment for the same distance wholly over its own line. Could there be any question that a shipment made over such lines, and under such circumstances, would be a joint through shipment, and the rate a joint through rate, regardless of the plan by which division between the several roads of the entire sum to be charged should be made? The law expressly provides for just

ments are not necessarily binding on a subsequent purchaser of the road. Thus where the plaintiff made an agreement with a railroad company, whereby, in consideration of the grant by him of a certain right of way upon which to build certain spur tracks, and the exclusive use of a track belonging to him in connection therewith, he was to receive special rates, and thereafter a mortgage on the railroad antedating plaintiff's contract was foreclosed, and the decree provided that the purchasers of the railroad might disclaim the agreement, which they did, and their disclaimer was approved by the court, it was held that defendant, claiming through the purchasers, was not bound by the agreement.²³

§ 586. **Right to engage in a collateral business.**—Should a railroad attempt to engage in a collateral business, such business will usually be considered as *ultra vires*. Thus it has been held *ultra vires* for a railroad company to maintain a grain elevator.²⁴ Nor does it have the right to absorb the coal business, along its route.²⁵ It would also seem by the weight of authority that contracts for the use of a railroad's cars for advertising purposes are *ultra vires*. The business of advertising has no connection with the right to operate a railroad.²⁶

§ 587. **When a carrier may refuse to perform its public duty.**—A public service corporation such as a carrier will be excused from the performance of its public duty when in so doing

such agreements. Then why is such a rate, if made by the commissioners, any the less a joint rate than it would have been if entered into voluntarily by the interested companies?"

²³ *Chicago & E. R. Co. v. Towle*, 10 Ind. App. 540, 37 N. E. 358.

²⁴ *People v. Illinois Central R. Co.*, 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. 181. See also, *Colman v. Eastern Counties R. Co.*, 10 Beav. 1; *Attorney-General v. Great Northern R. Co.*, 1 Dr. & Sm. 154; *Munt v. Shrewsbury & Chester R. Co.*, 13 Beav. 1; *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *Northwestern Union Packet Co. v.*

Shaw, 37 Wis. 655, 19 Am. Rep. 781. See, however, *Danville &c. R. Co. v. Lybrook*, 111 Va. 623, 69 S. E. 1066, Ann. Cas. 1912B, 175.

²⁵ *Attorney-General v. Great Northern R. Co.*, 29 N. J. Eq. 794.

²⁶ *Fifth Ave. Coach Co. v. New York*, 58 Misc. (N. Y.) 401, 111 N. Y. S. 759; *Pittsburg &c. Tract. Co. v. Seidell*, 6 Pa. Dist. 414; *National Car Adv. Co. v. Louisville & N. R. Co.*, 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010n. See, however, *Burns v. St. Paul City R. Co.*, 101 Minn. 363, 112 N. W. 412, 12 L. R. A. (N. S.) 757n; *New York v. Interborough Rapid &c. Co.*, 53 Misc. (N. Y.) 126, 104 N. Y. S. 157. See post, ch. 23.

it complies with governmental authority. Thus, military necessity may justify an order requiring a steamship line to tie up its boats and refuse further freight,²⁷ or it may refuse to accept food stuffs for shipment unless accompanied with a transit permit from the military authorities.²⁸

§ 588. *Ultra vires contracts*—Street railway companies.

—A street railway company acquires a right in the street by its license to occupy, which, it has been held, may be sold or transferred.²⁹ It is the property of the company which, it is held may be mortgaged.³⁰ A sale upon a decree of foreclosure of an authorized mortgage will vest the franchise in the purchaser.³¹ This must be distinguished, however, from a sale of its franchise of being a corporation. As a general rule, a railroad company cannot voluntarily and without legislative authority sell or mortgage its franchise of being a corporation and operating and maintaining a railroad.³² Nor can a street railway com-

²⁷ See *Palmer v. Lorillard*, 16 Johns. (N. Y.) 348.

²⁸ *Illinois Central R. Co. v. Phelps*, 4 Ill. App. 238, 94 Ill. 548.

²⁹ *Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252; *Detroit Citizens' St. R. Co. v. Detroit*, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667. See also, *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334; *Bardstown &c. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541. But compare *Clemens Elec. Mfg. Co. v. Walton*, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820; *Braslin v. Somerville &c. R. Co.*, 145 Mass. 64, 13 N. E. 65; *State v. Bridgeton &c. Co.*, 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

³⁰ *Sixth Avenue R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536. Compare *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

³¹ In the case of *New Orleans &c. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 245, 5 Sup. Ct. 1009, it was held that: "When there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the rail-

road passed to the purchasers." In another case it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchaser at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road." *Memphis &c. R. Co. v. Railroad Comrs.*, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. 299. See also, *Bardstown &c. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; *People v. Brooklyn F. & C. I. R. Co.*, 89 N. Y. 75; *Brooklyn Central R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357. Compare *Abbott v. Johnstown &c. R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572.

³² *Fietsam v. Hay*, 122 Ill. 293, 13 N. E. 501, 3 Am. St. 492; *Rollins v. Clay*, 33 Maine 132; *Commonwealth v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Black v. Delaware &c. Co.*, 22 N. J. Eq. 130; *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co. v. Ore-*

pany, whose franchise authorizes it to operate cars and transport passengers within the streets of a city, confer its privileges upon an interurban railroad which has no authority to enter the city, by contracting with such interurban railroad to transport its cars through the city streets. The interurban company must seek and obtain a license from the city subject to the reasonable rules and regulations imposed upon it by the municipality.³³ And a sale of a street railway and its assets, fraudulent as to a minority stockholder, is void or at least may be avoided.³⁴ The liability of a street railway company to repave a street is measured by statutory enactment in the absence of any contract with the municipality.³⁵ The city may contract with the street railway company and bind itself by an agreement to repair and repave between the tracks³⁶ or to construct a foundation for the tracks³⁷ and such contracts are not ultra vires the municipality. On the other hand, a street railway company has no power or authority to enter into an agreement with abutting property owners to pave the street through which its tracks run when the city council is vested with exclusive power to make such improvements.³⁸ Advertising contracts have also been held ultra vires the street railway company.³⁹ A street railway company, after it has accepted and acted upon its

gonian R. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409. See also, ante, § 576. Attempt to Transfer Franchises. See also, ante, § 547, in chapter on Private Corporations entitled Power to Hold and Convey Personal or Real Property.

³³ *Aurora v. Elgin & C. Tract. Co.*, 227 Ill. 485, 81 N. E. 544, 118 Am. St. 284.

³⁴ *Mulverhill v. Vicksburg R. Power & Mfg. Co.*, 88 Miss. 689, 40 So. 647. But a stockholder who seeks to enjoin a street railway company from carrying out a lease and to have it set aside has been held unable to maintain an action on his own behalf where his objection is that the lease is ultra vires when it does not appear that it is either malum prohibitum or malum in se and where he has acquired and accepted pecuniary benefits thereunder. *Wormser v. Metropolitan Street R. Co.*, 184 N. Y. 83, 76 N. E. 1036, 112 Am. St.

596, affg. 98 App. Div. (N. Y.) 29, 90 N. Y. S. 714.

³⁵ *Mayor of New York v. Bleecker St. & F. F. R. Co.*, 130 App. Div. (N. Y.) 830, 115 N. Y. S. 592.

³⁶ *Detroit v. Detroit United Railway Co.*, 133 Mich. 608, 95 N. W. 736, 1 Street Railway Rep. 368.

³⁷ *Detroit v. Detroit United Ry. Co.*, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. 600, 1 Street Railway Rep. 372.

³⁸ *Farson v. Fogg*, 205 Ill. 326, 68 N. E. 755, 2 Street Railway Rep. 87.

³⁹ *Fifth Ave. Coach Co. v. New York*, 58 Misc. (N. Y.) 401, 111 N. Y. S. 759; *Pittsburg & C. Tract. Co. v. Seidell*, 6 Pa. Dist. 414. See, however, *Burns v. St. Paul City R. Co.*, 101 Minn. 363, 112 N. W. 412, 12 L. R. A. (N. S.) 757n; *New York v. Interborough Rapid Transit Co.*, 53 Misc. (N. Y.) 126, 104 N. Y. S. 157. See also, ante, § 578.

franchise, cannot defend that it was *ultra vires* the municipal council when resisting a suit for the enforcement of restrictions therein contained.⁴⁰

§ 589. *Ultra vires* contracts—Gas and water companies.—

It has been held that a gas company has implied power to contract debts, borrow money and give the customary evidences of debt and the customary securities therefor.⁴¹ But the same general rule which governs the power of public service corporations generally to contract is applicable to gas and water companies. They cannot bind themselves by contracts which would prevent them from performing the duty which they owe the public generally.⁴² It is the duty of such a corporation to supply gas or water to all applicants at reasonable rates fairly and without discrimination.⁴³ It has been held that a gas company could not refuse to furnish gas to an assignee for the benefit of creditors, who was temporarily continuing the assignor's business for the benefit of creditors, notwithstanding the assignor's bill for gas furnished remained unpaid.⁴⁴

§ 590. Illustrative cases of application of doctrine to telegraph and telephone companies.—Some cases treat telegraph⁴⁵ and telephone companies⁴⁶ as common carriers. It would

⁴⁰ *Rutherford v. Hudson River Tract. Co.*, 73 N. J. L. 227, 63 Atl. 84, 4 Street Railway Rep. 719.

⁴¹ *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588, 26 Ky. L. 401, 81 S. W. 927, 111 Am. St. 302. See also, *Sammons v. Kearney Power & Co.*, 77 Nebr. 580, 110 N. W. 308, 8 L. R. A. (N. S.) 404n.

⁴² *Chicago Gas Light & Co. v. People's Gas Light & Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; *Sammons v. Kearney Power & Co.*, 77 Nebr. 580, 110 N. W. 308, 8 L. R. A. (N. S.) 404n. In the above case the contract contained the clause for which the water company agreed not to sell water for power to any person or corporation who intended to compete with the other party in the generation of electricity. This clause was held illegal and void.

⁴³ *Robbins v. Bangor R. & Electric Co.*, 100 Maine 496, 62 Atl. 136, 1 L.

R. A. (N. S.) 963. See also, cases cited in preceding note. See also, in connection with this subject, *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731. See, however, *State v. Birmingham & Co.*, 164 Ala. 586, 51 So. 354, 137 Am. St. 69.

⁴⁴ *Cox v. Malden & Co. Gas Light Co.*, 199 Mass. 324, 85 N. E. 180, 127 Am. St. 503. See also, *Phelan v. Boone Gas Co.*, 147 Iowa 626, 125 N. W. 208, 31 L. R. A. (N. S.) 319n.

⁴⁵ *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300, 81 S. W. 1052. See also, *Western Union Tel. Co. v. Call Pub. Co.*, 44 Nebr. 326, 62 N. W. 506, 48 Am. St. 729, 27 L. R. A. 622.

⁴⁶ *Mooreland Rural Telephone Co. v. Mouch* (Ind. App.), 96 N. E. 193; *McDaniel v. Faubush Telephone*

seem that such decisions have adopted a rather artificial classification in order to impose upon such companies the liabilities of a public service corporation. Courts rendering such decisions seem to have mistaken a species for the genus. Carriers and telegraph and telephone companies all belong to a group of corporations that are bound to serve the public impartially and in good faith.⁴⁷ This is true regardless of the purpose which may have prompted the incorporators to action. Thus, it has been held that in case a railroad company is authorized to construct, in connection with its road, a telegraph line, it cannot, in the absence of legislative authority, divest itself of the public duty thus incurred by transferring the right to construct such telegraph to another, and any contract whereby it attempts so to do is ultra vires and void.⁴⁸ It has been held, however, that a telegraph or telephone company may, by legislative authority, be empowered to alienate its franchise⁴⁹ and that a telegraph company might lease its wires and property for a reasonable length of time.⁵⁰ It has also been held that an agreement entered into between two telegraph companies to divide earnings and expenses is not ultra vires nor against public policy.⁵¹

"The law relating to the receiving and forwarding of telegraphic messages to connecting lines is so nearly analogous to that in regard to common carriers that the established rules of law that govern the liability of the common carrier apply with equal force to telegraph companies. Each can restrict its liability to its own line, but each must receive and forward with diligence to the

Co., 32 Ky. L. 572, 106 S. W. 825; *Gwynn v. Citizens' Tel. Co.*, 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. 819.

⁴⁷ See, generally, *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. 126; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 50 Am. St. 917; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715n. The preceding cases state the distinction that exists between telegraph and telephone companies and carriers.

⁴⁸ *Central Branch Union Pac. R. Co. v. Western Union Tel. Co.*, 3 Fed. 417, 1 McCrary (U. S.) 551; *Western Union Tel. Co. v. Union*

Pac. R. Co., 3 Fed. 1; *Atlantic & C. Tel. Co. v. Union Pac. R. Co.*, 1 Fed. 745, 1 McCrary (U. S.) 541. Compare *Western Union Tel. Co. v. Kansas Pac. R. Co.*, 4 Fed. 284; *Western Union Tel. Co. v. St. Joseph & C. R. Co.*, 3 Fed. 430; *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. 423.

⁴⁹ *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520.

⁵⁰ *Western Union Tel. Co. v. Baltimore & C. R. Co.*, 69 Md. 211, 14 Atl. 531; *Philadelphia v. Western Union Tel. Co.*, 11 Phila. (Pa.) 327, 33 Leg. Int. (Pa.) 129.

⁵¹ *Benedict v. Western Union Tel. Co.*, 9 Abb. New Cas. (N. Y.) 314.

connecting line, and each will be held liable for its failure or refusal to perform that duty.”⁵² A telegraph company has no right to refuse to accept or send a telegram complaining of the operator.⁵³ Nor can it refuse a telegram which will be unprofitable for it to handle,⁵⁴ or one which has attached to it a notice of probable damage in case the company is negligent in its transmission or delivery.⁵⁵ Nor can it refuse to transmit a telegram which it considers unwise or useless to send.⁵⁶

The same principles apply to a telephone company. It cannot refuse an applicant service who also uses another system.⁵⁷ Nor can it discriminate between applicants and patrons and charge new subscribers a higher rate than its old subscribers.⁵⁸ A telegraph company is not, however, required to send every message presented for transmission. It “should refuse to send libelous or obscene messages, or those which clearly indicate the furtherance of an illegal act or the perpetration of some crime.”⁵⁹ A telephone company cannot be required to install a telephone when it might thereby render itself liable for aiding and abetting a violation of the law.⁶⁰ The use of improper language may also warrant the discontinuance of telephone service.⁶¹ A tele-

⁵² *Western Union Tel. Co. v. Simmons* (Tex. Civ. App.), 93 S. W. 686.

⁵³ *Western Union Tel. Co. v. Lillard*, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836n.

⁵⁴ *Western Union Tel. Co. v. Matthews*, 24 Ky. L. 3, 67 S. W. 849.

⁵⁵ *Vermilye v. Postal Tel.-Cable Co.*, 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472.

⁵⁶ *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. 148; *Cordell v. Western Union Tel. Co.*, 149 N. Car. 402, 63 S. E. 71.

⁵⁷ *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. 870.

⁵⁸ *Bradford v. Citizens' Tel. Co.*, 161 Mich. 385, 126 N. W. 444, 137 Am. St. 513. It may, however, give preachers and charitable institutions a lower rate than that given the ordinary customer, on the theory that the public is benefited thereby. *New York Tel. Co. v. Siegel-Cooper Co.*,

202 N. Y. 502, 96 N. E. 109.

⁵⁹ *Gray v. Western Union Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. 259. See also, *Dominion Tel. Co. v. Silver*, 10 Can. Sup. Ct. 238; *Archambault v. Great Northwestern Tel. Co.*, 14 Quebec 8; *Cullen v. N. Y. Tel. Co.*, 106 App. Div. (N. Y.) 250, 94 N. Y. S. 290. As to the care the company is required to exercise to ascertain whether or not the message is authorized, see *Western Union Tel. Co. v. Totten*, 141 Fed. 533, 72 C. C. A. 591; *Bank of Havlock v. Western Union Tel. Co.*, 141 Fed. 522, 52 C. C. A. 580, 4 L. R. A. (N. S.) 181n; *Wells v. Western Union Tel. Co.*, 144 Iowa 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045 and note, 138 Am. St. 317.

⁶⁰ *Cullen v. New York Tel. Co.*, 106 App. Div. (N. Y.) 250, 94 N. Y. S. 290.

⁶¹ *Huffman v. Marcy & Co. Tel. Co.* (Iowa), 121 N. W. 1033, 23 L. R. A. (N. S.) 1010. In this case, however, it was held that the circumstances

phone company's contract for exclusive service has been held void as against public policy, and unenforcible.⁶² It has also been held that a telephone company cannot refuse service in order to coerce payment for past services.⁶³ But there is nothing which requires a telephone company to furnish its service to one who will not pay therefor, and regulations which provide that service will be denied to a patron in default are usually upheld.⁶⁴

did not warrant the removal of the telephone. *Pugh v. City &c. Tel. Assn.*, 8 Ohio Dec. (Reprint) 644.

⁶² *Central &c. Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494. See also, *Home Tel. Co. v. Granby &c. Tel. Co.* (Mo.), 126 S. W. 773.

⁶³ *Danaher v. Southeastern Tel. Co.* (Ark.), 127 S. W. 963, 30 L. R. A. (N. S.) 1027; *Cumberland Tel. &c. Co. v. Hobart*, 89 Miss. 252, 42 So. 349, 119 Am. St. 702. The above case holds that the husband could not be refused service because his wife had failed to pay her bill. *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684; *State v. Nebraska Tel. Co.*, 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; *Southwestern Tel. &c. Co. v. Lockett* (Tex. Civ. App.), 127 S. W. 856.

⁶⁴ *Rushville Co-op. Tel. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327; *Irvin v. Rushville Co-op. Tel. Co.*, 161 Ind. 524, 69 N. E. 258; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Malochee v. Great Southern Tel. &c. Co.*, 49 La. Ann. 1690, 22 So. 922; *Cumberland Tel. &c. Co. v. Hobart*, 89 Miss. 252, 42 So. 349, 119 Am. St. 702; *Magruder v. Cumberland Tel. &c. Co.*, 92 Miss. 716, 46 So. 404, 16 L. R. A. (N. S.) 560; *Cumberland Tel. &c. Co. v. Baker*, 85 Miss. 486, 37 So. 1012; *Buffalo County Tel. Co. v. Turner*, 82 Nebr. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693n, 130 Am. St. 699. It may require a given customer to pay in advance. *Vaught v. East Tenn. Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315, and note.

CHAPTER XX.

MUNICIPAL AND OTHER PUBLIC CORPORATIONS.

- | | |
|---|---|
| <p>§ 600. Introductory.</p> <p>601. Powers of municipal or other public corporation.</p> <p>602. Municipal contracts—By whom made—Extent of power—Parties chargeable with notice.</p> <p>603. Contracts extending beyond term of board.</p> <p>604. What are municipal contracts.</p> <p>605. Municipal contracts—Implied contracts.</p> <p>606. When no implied liability arises.</p> <p>607. Validity of contract generally.</p> <p>608. Validity of contract generally—Examples of valid contracts.</p> <p>609. Validity of contract generally—Examples of invalid contracts.</p> <p>610. Leasing public property for private purposes.</p> <p>611. Leasing public property for private purposes—Enforcement of contract.</p> <p>612. Ratification.</p> <p>613. Rescission.</p> <p>614. Ultra vires.</p> <p>615. Estoppel.</p> <p>616. The borrowing of money and the issuance of negotiable papers.</p> <p>617. No right of action on void bonds.</p> <p>618. Defenses available against bona fide holders.</p> | <p>§ 619. Bona fide holder—Bond containing no recitals.</p> <p>620. Limitation of indebtedness—Limitation on power to create municipal indebtedness.</p> <p>621. Indebtedness depending on popular vote.</p> <p>622. Indebtedness limited by a per cent. of valuation.</p> <p>623. Preliminary provisions for a sinking fund.</p> <p>624. Aggregate indebtedness—How determined—Refunding and sinking fund bonds.</p> <p>625. Indebtedness payable annually or monthly.</p> <p>626. Valid indebtedness only included.</p> <p>627. Includes implied as well as express liability.</p> <p>628. Current expense not included.</p> <p>629. Debts payable out of special fund—Special assessment—Optional debts.</p> <p>630. Diverted money—License money—Miscellaneous.</p> <p>631. Evasion of constitutional limitations.</p> <p>632. Indebtedness in excess of limit not a defense when.</p> <p>633. Construction of constitutional provisions.</p> <p>634. Special statutory provisions.</p> <p>635. Other special provisions.</p> <p>636. Indebtedness for water and lights.</p> <p>637. Effect of exceeding the limit.</p> |
|---|---|

§ 600. **Introductory.**—The general title of this chapter, namely, municipal and other public corporations, is broad enough to include a county¹ or a school² or drainage district,³ or other

¹ Central &c. Co. v. Wright, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. 80. Kendall School Dist., 121 Pa. St. 543, 15 Atl. 812.

² Curry v. District Tp., 62 Iowa 102, ³ People v. Spring Lake Drainage &c. Dist., 253 Ill. 479, 97 N. E. 1042.

governmental subdivision.⁴ Public corporations may be subdivided into municipal corporations and public quasi corporations. Municipal corporations embrace incorporated cities, villages and towns, which are full fledged corporations with all the powers, duties and liabilities incident to such a status, such as local government, including the power to make local laws, while public quasi corporations such as counties, school districts and the like have limited powers of government or administration and do not have the right to enact local laws.⁵ A municipal corporation is generally asked for, or at least assented to, by the people it embraces, while a public quasi corporation is superimposed by sovereign and paramount authority.⁶

⁴ A public corporation is founded for public purposes and generally has for its object the government of a portion of the state, and is therefore endowed with a portion of political powers. Towns, cities and boroughs are familiar examples of this kind of corporations. *Rhodes v. Love*, 153 N. Car. 468, 69 S. E. 436. See also, *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 979, 19 Sup. Ct. 383. "The term 'municipal corporation' implies the organization of a certain geographical district under authority of law, and that it includes within its jurisdiction and control a certain geographical area." *Short v. Gouger* (Tex. Civ. App.), 130 S. W. 267.

⁵ *People v. Spring Lake Drainage &c. District*, 253 Ill. 749, 97 N. E. 1042; *Schweiss v. Court*, 23 Nev. 226, 45 Pac. 289, 34 L. R. A. 602. See also, *Askew v. Hale*, 54 Ala. 641, 25 Am. Rep. 730; *Valverde v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. 208; *People v. School Trustees*, 78 Ill. 136; *Freeland v. Stillman*, 49 Kans. 197, 30 Pac. 235; *Fry v. County of Albemarle*, 86 Va. 195, 19 Am. St. 879. The above classification is one of convenience. Townships, school districts and the like are, in fact, but territorial sections of counties, upon which for appropriate purposes, power is conferred to perform functions of government of local application and interest. *Wittkowsky v. Jackson*

County, 150 N. Car. 90, 63 S. E. 275. See also, as instances of the latter, *Askew v. Hale*, 54 Ala. 639, 25 Am. Rep. 730; *Pulaski County v. Reeve*, 42 Ark. 54; *Adams v. Wiscasset Bank*, 1 Maine 361; *Talbot County v. Queen Anne's County*, 50 Md. 245; *Fourth School District v. Wood*, 13 Mass. 193; *Mower v. Leicester*, 9 Mass. 247, 6 L. R. A. 63; *Damon v. Granby*, 2 Pick. (Mass.) 345; *Riddle v. Proprietors &c.*, 7 Mass. 169, 5 Am. Dec. 35n; *Rouse v. Moore*, 18 Johns. (N. Y.) 407; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Hamilton County v. Mighels*, 7 Ohio St. 109. It must be borne in mind that public quasi-corporations and quasi-public corporations are entirely distinct classes, the former being represented as we have said, by townships, counties and other governmental subdivisions of the state, the latter being represented by corporations, the property of which is devoted to a use in which the public has an interest, such as railroads, grain elevators, telegraph companies, and similar corporations. See, ante, ch. 19, *Public Service Corporations*.

⁶ *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479; *People v. Harvey*, 142 Ill. 573, 32 N. E. 295; *Phillips v. Scale Mound*, 195 Ill. 353, 63 N. E. 180; *Hamilton County v. Mighels*, 7 Ohio St. 109. See also, cases cited ante, note 5.

§ 601. Powers of municipal or other public corporations.

—Municipal corporations, while having a twofold aspect as instrumentalities of state government and local self government, are mere instrumentalities of the state for the more convenient administration of local government and their powers are not only such as the legislature may confer, but may also, at least as to those granted as an agency of the state for public purposes, be enlarged, abridged or entirely withdrawn at its pleasure.⁷ Briefly stated, the powers of a municipal corporation are those granted in express words by its charter or the general statute under which it is incorporated; the powers necessarily or fairly implied in or incident to the powers thus expressly granted; and those powers essential to the declared purpose of the corporation and which are not only convenient but indispensable to the execution of this declared purpose.⁸ It thus is made to appear that the powers of

⁷ *Allen v. Board &c. of Bakersfield*, 157 Cal. 720, 109 Pac. 486; *People v. Niebrugge*, 244 Ill. 82, 91 N. E. 115; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. 82; *Mix v. Nez Perce County*, 18 Idaho 695, 112 Pac. 215, 32 L. R. A. (N. S.) 534; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440. "A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the legislature in making provision for the wants and welfare of the public within the territory for which it was organized, and it is for the legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the constitution has imposed upon itself." *Chico H. S. Board v. Supervisors*, 118 Cal. 120, 50 Pac. 275. This is true as to counties and their government. *Santa Monica v. Los Angeles County (Cal.)*, 115 Pac. 945. Thus a local option law, general in its application, which is declarative of a state policy, divests a municipality of its powers to license and regulate the sale of intoxicating liquors. *Minnehaha County v. Champion*, 5 Dakota 433, 41 N. W. 754; *Turner v. Forsyth*, 78 Ga. 683, 3 S. E. 649; *Mix v. County Commrs.*, 18

Idaho 695, 112 Pac. 215, 32 L. R. A. (N. S.) 534; *Garrett v. Aby*, 47 La. Ann. 618, 17 So. 238; *Ex parte Elliott*, 49 Tex. Cr. 108, 91 S. W. 570; *Fox v. State*, 53 Tex. Cr. 150, 109 S. W. 370. But such laws do not effect any material change in the existing municipal charters which authorize the licensing, or permit the prohibition of the sale of intoxicating liquors in any incorporated town or city until its provisions were made specially applicable to a particular locality by a majority vote of the electors thereunder in favor of prohibition. *Sandys v. Williams*, 46 Ore. 327, 80 Pac. 642; *Renshaw v. Lane County Court*, 49 Ore. 526, 89 Pac. 147.

⁸ *Eufaula v. McNab*, 67 Ala. 588, 42 Am. Rep. 718; *Long Beach v. Boynton*, 17 Cal. App. 290, 119 Pac. 677; *Arcata v. Green*, 156 Cal. 759, 106 Pac. 86; *Kelly v. Milan*, 21 Fed. 842; *Cook County v. McCrea*, 93 Ill. 236; *Delphi v. Hamlin*, 172 Ind. 645, 89 N. E. 308; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201; *Richmond v. McGirr*, 78 Ind. 192; *Henke v. McCord*, 55 Iowa 378, 7 N. W. 623; *Parish of Ouachita v. Monroe*, 42 La. Ann. 782, 7 So. 717; *Somerville v. Dickerman*, 127 Mass. 272; *Peters v. St. Louis*, 226 Mo. 62, 125 S. W.

a municipal corporation are either express or implied. It possesses not only the powers specifically conferred upon it by its charter, but also such as are necessarily incident to or may fairly be implied from those powers, including all that are essential to the declared object of its existence.⁹ The implied power resident in a municipal corporation is the power necessarily incident to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise.¹⁰ Only such powers and rights can be exercised under municipal charters as are clearly comprehended within their words or derived therefrom by neces-

1134; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278n, 9 Am. St. 370; *State v. Swift*, 11 Nev. 128; *Smith v. Newbern*, 70 N. Car. 14, 16 Am. Rep. 766; *Stern v. Fargo*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665n; *In re Jones*, 4 Okla. Cr. 74, 109 Pac. 570, 140 Am. St. 570; *Naylor v. McCulloch*, 54 Ore. 305, 103 Pac. 68; *Portland v. Schmidt*, 13 Ore. 17, 6 Pac. 221; *Blake v. Walker*, 23 S. Car. 517; *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143; *Danville v. Shelton*, 76 Va. 325; *Bluefield Waterworks & Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Gilman v. Milwaukee*, 61 Wis. 588, 21 N. W. 640. The court in *Los Angeles & Co. v. Los Angeles*, 88 Fed. 720, states the doctrine of the text as follows: 'The general proposition is that "a municipal corporation possesses and can exercise the following powers, and no others: First, Those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied." To the same effect are, *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682; *Joplin v. Leckie*, 78 Mo. App. 8. Doubt-

ful claims to power are resolved against the corporation. *Pittsburg & Co. R. Co. v. Anderson (Ind.)*, 95 N. E. 363.

⁹ *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178n, 19 Am. St. 490; *Warner v. Berks County*, 38 Pa. Super. Ct. 437. "The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation, unless it is cognate to the purpose for which the corporation was created." *Blades v. Hawkins (Mo.)*, 112 S. W. 979. "A municipal corporation possesses no power not derived from its charter, therefore the general terms 'full powers of self-government' and 'all powers of municipal government not prohibited by this charter,' add nothing to the terms of the charter. We still must look to the charter for the authority to sustain an act done by the corporation." *Southwestern Tel. & T. Co. v. Dallas (Tex.)*, 134 S. W. 321.

¹⁰ *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. 319; *Chicago & Co. R. Co. v. Chicago*, 148 Ill. 141, 35 N. E. 881; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216. "The policy of the state is that municipal corporations are to exercise only such powers as are clearly embraced within the legislative grant or those derived therefrom by necessary implication, and to this end municipal grants of power are construed so as to confine the

sary implication, regard being had to the object of the grant. The construction is strict rather than liberal, and the general rule is that ambiguity or reasonable doubt arising out of the words used in the charter must be resolved in favor of the public and against the corporation.¹¹ It has even been held that in the absence of express authority a village board did not have the right to employ a private detective as an incident to the corporate functions which imposed on the village officers the duty of employing measures necessary to maintain security and good order and to enforce the law by the prosecution and punishment of offenders.¹² Nor does a municipality, as a general rule, have implied authority to regulate by ordinance the rates to be charged by a public service corporation, unless such power is reserved to it by the franchise it grants the corporation.¹³

corporate authorities to the employment of such means and measures as are necessary to effectually execute the powers conferred." *Flannagan v. Buxton* (Wis.), 129 N. W. 642, 32 L. R. A. (N. S.) 391.

¹¹ *Long Beach v. Boynton*, 17 Cal. App. 290, 119 Pac. 677. "Implications of authority in bodies corporate, more especially those created for municipal purposes, should be clear and undoubted. * * * Implications spring from the necessities of some power actually conferred, and not from notions of what would be convenient or expedient under particular circumstances." *Butler v. Milwaukee*, 15 Wis. 493. "It is well settled, of course, that a municipal corporation has such powers and such only as are, first, expressly granted, or second, such as are fairly or necessarily implied from those granted, or third, such as are essential to the declared objects and purposes of the incorporation. As to the third, it is not enough that they be convenient; it must appear that they are indispensable. In case of doubt the existence of the power is denied by the courts." *Brooks v. Brooklyn*, 146 Iowa 136, 124 N. W. 868. See generally, *Minturn v. Larue*, 23 How. (U. S.) 435, 16 L. ed. 574; *Joplin v. Leckie*, 78 Mo. App. 8. In *re Unger*, 22 Okla. 755, 98 Pac. 999, 132 Am. St. 670; *Philadelphia v. Madden*, 8 Pa. Dis. 532;

Quint v. Merrill, 105 Wis. 406, 81 N. W. 664. "The powers of a city to construct sewers and drains is also incident to the power to construct and maintain streets." *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556. "Municipal corporations possess only such powers as are granted in express words, or those necessarily incident to or implied in the powers expressly granted." *State v. Wilson*, 151 Mo. App. 723, 132 S. W. 625. But construction must not be unreasonably strict. *Kyle v. Malin*, 8 Ind. 34; *Orange & A. R. Co. v. Alexandria*, 17 Grat. (Va.) 176. See also, *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. 214; *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; *Goodrich v. Busse*, 247 Ill. 366, 93 N. E. 292, 139 Am. St. 335.

¹² *Flannagan v. Buxton*, 145 Wis. 81, 129 N. W. 642, 32 L. R. A. (N. S.) 391. See, however, *Sargent v. Bristol*, 2 Haskell (U. S.) 112, Fed. Cas. No. 12363. Under the statutes of Washington, however, it has been held that the county board might employ an alienist to render services in connection with a homicide case. *Williamson v. Snohomish Co.*, 64 Wash. 233, 116 Pac. 675.

¹³ *Old Colony Trust Co. v. Atlanta*, 83 Fed. 39, affd. in 88 Fed. 859, 32 C. C. A. 125; *Jacksonville v. Southern Bell Tel. & T. Co.*, 57 Fla. 374,

§ 602. Municipal contracts—By whom made—Extent of power—Parties chargeable with notice.—As with all other corporations, a municipal corporation can act only through agents. Concerning the power of such agents to make contracts in behalf of the municipality, it may be stated that their power is special and limited and usually prescribed by the statute or charter. Outside of this scope of authority they have no power to act and, being special agents, the general law of agency applies, and all persons dealing with them in matter of contract must do so charged with knowledge of their authority to act and the scope of their power to bind the corporation under the law.¹⁴ More-

49 So. 509. In re Pryor, 55 Kans. 724, 29 L. R. A. 398, 41 Pac. 958, 49 Am. St. 280; State v. Missouri & K. Tel. Co., 189 Mo. 83, 88 S. W. 41; Wabaska Elec. Co. v. Wymore, 60 Nebr. 199, 82 N. W. 626; Ball v. Texarkana Water Corp. (Tex. Civ. App.), 127 S. W. 1068. "We think the city's power of regulation as to rates to be charged, and the forms of contract between the company and its patrons, both public and private, rests solely upon its right to make contracts, and not upon delegated legislative power. Its administrative powers, under its right to make such contracts, may be exercised in the form of ordinances; but its right to pass ordinances upon the subject does not include the right to enforce its contracts, either in favor of itself or the inhabitants, by the imposition of criminal penalties. It can enforce its contracts only in those modes allowed to individuals and private corporations. Not having the power to make violations of contracts criminal, it could not reserve any such power to itself in the ordinance by which it granted the franchise. Nor could the water-works company, having no power to add anything to the capacity of the city, confer upon it such right or power. Two private persons cannot, by their contract, confer upon each other right to inflict fines and imprisonment for violations of their contract. This power, if it exists at all, is vested in the Legislature of the state, and has not been delegated to the city of Bluefield. It could not

be obtained from any other source. Hence it is plain that the city does not possess it." Bluefield Water-works & I. Co. v. Bluefield (W. Va.), 70 S. E. 772, 33 L. R. A. (N. S.) 759. A city does not have implied power to create offices other than those provided for in its charter. State v. Mackie, 82 Conn. 398, 74 Atl. 759, 26 L. R. A. (N. S.) 660n.

¹⁴New Albany v. New Albany St. R. Co., 172 Ind. 487, 87 N. E. 1084; Wurth v. Paducah, 116 Ky. 403, 76 S. W. 143, 105 Am. St. 225; Newport v. Schoolfield, 142 Ky. 287, 134 S. W. 503; Floyd County v. Owego Bridge Co., 143 Ky. 693, 137 S. W. 237; The Condran v. New Orleans, 43 La. Ann. 1202, 9 So. 31; Burchfield v. New Orleans, 42 La. Ann. 235, 7 So. 448; Fox v. Sloo, 10 La. Ann. 11; Edwards Hotel Co. v. Jackson, 96 Miss. 547, 51 So. 802; McDonald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; Ross v. Philadelphia, 115 Pa. St. 222, 8 Atl. 398. "Municipalities can lawfully exercise only such rights, powers and authority and perform such duties as are conferred upon them, expressly or impliedly, by valid provisions of law; and such rights, powers, authority, and duties are exercised or performed through officers, agents or employees; the municipalities being corporate entities existing only in contemplation of law." Scott v. Tampa (Fla.), 55 So. 983. One dealing with a municipal corporation is bound to know the extent of its powers and cannot hold it liable for a false representation made by its officers concerning matters not with-

over, there is also the limitation upon the corporation itself that its corporate contracts must relate to corporate matters. Where the limitation on the power of the city council to contract appears in the statute or charter, the courts will presume that the parties had knowledge of such limitation.¹⁵ All persons dealing with the corporation are bound to take notice of the statutes creating the corporation and conferring power upon it and those mandatory provisions of the statute which prescribe the manner in which such power must be exercised.¹⁶

in its corporate powers, or for the breach of contract that such officers have no authority to make on its behalf. *Hart v. Wyndmere*, 21 N. Dak. 383, 131 N. W. 271. See also, ante, ch. 15, Agents. See also, ante, § 263 et seq.

¹⁵ *Black v. Common Council &c.*, 119 Mich. 571, 78 N. W. 660. See also, *Johnson v. Indianapolis*, 16 Ind. 227; 1 *Elliott Rds. & Sts.* (3d ed.), § 629. In all cases where authority is conferred by statute upon an agent a person dealing with such agent is bound to ascertain the nature and extent of his authority. *Madison v. Newsome*, 39 Fla. 149, 22 So. 270. And in dealing with a city treasurer parties are charged with notice that he has no power to issue city warrants. *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499. A contractor entering into a contract with a municipality does so with knowledge of the limitations upon the power of the municipality. *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863; *Osgood v. Boston*, 165 Mass. 281, 43 N. E. 108; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588. The rule is universal and general that persons contracting with a municipal corporation must inquire into the power of the corporation or its officers to make the contract; Cf. *Chicago v. Williams*, 182 Ill. 135, 55 N. E. 123; *State v. Minnesota &c. R. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *Kerr v. Bellefontaine*, 59 Ohio St. 446, 52 N. E. 1024. See also, ante, § 263 et seq., Parties, Power of State to Contract.

¹⁶ *Sutro v. Dunn*, 74 Cal. 593, 16 Pac. 505; *Smith &c. Co. v. Denver*, 20

Colo. 84, 36 Pac. 844; *National Bank of Commerce v. Granada*, 54 Fed. 100, 4 C. C. A. 212; *Coffin v. Kearney Co.*, 57 Fed. 137, 6 C. C. A. 288; *Manhattan Co. v. Ironwood*, 74 Fed. 535, 20 C. C. A. 642; *Law v. People*, 87 Ill. 385; *McPherson v. Foster*, 43 Iowa 48, 22 Am. Rep. 215; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa 250, 90 N. W. 746; *Murphy v. Louisville*, 9 Bush (Ky.) 189; *Raton Water Works Co. v. Raton*, 9 N. Mex. 70, 49 Pac. 898, reversed on another point, 174 U. S. 360, 43 L. ed. 1005, 19 Sup. Ct. 719; *Wilkes County v. Call*, 123 N. Car. 308, 31 S. E. 481, 44 L. R. A. 252; *McPeeters v. Blankenship*, 123 N. Car. 651, 31 S. E. 876; *Roberts v. Fargo*, 10 N. Dak. 230, 86 N. W. 726; *People's Bank v. School District*, 3 N. Dak. 496, 57 N. W. 787, 28 L. R. A. 642; *Wellston v. Morgan*, 65 Ohio St. 219, 62 N. E. 127; *Diggs v. Lobsitz*, 4 Okla. 232, 43 Pac. 1069; *Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260, 79 Am. St. 741; *Livingston v. School District No. 7*, 9 S. Dak. 345, 69 N. W. 15; *In re The Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. ed. 169; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *German Savings Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. 159; *Barnett v. Denison*, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. 819; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. 746. "It is put beyond question, under our decisions, that parties who are invited, or seek, to enter into contractual relations with a municipi-

§ 603. **Contracts extending beyond term of board.**—The power of a municipal board to appoint or attempt to appoint officers or to make contracts extending beyond its own term is a question that frequently arises. The power of a board to do this may be either express or implied. It is well settled that the legislature may authorize municipal boards to enter into contracts which will extend beyond their own official term.¹⁷ Whether such board has the implied power so to do depends largely upon the nature of the contract. The distinction has been thus expressed: "A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their offices because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary, powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens."¹⁸

pal corporation cannot, if the contract is made, plead want of knowledge of such statutory limitations in avoidance, and the plaintiff, having been charged with notice of the invalidity of the lease, cannot recover on the covenant." *Commercial Wharf Corporation v. Boston*, (Mass.), 94 N. E. 805.

¹⁷ *Taylor v. Northampton Co.*, 50 N. Car. 98; *Kerlin Bros. Co. v. To-*

ledo, 20 Ohio C. C. 603, 11 Ohio C. D. 56; *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 4 L. ed. 592, 22 Sup. Ct. 410.

¹⁸ *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736; *Horkan v. Moultrie*, 136 Ga. 561, 71 S. E. 785. To same effect, *Tuttle Bros. & Bruce v. Cedar Rapids*, 176 Fed. 86, 99 C. C. A. 606.

In conformity with the opinion above expressed as to the validity of the second class of contracts it has been held that a city council might contract for a gas, water or electricity supply for a reasonable time extending beyond its term of office.¹⁹ The same doctrine has been applied to the leasing of municipal property to a private individual²⁰ or by the municipality from a private individual.²¹ It has also been held applicable to public printing contracts, in the absence of fraud or collusion or a prohibitive statute.²² But it has been said that a board of county commissioners does not have the power to bind their successors to forever support and maintain a hospital.²³

¹⁹ *Illinois Trust &c. Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Blood v. Manchester Electric Light Co.*, 68 N. H. 340, 39 Atl. 335; *Tanner v. Auburn*, 37 Wash. 38, 79 Pac. 494. See, however, *Westminster Water Co. v. Westminster*, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. 424, in which a contract which required the city to levy a tax forever to pay for the water supply was held invalid since the levying of a tax was a governmental power. See also, *Carlyle Water &c. Co. v. Carlyle*, 31 Ill. App. 325, which holds such a contract voidable merely as to the executory part. Also, *Horkan v. Moultrie*, 136 Ga. 561, 71 S. E. 785, which holds that the city council had no power to agree to furnish "free of charge" water to a private individual for an indefinite time, since to do so would be to permit the council to tie the hands of its successors.

²⁰ *Biddleford v. Yates*, 104 Maine 506, 72 Atl. 335, 15 Am. & Eng. Ann. Cas. 1091.

²¹ *Dubuque Female College v. District Tp. Dubuque*, 13 Iowa 555; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

²² *Liggett v. Kiowa*, 6 Colo. App. 269, 40 Pac. 475; *Pickett Pub. Co. v. Carbon County*, 36 Mont. 188, 92 Pac. 524, 13 L. R. A. (N. S.) 1115, 122

Am. St. 352, 12 Am. & Eng. Ann. Cas. 986. Statute permitted contracts for public printing for a term not exceeding two years. This contract might be made the first or last week of board's existence, if the prior contract has expired. See, however, *Sheldon v. Butler County*, 48 Kans. 356, 29 Pac. 759, 16 L. R. A. 257; Such contract forbidden by statute; *Robson v. Smith*, 50 Kans. 350, 32 Pac. 30.

²³ *Robbins v. Hoover (Colo.)*, 115 Pac. 526. The court said: "Under our laws a board can expend money, except in designated emergencies, only when it has been previously appropriated for the given purpose. Each year the board must make its various appropriations of money for the necessary public purposes, and levy the necessary taxes to meet them. Within the statutory or constitutional limits each board must for itself determine the tax levy and the amount of such appropriations, and it is beyond the power of any board, in any one year, to determine for its successor in any subsequent year how it shall perform such duties, or prescribe or limit its action in the exercise of governmental functions, all of which is equivalent to saying that, under our existing laws, it is legally impossible for a board of commissioners to bind the county forever to maintain and support a hospital which Mr. Macky was desirous of building, and, for that reason, his bequest is void as depending upon an impossible condition." To same effect, *Edwards Hotel &c. R. Co. v. Jackson (Miss.)*,

The "spoils system" quite frequently prompts municipal officials to make official appointments which shall continue in effect after their term of office has expired. Notwithstanding the motive which in many cases underlies the appointment it has been held that a board of county commissioners, the term of certain members of which is about to expire, may employ an officer and enter into a contract with him to perform certain required services for a specified period of time beyond the life of the board as then constituted.²⁴ The employment of superintendents and teachers in public schools for a longer period than the life of the board as then constituted, has been upheld by many cases²⁵ in the absence of fraud on the part of the board making the contract.²⁶ On the other hand should the appointment be one which

51 So. 802, in which it is said: "Each mayor and board of aldermen cannot exercise full jurisdiction if predecessors may tie their hands in the matter of requiring to be done any matter which is comprehended in the exercise of full jurisdiction; that is to say, each mayor and board of aldermen has a right, in their discretion, to say when paving is necessary. It is a discretion which vests in them at the time they choose to exercise it; that is to say, the right vests in the municipality to exercise it through the mayor and board of aldermen. It is a right in the municipality, belonging to the inhabitants, and exercised through the constituted authorities."

²⁴ The court said, quoting from *Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385, "It is insisted, however, that this contract is void upon other grounds,—that it is in contravention of public policy, for the reason that to uphold it would put it in the power of one of the board of commissioners to bind the hands of its successors, and that it operates as an unwarranted abridgment of the 'administrative, executive, and legislative' powers of the board. The first of the reasons assigned rests upon an erroneous conception of the constitution of the board of county commissioners,—that that body consists of a series or succession of boards, one following the other. As we have

heretofore said, the board of (county) commissioners is a corporation, representing the county. From a legal standpoint, it is the county. * * * It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason." *Mauley v. Scott*, 108 Minn. 142, 121 N. W. 628, 29 L. R. A. (N. S.) 652. See also, *Webb v. Spokane Co.*, 9 Wash. 103, 37 Pac. 282.

²⁵ *Caldwell v. School District No. 7*, 55 Fed. 372; *Reubelt v. School Town of Noblesville*, 106 Ind. 478, 7 N. E. 206; *Moon v. School City of South Bend* (Ind. App.), 98 N. E. 153; *Tappan v. School District No. 1*, 44 Mich. 500, 7 N. W. 73; *Cleveland v. Amy*, 88 Mich. 374, 50 N. W. 293; *Farrell v. School District No. 2*, 98 Mich. 43, 56 N. W. 1053; *Gillis v. Space*, 63 Barb. (N. Y.) 177; *Wait v. Ray*, 67 N. Y. 36.

²⁶ *Milford v. Zeigler*, 1 Ind. App. 138, 27 N. E. 303. In the above case it was held valid notwithstanding the fact that the appointment was made

would deprive the succeeding board of its power to perform the duties which are imposed upon it by law, in other words interfere with its governmental or legislative functions, such contract of appointment cannot be extended beyond the life of the board making the appointment.²⁷

§ 604. What are municipal contracts.—An ordinance whereby a franchise is granted which is accepted and acted upon by the grantee becomes an irrevocable contract except for breach of contract in some form by the company and cannot be violated by the city.²⁸ And unless the ordinance reserves such power to the municipality the franchise cannot be amended or diminished without the consent of the grantee.²⁹ The grantee is also bound by the reasonable provisions of the franchise granted by the municipality.³⁰ Thus the franchise of a street railway company may require it to carry free of charge or at reduced rate certain classes of persons and the person or corporation accepting such

for the purpose of forestalling the new board, no fraud being alleged. *Taylor v. School Dist. No. 7*, 16 Wash. 365, 47 Pac. 758. The above decision is based on the ground that the appointment is that of the board and not of its members. To same effect, *Splaine v. School Dist.*, 20 Wash. 74, 64 Pac. 766. See also, *Webster v. School District No. 4*, 16 Wis. 317. The following cases make good faith on the part of the appointing board, the test: *School District No. 6 v. Morse*, 8 Cush. (Mass.) 191; *Chittenden v. School District No. 1*, 56 Vt. 551. See also, *Stevenson v. School District No. 1*, 87 Ill. 255; *District No. 6 v. Hart*, 4 Ill. App. 224. The power to make an appointment extending beyond the life of the board may, however, be withheld by statute. *Gates v. School District*, 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186; *School District No. 54 v. Garrison*, 90 Ark. 335, 119 S. W. 275; *Taylor v. Northampton County*, 5 Jones L. (N. Car.) 98. See also, *Davis v. School Directors*, 92 Ill. 393; *Cross v. School Directors*, 24 Ill. App. 191; *Fitch v. Smith*, 57 N. J. L. 526, 34 Atl. 1058.

²⁷ *Millikin v. Edgar County*, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447;

State v. Platner, 43 Iowa 140; *State v. Layton*, 28 N. J. L. 244. See also, *Jay County v. Taylor*, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160. Compare, however, with, *Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385; *Franklin v. Rauck*, 9 Ohio C. C. 301, 6 Ohio C. D. 133.

²⁸ *Western Union Tel. Co. v. Syracuse*, 24 Misc. (N. Y.) 338, 53 N. Y. S. 690; *Bluefield Waterworks & Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; 2 *Elliott Rds. & Sts.* (3d ed.), § 938, and numerous authorities there cited.

²⁹ *Shreveport Tract. Co. v. Shreveport*, 122 La. 1, 47 So. 40, 129 Am. St. 345; *New Orleans v. Great Southern Tel. & T. Co.*, 40 La. Ann. 41, 3 So. 533, 8 Am. St. 502; *Texarkana Gas & Co. v. Texarkana* (Tex. Civ. App.), 123 S. W. 213. But this does not mean that it may not be subject to police regulations. 2 *Elliott Rds. & Sts.* (3d ed.) §§ 939, 956.

³⁰ *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731, citing many authorities. (Company agreed to furnish heat for library building free of charge.) *Postal Tel. Cable Co. v. Chicopee*, 207 Mass. 341, 93 N. E. 927, 32 L. R. A. (N. S.) 997n. In the above case the company was

franchise may be compelled to perform its conditions.³¹ Where a specification for a public improvement fully describes the work to be done, and a bid is made thereon for such work in writing and it is accepted and entered of record, it constitutes between the city and the contractor a valid contract.³² But it is not absolutely essential, however desirable, that such a contract shall be in writing, and it has been held that the lack of a writing will not prevent a recovery where the contract has been performed, although the charter so requires. Thus where the contract was verbal and was fully performed on the part of the contractor, he was permitted to recover.³³

And, it would seem, that in the absence of any positive statutory provision requiring the contract to be in writing, recovery may be had for the breach of an executory oral agreement.³⁴ Neither the municipal charter, nor a statute purporting to regulate the use of property held by a public corporation for governmental or public purposes, is a contract.³⁵ A resolution by the

required to carry on its poles the fire alarm and electric light wires of the city without compensation.

³¹ *Oklahoma City v. Oklahoma R. Co.*, 20 Okla. 1, 93 Pac. 48, 16 L. R. A. (N. S.) 651 and note.

³² *Fort Madison v. Moore*, 109 Iowa 476, 80 N. W. 527.

³³ *North River Elec. & C. Co. v. New York*, 48 App. Div. (N. Y.) 14, 62 N. Y. S. 726. See also, *Argenti v. San Francisco*, 16 Cal. 255; *Maher v. Chicago*, 38 Ill. 266; *Warner v. New Orleans*, 87 Fed. 829, 31 C. C. A. 238; *Chapman v. County of Douglass*, 107 U. S. 348, 27 L. ed. 378. "It is the general rule that where the specification of a public improvement fully describes the work to be done, and a bid in writing is made to do such work and is accepted and entered of record, sufficient evidence of a contract exists to satisfy the statute of frauds. * * * And if, in such a case, the execution of a written contract is provided for, in terms, in the charter of a city, is not executed, and the materials are furnished and used, the neglect to execute the contract will not prevent the recovery of the reasonable value of whatever is

furnished." *Central Bitulithic Pav. Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912B. 719. But if the provision for a written contract is mandatory it must be complied with, otherwise the contract will be void. *Cook v. Cameron* (Mo. App.), 128 S. W. 269. See also, *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, and note; *Logansport v. Blakemore*, 17 Ind. 318; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063.

³⁴ *Pearson v. School Dist. No. 8*, 144 Wis. 620, 129 N. W. 940, 140 Am. St. 1043. In the above case a school-teacher was permitted to recover for the breach of an oral contract by which the school board hired plaintiff to teach school. See also, *Stivers v. Cherryvale*, 86 Kans. 270, 120 Pac. 361 (bidder requested to proceed without waiting for contract to be signed).

³⁵ *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383; *State v. Noyes*, 25 Nev. 31, 56 Pac. 946.

city council passed pending an injunction proceeding in which it is provided that a proposed draft of the contract be approved, and its execution agreed upon, to be performed as soon as the council shall be free to act, is not a contract.³⁶ A resolution of the council that the mayor be instructed to purchase certain property for a certain sum and on certain conditions is not on its face a contract of purchase.³⁷ The principle applicable to contracts generally that a contract is not made so long as, in the contemplation of both parties thereto, something remains to be done to establish contract relations, applies to contracts to which the municipality is a party.³⁸ But if the contract relates to a matter concerning which the municipality had a right to contract and is signed and sealed by the proper authorities, such contract is *prima facie* presumed to be valid.³⁹

§ 605. Municipal contracts—Implied contracts.—A municipality may be liable on an implied contract if an express contract would be within the municipality's delegated powers,⁴⁰ and the city had ratified the act of its officers.⁴¹ Consequently, it is well settled that in a proper case a municipality may be liable on an implied contract for benefits received and appropriated by it.⁴²

³⁶ *State v. Noyes*, 25 Nev. 31, 56 Pac. 946.

³⁷ *Carskaddon v. South Bend*, 141 Ind. 596, 39 N. E. 667, 41 N. E. 1. But see as to when a resolution or ordinance is binding as a contract, *People v. San Francisco*, 27 Cal. 655; *Wade v. Newbern*, 77 N. Car. 460.

³⁸ *Central Bitulithic Pav. Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912B, 719.

³⁹ *New York S. & W. R. Co. v. Paterson*, 81 N. J. L. 72, 80 Atl. 949.

⁴⁰ *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612. See also, *Brush Elec. Light & Co. v. Montgomery*, 114 Ala. 433, 21 So. 960. Both municipal and public quasi corporations have an implied power to make contracts necessary to enable them to exercise the powers and perform the duties which are conferred upon them by law. *People v. Spring Lake Drainage & Co. Dist.*, 253 Ill. 479, 97 N. E. 1042.

⁴¹ *Wilson v. Mitchell*, 17 S. Dak. 515, 97 N. W. 741, 65 L. R. A. 158, 106 Am. St. 784.

⁴² *Argenti v. San Francisco*, 16 Cal. 255; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96n; *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503; *Warner v. New Orleans*, 87 Fed. 829, 31 C. C. A. 238, 59 U. S. App. 131; *Austin v. Bartholomew*, 107 Fed. 349, 46 C. C. A. 327, writ of certiorari denied in 183 U. S. 698, 46 L. ed. 395, 22 Sup. Ct. 934; *Sanitary District v. George F. Blake Mfg. Co.*, 179 Ill. 167, 53 N. E. 627; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. (Ky.) 41; *Messenger v. Buffalo*, 21 N. Y. 196; *Noel v. San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263; *Ellis v. Cleburne* (Tex. Civ. App.), 35 S. W. 495; *Town School Dist. v. Town Dist. of Wolcott*, 78 Vt. 23, 61 Atl. 471.

Liability attaches to a municipal or other public corporation upon an implied contract for the benefits received under an express contract invalid for some irregularity in the execution thereof where the form or manner of letting or execution does not violate any mandatory statutory provision relative to the power of such corporation to contract and does not otherwise violate public policy.⁴³ In case the contract entered into is a valid exercise of the power vested in the city a mutual obligation will be implied and the construction of the contract will not always be limited to the exact words used. Thus a contract entered into by the street cleaning department of a city by which it granted, for a valuable consideration, the right of picking over the city refuse, implied an obligation on the part of the city to deliver its refuse at the city dump.⁴⁴

⁴³ *Montgomery County v. Barber*, 45 Ala. 237 (street improvement); *Brush Elec. Light & Power Co. v. Montgomery*, 114 Ala. 433, 21 So. 960 (electric lighting); *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453 (gas lighting); *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670 (water supply); *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189 (water supply); *Kinsey v. Little River County*, Fed. Cas. No. 7829 (money properly used); *Boyd v. Black*, 123 Ind. 1, 23 N. E. 862 (articles necessary for school district); *Norway Tp. v. Clear Lake Tp.*, 11 Iowa 506 (money expended for legitimate township purposes); *Martin-Strelan Co. v. Dubuque*, 149 Iowa 1, 127 N. W. 1013 (coal purchased and used but no appropriation made to pay therefor); *Howell Elec. Light & P. Co. v. Howell*, 132 Mich. 117, 92 N. W. 940 (electric light); *Currie v. School Dist. No. 26*, 35 Minn. 163, 27 N. W. 922 (goods necessary for a school district); *Laird Norton Yards v. Rochester (Minn.)*, 134 N. W. 644 (coal received and used); *Methodist Episcopal Church v. Vicksburg*, 50 Miss. 601 (material); *Crump v. Colfax County*, 52 Miss. 107 (case of building); *Lincoln Land Co. v. Grant*, 57 Nebr. 70, 77 N. W. 349 (water supply); *Nebraska Bitulithic Co. v. Omaha*, 84 Nebr. 375, 121 N. W. 443

(asphalt plant, street repairing); *Wentink v. Passaic County*, 66 N. J. L. 65, 48 Atl. 609 (construction of bridge); *Kramrath v. Albany*, 127 N. Y. 575, 28 N. E. 400; *McCloskey v. Albany*, 7 Hun (N. Y.) 472 (fuel); *Leonard v. Long Island City*, 65 Hun (N. Y.) 621, 47 N. Y. St. 761, 20 N. Y. S. 26 (goods for fire department); *Port Jervis Waterworks Co. v. Port Jervis*, 71 Hun (N. Y.) 66, 24 N. Y. S. 497, 54 N. Y. St. 84, affd. in 151 N. Y. 111, 45 N. E. 388 (water supply); *Long v. Lemoyne Borough*, 222 Pa. 311, 71 Atl. 211, 21 L. R. A. (N. S.) 474 (money borrowed for legitimate purposes); *Valley Falls Co. v. Taft*, 27 R. I. 136, 61 Atl. 41 (money received for valid purposes); *London & N. Y. Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995 (street improvement); *Tyler v. Jester*, 97 Tex. 344, 78 S. W. 1058 (water supply); *Thomson v. Elton*, 109 Wis. 589, 85 N. W. 425 (money borrowed and expended for legitimate purposes). See also, *State v. Clark (Minn.)*, 134 N. W. 129. But compare *Schell City v. L. M. Rumsey Mfg. Co.*, 39 Mo. App. 264; *Crutchfield v. Warrensburg*, 30 Mo. App. 456, and see *McPherson v. Foster*, 43 Iowa 48, 22 Am. Rep. 215.

⁴⁴ *New York v. Paoli*, 202 N. Y. 18, 94 N. E. 1077. The court said: "It is insisted that the instrument sued upon

As a general rule, where a contractor is required by the municipal representative, without collusion and against the contractor's opposition, to do something as covered by his contract, and the question whether the thing required is embraced within the contract is fairly debatable and its determination surrounded by doubt, he may comply with the demand under protest and subsequently recover for the extra expense thereby incurred if the thing required was not covered by the contractor's agreement; but, on the other hand, if the thing required is clearly beyond the limits of the contract, the contractor may not even under protest do it and subsequently recover for the extra expense thereby incurred.⁴⁵ A municipality may also be held liable in an action for money had and received, notwithstanding the fact that the resolution under which the loan was made was invalid.⁴⁶

§ 606. When no implied liability arises.—But no implied liability arises where the contract, though within the scope of the statute, is violative of a mandatory provision thereof,⁴⁷ as where

as the contract contains no covenant on the part of the city, and imposes no obligation upon it. Of course, if it is the fact that the city had not bound itself to do anything, which, as an obligation, was enforceable by Delli Paoli, then the instrument lacked an essential element of a contract. Such a contract must be obligatory upon both parties, in the sense that their promises are concurrent and enforceable by either. If in this instrument there existed but the promise on the part of Delli Paoli, and there was no agreement on the part of the city to deliver its refuse at the "dumps" for the contractor to pick over, then the appellants' objection would be sound. It is not true, however, that the city came under no obligation to Delli Paoli."

⁴⁵ *Borough Const. Co. v. New York*, 200 N. Y. 149, 93 N. E. 480, 140 Am. St. 633. In the above case it was said there might be a recovery for an extra grade of cement which he was compelled but not required by his contract to use, but that he could not recover the expense incurred by constructing an elevator by which to lower an automobile into the sewer

and lighting it with candles when inspected by city officials.

⁴⁶ *Long v. Lemoyne Borough*, 222 Pa. 311, 71 Atl. 211, 21 L. R. A. (N. S.) 474.

⁴⁷ *Fountain v. Sacramento*, 1 Cal. App. 461, 82 Pac. 637 (purchase of material invalid because not authorized by vote of board of trustees); *Richardson v. Grant County*, 27 Fed. 495 (building contract invalid because not let on competitive bidding); *Peck-Williamson Heating & Ventilating Co. v. Steen School Tp.*, 30 Ind. App. 637, 66 N. E. 909 (contract for supplies not let on competitive bidding); *Reichard v. Warren County*, 31 Iowa 381 (contract for public building exceeded amount appropriated by vote); *Harrison County v. Ogden*, 133 Iowa 9, 110 N. W. 32; *Lovejoy v. Foxcroft*, 91 Maine 367, 40 Atl. 141; *Detroit v. Michigan Paving Co.*, 36 Mich. 335 (contract for street improvement not let to lowest bidder as required by statute); *Detroit v. Robinson*, 38 Mich. 108. To same effect, *Niles Water Works v. Niles*, 59 Mich. 311, 26 N. W. 525 (contract for water-works creating a debt beyond statutory limit); *Mc-*

the contract is with an officer of the municipality it being expressly forbidden to make a contract with its officers.⁴⁸ In such a case it has been held that no recovery can be had notwithstanding the municipal corporation has received and made

Curdy v. County of Shiawassee, 154 Mich. 550, 118 N. W. 625 (money borrowed for current expenses in excess of constitutional power of county to create indebtedness, ex contractu without vote); *Rumsey Mfg. Co. v. Schell City*, 21 Mo. App. 175, reafld. in 39 Mo. App. 264 (material contract invalid because not made by ordinance); *Wolcott v. Lawrence County*, 26 Mo. 272 (contract for county building not made in conformity with statute); *New Jersey Car Spring & Rubber Co. v. Jersey City*, 64 N. J. L. 544, 46 Atl. 649 (goods purchased by one employe and accepted by another employe without precedent authority); *Atlantic City Water-works Co. v. Reed*, 50 N. J. L. 665, 15 Atl. 10 (contract for water supply created an obligation in excess of statutory limitation); *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144 (contract for material not in writing and on record); *La France Fire Engine Co. v. Syracuse*, 33 Misc. (N. Y.) 516, 68 N. Y. S. 894 (violating provision of charter that all purchases of supplies be from the lowest bidder, etc.); *Keane v. New York*, 88 App. Div. (N. Y.) 542, 85 N. Y. S. 130 (facts similar to above case); *Smith v. Newburg*, 77 N. Y. 130 (contract for water supply invalid; statutory requirements for letting contract not complied with); *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4 (contract to improve streets invalid, no compliance with requirements as to letting to lowest bidder); *Dickinson v. Poughkeepsie*, 75 N. Y. 65 (failure to let to lowest bidder); *Walton v. New York*, 26 App. Div. (N. Y.) 76, 49 N. Y. S. 615 (invalid for failure to follow statutory requirement as to public letting thereof); *Wellston v. Morgan*, 65 Ohio St. 219, 62 N. E. 127 (contract for supply of gas invalid; not provided for by ordinance or resolution); *Buchanan Bridge Co. v. Walters*, 3 Ohio N. P. 176, 4 Ohio S. & C. P. Dec. 134 (contract to con-

struct bridge invalid; no competitive bidding); *State v. Biddle*, 4 Ohio Dec. 130 (same defect in contract); *Perry Water, Light & Ice Co. v. City of Perry (Okla.)*, 120 Pac. 582 (purchase of supplies); *Springfield Mill Co. v. Lane County*, 5 Ore. 265 (contract for labor for bridge not let to lowest bidder); *O'Rourke v. Philadelphia*, 211 Pa. 79, 60 Atl. 499; *McGillivray v. Joint School District No. 1*, 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100, 88 Am. St. 969 (materials for schoolhouse in excess of limit); *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. 931; *Martin v. Fond Du Lac County*, 127 Wis. 586, 106 N. W. 1095; *Appleton Water-works Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44. "The law is well settled that where, as in the cases between these parties here under consideration, the contract upon which suit is brought is forbidden by statute, the acceptance of benefits raises no implication of an obligation. The law is not properly chargeable with the absurdity of implying an obligation to do that which it forbids." *Edison Electric Co. v. City of Pasadena*, 178 Fed. 425, 102 C. C. A. 40.

⁴⁸ *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. 31; *McNay v. Lowell*, 41 Ind. App. 627, 84 N. E. 778; *Brazil v. McBride*, 69 Ind. 244; *Macy v. Duluth*, 68 Minn. 452, 71 N. W. 687. See also, *State v. Cheney*, 67 Wash. 151, 121 Pac. 48. See, however, *Capital Gas Co. v. Young*, 109 Cal. 140, 41 Pac. 869, 29 L. R. A. 463; *Currie v. School District*, 35 Minn. 163, 27 N. W. 922. "The principle that trustees of a municipal corporation have no right to enter into contracts with each other at the expense of those for whom they are acting and whose interests they are bound to guard and protect is fundamental in the law relating to trustees. Such illegality does not depend upon statutory enactments; the contracts are illegal at common law." *In re Moran*, 130 N. Y. S. 432.

use of the merchandise or other benefits received under the contract.⁴⁹ And if payment for the merchandise received has been made to the officer interested in the contract the money so paid may be recovered.⁵⁰

There is no implied liability on the part of a municipality to repay money borrowed in its name, by a municipal officer, without the knowledge, consent or approval of the municipality, even if placed to his official credit, such official being at the time a defaulter.⁵¹ It has also been held that a contractor cannot recover from a municipal or other public corporation the value of a bridge built⁵² or street improvement made⁵³ or extra services

⁴⁹ Bay v. Davidson, 133 Iowa 688, 111 N. W. 25, 9 L. R. A. (N. S.) 1014 and note. Compare, however, with above case, Diver v. Keokuk Sav. Bank, 126 Iowa 691, 102 N. W. 542.

⁵⁰ Independent School District v. Collins, 15 Idaho 535, 98 Pac. 857, 128 Am. St. 76. In the above case it is said: "It is contended that the only penalty provided in said section is that no action can be maintained or recovery had against a district on such a contract; that, as the district has received the benefit of the goods so purchased and has paid the money therefor, a recovery of the money cannot be had. There is nothing in this contention, as the statute provides such contracts are absolutely void. If money is illegally paid on such void contract, the district may recover it back, and in case the district refuses to do so, any taxpayer of the district may, for and on behalf of the district maintain an action for recovery of money so illegally paid. However, the judgment in such cases should run in favor of the municipality whenever a recovery is adjudged. In case a taxpayer fails to recover judgment, the court should require him to pay the costs of the suit. The rule contended for by appellant, to the effect that neither party to a transaction will be permitted to take advantage of its invalidity while retaining the benefits, applies only to voidable contracts, and not to a transaction that is absolutely void." McNay v. Town of Lowell, 41 Ind. App. 627, 84 N. E.

778. See also, Town of Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452, 140 Am. St. 464.

⁵¹ First Nat. Bank v. New Castle, 224 Pa. 285, 73 Atl. 331.

⁵² Berlin I. B. Co. v. San Antonio, 62 Fed. 882. But while the builder cannot enforce payment he nevertheless has the right to remove the bridge. Floyd Co. v. Owego Bridge Co., 143 Ky. 693, 137 S. W. 237. A town is relieved from liability on a contract assigned without its consent, though not annulled until after receiving the benefits, where the law prohibits the assignment of such contracts without the written consent of the town, and authorizes its revocation on the ground of an assignment without consent. Suburban Elec. Light Co. v. Hempstead, 38 App. Div. (N. Y.) 355, 56 N. Y. S. 443.

⁵³ In the case of City of Newport v. Schoolfield (Ky.), 134 S. W. 503, quoting from Murphy v. City of Louisville, 9 Bush. (Ky.) 194, it is said: "Nor is the corporation liable for the value of the work by reason of any implied promise to pay, upon the idea that the city derived a benefit from it. If so, as previously argued, it would dispense with the exercise of the power conferred by those in authority to execute contracts, and the contractor, or the party performing the work at the instance of any official of the corporation or even inhabitant of the city, could make improvements beneficial to the corporation, and thereby create an implied contract on the part of the city to pay. If the alleged con-

rendered, under a void contract.⁵⁴ Nor is there any implied liability when the contract is *ultra vires* the municipality.⁵⁵

It has been held that a contract will not be implied where goods have been ordered by one employé and accepted by another without authority and used by him.⁵⁶ Nor is the city liable to a person who volunteers services.⁵⁷ Nor is it liable on an implied contract for the temporary use of a hose which belonged to an individual but was used under the supposition that it belonged to the city.⁵⁸ On the other hand where a person is compelled by a municipal officer to perform labor for the municipality under a judgment which is void it has been held that he may recover the value of his services.⁵⁹

§ 607. Validity of contract generally.—It may be stated generally that the contract must relate to a subject-matter within the scope of the contractual powers of the municipal or other public corporation. It must not be in contravention of the con-

tract is made otherwise than as required by the ordinance, it is not binding; and if not obligatory as a contract, the law creates no promise to pay. The difference between the contract of a private person and that of an officer of a corporation is this: An individual has the right to make, alter or ratify a contract at his own free will and pleasure with the consent of the party contracting with him; or if he stands by and permits others to work for him, and accepts the work, the law implies a promise to pay its value; while an officer of a corporation has no power to make a contract except in the manner pointed out by the statute from which the power is derived. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96." Compare *Nebraska Bitulithic Co. v. City of Omaha*, 84 Nebr. 375, 121 N. W. 443.

⁵⁴ *W. W. Cook & Son v. Cameron*, 144 Mo. App. 137, 128 S. W. 269. Compare the foregoing cases with the case of *Hart v. New York* (N. Y.), 94 N. E. 219, which holds that recovery cannot be had under the void contract but contains a dictum statement to the effect that an action might be brought for the

quantum meruit. The above case had to do with a sewage disposal plant.

⁵⁵ *Salt Creek Tp. v. King Iron Bridge & Mfg. Co.*, 51 Kans. 520, 33 Pac. 303; *Hovey v. Wyandotte County*, 56 Kans. 577, 44 Pac. 17; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Peterson v. New York*, 17 N. Y. 449; *Bloomsburg Land Improv. Co. v. Bloomsburg*, 215 Pa. 452, 64 Atl. 602; *Close v. Berks County*, 2 Woodw. Dec. (Pa.) 453; *Burrill v. Boston*, 2 Clif. (U. S.) 590, Fed. Cas. No. 2198. See also, post, §§ 614, 615, *Estoppel*, and also *Ultra Vires*.

⁵⁶ *New Jersey Car Spring & Co. v. Jersey City*, 64 N. J. L. 544, 46 Atl. 649.

⁵⁷ *Lydecker v. Nyack*, 6 App. Div. (N. Y.) 90, 39 N. Y. S. 509. The mere rendition of a specified service is not sufficient to imply a promise to pay therefor. *McCormick v. Niles*, 81 Ohio St. 246, 90 N. E. 803. See also, *Roemheld v. City of Chicago*, 231 Ill. 457, 83 N. E. 291.

⁵⁸ *Dolloff v. Ayer*, 162 Mass. 569, 39 N. E. 191.

⁵⁹ *Fox v. Richmond*, 19 Ky. L. Rep. 326, 40 S. W. 251.

stitution, general statutes or the municipal charter and not contrary to public policy. When the charter or other law governing the subject has prescribed certain preliminary steps in relation to the making of contracts which are mandatory these conditions precedent are to be carefully observed. With these general principles in mind some examples of valid contracts entered into by a municipality will be given.

§ 608. **Validity of contract generally—Examples of valid contracts.**—Without classifying, generalizing or setting out the authority on which the city acted in each case, because it would unduly extend this division of the subject, attention is called to the following contracts as having been held valid on various grounds. The purchase, erection or maintenance of an electric light plant by a municipality has been held valid under its inherent power to light its streets and public places.⁶⁰ It also has been held to have this power where it is given express power to light its streets.⁶¹ It may be given the power to lease⁶² or construct⁶³ a water works system. Where the statute authorizes a city to provide for the health and welfare of the city it has power to contract for a water supply as a protection against

⁶⁰ *Heilbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. 214; *Overall v. City of Madisonville*, 31 Ky. L. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433; *Opinion of Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; *Mauldin v. Greenville*, 33 S. Car. 1, 11 S. E. 434, 18 L. R. A. 291; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885. See also, *Lake Charles & Co. v. Lake Charles*, 106 La. Ann. 65, 30 So. 289; *Contra, Posey v. North Birmingham (Ala.)*, 45 So. 663, 15 L. R. A. (N. S.) 711. For a definition of the term public utility, see *Coleman v. Frame (Okla.)*, 109 Pac. 928, 31 L. R. A. (N. S.) 556.

⁶¹ *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 18 So. 677,

30 L. R. A. 540, 51 Am. St. 24; *Middleton v. St. Augustine*, 42 Fla. 287, 29 So. 421, 89 Am. St. 227; *Blanchard v. Benton*, 109 Ill. App. 569; *Hay v. Springfield*, 64 Ill. App. 671; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388; *State v. Hiawatha*, 53 Kans. 477, 36 Pac. 1119; *Overall v. Madisonville*, 31 Ky. L. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433; *Christensen v. Fremont*, 45 Nebr. 160, 63 N. W. 364. See, however, *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; *Howell v. Millville*, 60 N. J. L. 95, 36 Atl. 691.

⁶² *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

⁶³ *National Tube Works v. Chamberlain*, 5 Dak. 54, 37 N. W. 761.

fire.⁶⁴ It may be given authority to construct wharves⁶⁵ or erect an auditorium for public purposes.⁶⁶ Or a city may contract with individuals to furnish it with a market house.⁶⁷ It has also been held that a municipal corporation may permit the use of or lease unused public property for a fixed and limited term in order to avoid loss of revenue and to lighten the general burden of taxation.⁶⁸

An agreement to build and maintain certain roads, and repair the same, so far as damaged from flooding from a dam owned

⁶⁴ *Watson v. Town of New Milford*, 72 Conn. 561, 45 Atl. 167, 77 Am. St. 345. See also, *Salina Water-works Co. v. Salina*, 195 Fed. 142 (fire hydrants rented, with provision for extension in the case the city did not elect to purchase the plant). *Little Falls &c. Water Co. v. Little Falls*, 102 Fed. 663; *Maine Water Co. v. Waterville*, 93 Maine 586, 45 Atl. 830, 49 L. R. A. 294.

⁶⁵ *Jeffersonville v. The John Shallcross Co.*, 35 Ind. 19; *Waddington v. St. Louis*, 14 Mo. 190; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

⁶⁶ *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066; *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977, 12 A. & E. Ann. Cas. 1109, 124 Am. St. 543; *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243. See also, *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977, 124 Am. St. 543. See, however, *Brooks v. Incorporated Town of Brooklyn*, 146 Iowa 136, 124 N. W. 868, 26 L. R. A. (N. S.) 425 and note.

⁶⁷ *State v. Perry*, 151 N. Car. 661, 65 S. E. 915, 134 Am. St. 1002. The ability of a municipality to acquire public utilities is determined by its charter powers and is purely a question of local policy with each state. On this subject the Supreme Court of California has said: "We do not understand that it is seriously claimed that the state may not invest its municipalities with the power to acquire and operate any such necessary public utility as is generally owned and operated in a city by what is ordinarily known as a public service corporation, such as water-works, gas or electric light works, street railways, etc. The existence

and proper conduct of such utilities in cities clearly constitute public affairs, one relating very closely to the well-being, safety, health, advantage, and convenience of all the inhabitants thereof, and are well within the legitimate functions of government. If the state deems it conducive to the welfare of the inhabitants of a city that the municipality shall have the power to itself acquire and operate for their benefit any such utility, in order that they may not be dependent solely on the establishment or operation thereof by some private corporation, or person, there can be no doubt of its right to confer such power on the municipality. As to such utilities as water-works and artificial light works this power has long been exercised by municipalities in various sections of the United States under authorization from their respective states, and this is particularly true in California. We do not understand that the right of a state to invest its municipalities with such power has ever been doubted. There is no difference material here between an artificial lighting plant to supply the inhabitants with light and a street railway. Both are matters pertaining to the internal affairs of the state, as to which the state has absolute power. It is purely a question of local policy with each state what shall be the extent and character of the powers which its various political organizations shall possess." *Platt v. City & County of San Francisco* (Cal.), 110 Pac. 304.

⁶⁸ *Gottlieb-Knabe Co. v. Macklin*, 109 Md. 429, 71 Atl. 949, 31 L. R. A. (N. S.) 580 and note.

by the promisor, has been held not void for noncompliance with the statute in relation to keeping in repair roads generally.⁶⁹ A contract to pave a street and make repairs rendered necessary by indifferent work or the use of defective material has been held not to be invalid in the absence of proof that the agreement to repair increased the amount of the bid and imposed upon the abutting property-owners a burden properly resting on the general public.⁷⁰ So, while in many jurisdictions, abutters cannot be assessed for repairs as distinguished from improvements and such a contract as that last mentioned might be invalid, it is generally held that a provision in a street improvement contract, merely guaranteeing the quality of the work for a reasonable period is not invalid.⁷¹ And in Kentucky a guaranty to keep a street in repair for five years does not render the contract void, but the contractor cannot recover for the excess of the assessment caused by the guaranty which is presumed to be ten per cent. retained by the city to secure the repairs.⁷² A charter prohibiting contracts for public improvements, unless recommended by the board of public works, has also been held not to prevent the council from contracting for repairs for a term of years in a paving contract, which contract was made in accordance with the charter.⁷³

⁶⁹ *Levis v. Black River Imp. Co.*, 105 Wis. 391, 81 N. W. 669.

⁷⁰ *Cole v. People*, 161 Ill. 16, 43 N. E. 607; *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532; *Kansas City v. Hanson*, 60 Kans. 833, 58 Pac. 474; *Barber & Co. Pav. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Robertson v. Omaha*, 55 Nebr. 718, 76 N. W. 442, 44 L. R. A. 534; *State v. Inhabitants &c.*, 60 N. J. L. 394, 38 Atl. 635.

⁷¹ See 1 *Elliott Rds. & Sts.* (3d ed.), § 647, and numerous cases there cited, among which is *Shank v. Smith*, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564, where most of the authorities are reviewed. See also, *Kansas City v. Hanson*, 60 Kans. 833, 58 Pac. 474; *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492 (affd. in 181 U. S. 324); *People v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768. As will be seen from the

cases reviewed in those above cited, however, there is some conflict among the decisions.

⁷² *Louisville v. Selva*, 21 Ky. L. 349, 51 S. W. 447.

⁷³ *Barber & Co. Pav. Co. v. Hezel*, 76 Mo. App. 135. Where the contractor has agreed to make repairs on notice such notice must be given, although he has become insolvent and has assigned his interest in the balance of the contract price. *Southern Pav. Co. v. Chattanooga* (Tenn.), 48 S. W. 92. A city council is not authorized to make provision for repairs before the necessity exists therefor. *Kansas City v. Hanson*, 8 Kans. App. 290, 55 Pac. 513. Where a railroad company has obligated itself to keep a street in good order, and by inaction on the part of the city the street becomes in such state of repair as to require an unusual expenditure, the proper construction

Where an ordinance required all garbage to be removed by a licensed person it was held not objectionable in that it was for a longer term than was permissible.⁷⁴ A contract is valid, notwithstanding the legislature may subsequently restrict the debt limits under which it would be invalid.⁷⁵ A contract of sale of a gas plant by a city in consideration that the purchaser would light the streets and the city pay the taxes against such purchaser has been held enforceable.⁷⁶ A contract for water supply is not void for not stating the source of supply.⁷⁷ A contract for lighting may be within the discretion of the municipality.⁷⁸ A contract with a turnpike company to remove its gate and keep its road in repair within the city limits is valid.⁷⁹ A city has been held to have power to bind itself to pay part of the expense of constructing a bridge over a railroad.⁸⁰ Under a statute authorizing a town to construct a town hall, necessary outbuildings and convenient accommodations for the same, it is authorized to construct a sewer for the service of the town hall.⁸¹ Where a city is authorized to contract for or otherwise provide for the disposal of its garbage and to purchase or lease land within its territory for the purpose of erecting crematories, it is not prevented from contracting with a rendering establishment outside its limits to dispose of dead animals in a sanitary and inoffensive manner.⁸² A charter granting power to provide for supplying a city with water has been held to give power to fix the rates to be charged to consumers.⁸³ A joint committee created by law and which has control of the courthouse has authority to

requires the city to restore the street to good order and requires the railroad company to keep it so. *State v. New Orleans &c. R. Co.*, 52 La. Ann. 1570, 28 So. 111.

⁷⁴ *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269. A contract for the disposition of sewage for five years has been held valid. *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. 191.

⁷⁵ *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

⁷⁶ *Frankfort v. Capital Gas &c. Co.*, 16 Ky. L. 780, 29 S. W. 855.

⁷⁷ *Brady v. Bayonne*, 57 N. J. L. 379, 30 Atl. 968.

⁷⁸ *Wade v. Borough of Oakmont*, 165 Pa. St. 479, 30 Atl. 959.

⁷⁹ *Providence &c. Plank Road Co. v. Scranton*, 1 Lack. Leg. N. (Pa.) 183.

⁸⁰ *Argentine v. Atchison &c. R. Co.*, 55 Kans. 730, 41 Pac. 946, 30 L. R. A. 255. But compare *State v. St. Paul &c. R. Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298.

⁸¹ *Watson v. New Milford*, 72 Conn. 561, 45 Atl. 167, 77 Am. St. 345.

⁸² *Tiede v. Schneidt*, 105 Wis. 470, 81 N. W. 826.

⁸³ *Los Angeles Water Co. v. Los Angeles*, 88 Fed. 720.

contract for heating and lighting the same.⁸⁴ Irregularity in the payment for land by a municipality, as where no formal appropriation had been made as required by the charter, will not affect the municipality's title to the land in a suit by a citizen to rescind.⁸⁵ A license for a whole year is not a contract for that time within the provision of the constitution.⁸⁶ Where a charter authorizes the city to provide for lighting the streets and for a water supply, by contract or otherwise, and to grant franchises for a term of years for such purposes, a franchise may be granted or contract entered into binding the city for the term of the franchise or contract.⁸⁷ It has also been held that the statutory provision which requires contracts to be let on competitive bidding does not prevent a municipality from contracting for a patented article.⁸⁸

§ 609. Validity of contract generally—Examples of invalid contracts.—It is a question of prime importance that the city shall be interested in the subject-matter of the contract. It is not sufficient that some of its citizens may be benefited thereby, or even a considerable number of them, nor its officers or employes be parties. A contract by a corporation counsel for services of a stenographer in a suit to which the city is not a party and in no way interested is invalid.⁸⁹

A contract entered into by a town just prior to consolidation with a city and not to take effect until thereafter and to run for

⁸⁴ *State v. McCardy*, 62 Minn. 509, 64 N. W. 1133.

⁸⁵ *Ecroyd v. Coggeshall*, 21 R. 1. 1, 41 Atl. 260, 79 Am. St. 741.

⁸⁶ *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878.

⁸⁷ *Cunningham v. Cleveland*, 39 C. A. 211, 98 Fed. 657.

⁸⁸ *Tousey v. Indianapolis (Ind.)*, 94 N. E. 225; *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185; *Union Pav. Co. v. Schenectady*, 74 Misc. (N. Y.) 646, 134 N. Y. S. 740; *Reed v. Rockliff-Gibson Const. Co.*, 25 Okla. 633, 107 Pac. 168, 138 Am. St. 937. See, however, *Pollock v. Kansas City (Kans.)*, 123 Pac. 985; *Terwilliger Land Co. v. Portland (Ore.)*, 123 Pac. 57; *Dean v. Charlton*, 23

Wis. 590, 99 Am. Dec. 205. Compare with *Johnson v. Atlantic City (N. J.)*, 81 Atl. 1105 (proposal so framed as to deter rather than invite bona fide competitive bidding). It will be found from a reading of the preceding cases that a conflict of authority exists on this subject, but it seems that the doctrine stated in the text is gradually winning its way to general application. The doctrine upholding such contracts is known as the Michigan rule and the cases holding the contrary follow what is known as the Wisconsin rule. See also, 2 Elliott Rds. & Sts. (3d ed.), §§ 710, 711.

⁸⁹ *Chicago v. Williams*, 80 Ill. App. 33, revd. 182 Ill. 135, 55 N. E. 123.

ten years, and not in good faith, is against public policy, and void.⁹⁰ The authorities of a city cannot by present agreement bind themselves to exercise their legislative powers in a particular manner at some future time.⁹¹ The reservation in a contract of power in the city engineer to annul the contract has been held an attempt to delegate legislative power, and, therefore, void.⁹² A contract entered into at a special meeting of the council of which several members had no notice and in which they did not participate, is invalid.⁹³ A contract by sinking-fund trustees for the sale of bonds resulting in adding interest to the funded public debt has been held invalid.⁹⁴ The failure to annex specifications to a contract referred to as part thereof has been held to render the contract invalid and the assessment based thereon void.⁹⁵ Power to make police, sanitary and other regulations, not in conflict with general law, has been held not to authorize the purchase of a site for a smallpox hospital.⁹⁶ Where by statute cities are authorized to contract for a water supply for a period not exceeding thirty years, it has been held that they may not fix a price for that period.⁹⁷ Where the electors, at an election called for the purpose, have expressed themselves, in relation to street lighting, in favor of construction or purchase of an electric light plant, a subsequent contract with a corporation for street lighting for ten years is void.⁹⁸ A contract unlawfully diverting public funds is void.⁹⁹

⁹⁰ *Hendrickson v. New York*, 160 N. Y. 144, 54 N. E. 680, affg. 38 App. Div. (N. Y.) 480, 56 N. Y. S. 580.

⁹¹ *New York, N. H. & H. R. Co. v. New Rochelle*, 29 Misc. (N. Y.) 195, 60 N. Y. S. 904.

⁹² *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460.

⁹³ *Harding v. Vandewater*, 40 Cal. 77; *Stowe v. Wyse*, 7 Conn. 214; *Supervisors &c. v. Horton*, 75 Iowa 271, 39 N. W. 394; *Paola & F. R. R. Co. v. Anderson*, 16 Kans. 302; *Beaver Creek &c. v. Hastings*, 52 Mich. 528, 18 N. W. 250; *Lord v. Anoka*, 36 Minn. 176, 30 N. W. 550; *People v. Batchelor*, 22 N. Y. 128; *London &c. Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995.

⁹⁴ *Cincinnati v. Guckenberger*, 60 Ohio St. 353, 54 N. E. 376.

⁹⁵ *Gray v. Richardson*, 124 Cal. 460, 57 Pac. 385.

⁹⁶ *Von Schmidt v. Widber*, 105 Cal.

151, 38 Pac. 682. Compare *Summit Tp. v. Jackson*, 154 Mich. 37, 117 N. W. 545, 18 L. R. A. (N. S.) 260 and cases there cited in note.

⁹⁷ *Carlyle v. Carlyle Water &c. Co.*, 52 Ill. App. 577, affd. on other grounds, 140 Ill. 445, 29 N. E. 556. It is beyond the power of a city to enter into a contract with a railroad company binding itself to maintain and keep in repair for all future time a bridge which is the joint work of the city and railroad company, on a public highway and over tracks belonging to the railroad company, and agreeing to allow no grade crossings at such point. *State v. Minnesota &c. R. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

⁹⁸ *George v. Wyandotte &c. Light Co.*, 105 Mich. 1, 62 N. W. 985.

⁹⁹ *Kent v. Dithridge &c. Glass Co.*, 10 Ohio C. C. 629.

The rule is universal that fraud in procuring the making of a contract vitiates the contract. Hence, bribery in obtaining a contract will render it void, although it is with the lowest bidder.¹ A contract by what is neither a de facto nor de jure corporation is a nullity.² An act changing the line of an improvement after a contract has been made so as to lessen the amount and cost of work has been held to render the contract inoperative and the assessment void.³ A contract may also be void for the reason that it exceeds the estimate of costs submitted with the plans and specifications to the city engineer.⁴

A compromise of an illegal claim against the city is not legal, and creates no liability,⁵ and the same is true as to a contract in connection with an invalid franchise,⁶ and a contract based on a void ordinance.⁷ The municipal officials cannot surrender a liquidated claim in favor of the city under the guise of a compromise.⁸

A contract with a water company to furnish the city with water for thirty years has been held unreasonable and beyond

¹ *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364. An allegation in an answer that the contract sued on was obtained by bribery of the officers charged with its execution, the ones bribed and the amount paid being unknown, is sufficient where no application for a more specific statement is made. *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364.

² *Guthrie v. Wylie*, 6 Okla. 61, 55 Pac. 103.

³ *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132.

⁴ *Bowles v. Neely*, 28 Okla. 556, 115 Pac. 344.

⁵ *Village of Fort Edward v. Fish*, 86 Hun (N. Y.) 548, 33 N. Y. S. 784. See also, *Zuelly v. Casper*, 37 Ind. App. 186, 76 N. E. 646.

⁶ *Nicholasville W. Co. v. Councilmen of Nicholasville*, 18 Ky. L. 592, 36 S. W. 549, 38 S. W. 430 (the above case holds, however, that the municipality may be liable for the benefits received under the contract).

⁷ *Ellis v. Cleburne*, (Tex. Civ. App.), 35 S. W. 495.

⁸ *Jefferson v. Lineberger*, 3 Mont.

231, 35 Am. Rep. 462 (compromise with official from whom money had been stolen for less than amount due). To same effect, *Commonwealth v. Tilton*, 111 Ky. 341, 23 Ky. L. 753, 63 S. W. 602 (facts similar to above); *Bland v. Orr*, 90 Tex. 492, 39 S. W. 558 (case with similar facts); *Farnsworth v. Wilbur*, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.) 320. See, however, *Hancock v. Bradley*, 53 Ind. 422. As to the right to compromise a judgment, see, generally, *Petersburg v. Mappin*, 14 Ill. 193, 56 Am. Dec. 501; *Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230; *Mills County v. Burlington & C. R. Co.*, 47 Iowa 66; *Collins v. Welch*, 58 Iowa 72, 12 N. W. 121, 43 Am. Rep. 111; *St. Louis & C. R. Co. v. Anthony*, 73 Mo. 431; *Farnham v. Lincoln*, 75 Nebr. 502, 106 N. W. 666; *Kinsley v. Norris*, 62 N. H. 652; *Orleans County v. Bowen*, 4 Lans. (N. Y.) 24; *Standart v. Burtis*, 46 Hun (N. Y.) 82; *Hagler v. Kelly*, 14 N. Dak. 218, 103 N. W. 629; *Multnomah County v. Dekum*, 51 Ore. 83, 93 Pac. 821; *State v. Davis*, 11 S.

the power of the city to make,⁹ and so is an exclusive privilege for lighting for ninety-nine years.¹⁰ An agreement to pay a stipulated monthly rental for a water-works plant on condition that the lessor would construct a railroad between certain points, where the city has no right to expend funds to aid railroads, is void.¹¹ While a contract with specified persons may be void as granting an unauthorized exclusive franchise, yet it has been held that so long as the city accepts services under the contract it must pay the stipulated price.¹²

Where a contract is objectionable in itself on the ground of infringing on the police power of the state, or if it becomes so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants.¹³ An illegal contract might be canceled at the suit of a lot owner in a suit brought before work had been done, and before the bonds had been sold, and an assessment made, and the fact that at the time of the trial the work had been completed and the bonds issued and sold would not cure the illegality.¹⁴ The city may recover the proceeds of bonds issued by it to a corporation under a void subscription to the capital stock.¹⁵ Where a duty rests upon a railway company to restore a public highway to its former condition the city cannot

Dak. 111, 75 N. W. 897, 74 Am. St. 780; Washburn County v. Thompson, 99 Wis. 585, 75 N. W. 309; Butternut v. O'Malley, 50 Wis. 329, 7 N. W. 246.

⁹ Flynn v. Little Falls &c. Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106. See also, Danville v. Danville Water Co., 178 Ill. 299, 53 N. E. 118, 69 Am. St. 304; Gaslight &c. Co. v. New Albany, 156 Ind. 406, 59 N. E. 176. But compare Walla Walla v. Water Co., 172 U. S. 1, 19 Sup. Ct. 77; Little Falls R. Co. v. Little Falls, 102 Fed. 663; Monroe Water Co. v. Heath, 115 Mich. 277, 73 N. W. 234.

¹⁰ Wellston v. Morgan, 59 Ohio St. 147, 52 N. E. 127.

¹¹ Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670. A city without special authority can-

not extend its aid to an association. Park v. Modern Woodmen, 181 Ill. 214, 54 N. E. 932. The subscription for corporate stock by a city being unauthorized the acceptance of bonds by it does make it a stockholder. Geneseo v. Geneseo &c. Co., 55 Kans. 358, 40 Pac. 655. But if there was a general power to contract for a water supply the city will be liable on a quantum valebat for the reasonable value of the use of the plant.

¹² Illinois Trust &c. Bank v. Arkansas City W. Co., 67 Fed. 196.

¹³ Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77.

¹⁴ Allen v. Davenport, 107 Iowa 90, 77 N. W. 532.

¹⁵ Geneseo v. Geneseo &c. Co., 55 Kans. 358, 40 Pac. 655.

make a valid contract relieving the company from such performance and waiving the power of the city to enforce performance, at least so far as this would amount to attempting to contract against future exercise of its police power.¹⁶ A contract with a city to furnish it for municipal use a fire-alarm telegraph system which is void for contravening constitutional limitations cannot be changed by a court of equity so as to give an implied franchise to the contracting company to operate the system for its own benefit and use, nor can the court authorize the delivery of possession of the plant as an entirety where part of the apparatus and poles belong to the city.¹⁷ Where the charter requires all contracts to be signed by the mayor, or some other person authorized thereto, it has been held that a contract for a sewer signed only by the parties who agree to do the work is invalid and no action can be maintained thereon for damages for preventing its performance by the city, nor will equity grant relief, where no work has been done and there is no detriment except prospective profits.¹⁸

A municipality in letting contracts for the performance of public work cannot discriminate in favor of union labor. There is some conflict upon this and similar questions, but the weight of authority and the better reason are both in accord on the proposition as above stated.¹⁹ Where the city holds land for the

¹⁶ *State v. Minnesota Trans. R. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; (*Cf. Flynn v. Little Falls & Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106); *State v. St. Paul City R. Co.*, 78 Minn. 331, 81 N. W. 200; *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787. But see *Hicks v. Chesapeake & O. R. Co.*, 102 Va. 197, 45 S. E. 888.

¹⁷ *Gamewell & Tel. Co. v. Laporte*, 102 Fed. 417, 42 C. C. A. 405, affg. 96 Fed. 664.

¹⁸ *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250. See also, *Kelley v. Torrington*, 80 Conn. 378, 68 Atl. 855; *Carskaddon v. South Bend*, 141 Ind. 596, 39 N. E. 667. But compare *Fehler v. Gosnell*, 99 Ky. 380, 18 Ky. L. 238, 35 S. W. 1125; *Philadelphia v. Gergas*, 180 Pa. St. 296, 36 Atl. 868. And see, generally, 1 Elliott Rds. & Sts. (3d ed.), § 639. A judg-

ment rendered by consent against town commissioners will not estop the town from setting up want of power to make such contract. *Union Bank & Co. v. Oxford*, 119 N. Car. 214, 25 S. E. 966, 34 L. R. A. 487.

¹⁹ *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. 222; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; *Miller v. City of Des Moines*, 143 Iowa 409, 122 N. W. 226, 23 L. R. A. (N. S.) 815n; *Lewis v. Board of Education*, 139 Mich. 306, 102 N. W. 756; *State v. Toole*, 26 Mont. 22, 66 Pac. 496, 55 L. R. A. 644, 91 Am. St. 386; *Paterson Chronicle Co. v. Paterson*, 66 N. J. L. 129, 48 Atl. 589; *Davenport v. Walker*, 57 App. Div. (N. Y.) 221, 68 N. Y. S. 161; *John Single Paper Co. v. Edgcomb*, 112 App. Div. (N. Y.) 604, 98

benefit of the public it has no right to make a long and exclusive lease of such land for private purposes.²⁰

§ 610. Leasing public property for private purposes.—

This principle is rigidly enforced when applied to public streets. A city, in the absence of express authority has no power or right to grant the exclusive use of its streets or any part thereof to any private person or for any private purposes, but must, ordinarily at least, hold and control the possession solely for the public use. All public highways from side to side and from end to end are held for the use of the public.²¹ Thus a municipality cannot lease a part of the sidewalk in front of business houses to be used

N. Y. S. 965; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S. W. 815. See also, *Inge v. Mobile*, 135 Ala. 187, 33 So. 678, 93 Am. St. 20. But compare *Givins v. People*, 194 Ill. 150, 62 N. E. 534, 88 Am. St. 143; *People v. Coles*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. 605n; *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. 175. And see generally, 2 *Elliott Rds. & Sts.* (3d ed.), § 713.

²⁰ *Weeks v. City of Galveston*, 21 Tex. Civ. App. 102, 51 S. W. 544. A city cannot lease to one person all its wharf and water privileges. *Corpus Christi v. Central W. & W. Co.*, 8 Tex. Civ. App. 94, 27 S. W. 803. A lease of franchises by a city after the repeal of an act granting them to the city is void. *Central W. & W. Co. v. Corpus Christi*, 23 Tex. Civ. App. 390, 57 S. W. 982. A city as lessor, is governed by the same obligations of law as are imposed upon other lessors, and if part of the leased premises are taken for public improvement there must be a diminution for rent. *Hinrichs v. New Orleans*, 50 La. Ann. 1214, 24 So. 224. See, however, *Hopper v. Willcox*, 135 N. Y. S. 384, holding that a city may build a subway and then lease it.

²¹ *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Costello v. State*, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303; *Curry v. District of Columbia*, 14 App. D. C. 423; *Lutterloh v. Cedar Keys*, 15 Fla. 306;

Columbus v. Jaques, 30 Ga. 506; *Chicago v. Pooley*, 112 Ill. App. 343; *Snyder v. Mt. Pulaski*, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407, affg. 69 Ill. App. 474; *Sears v. Chicago*, 247 Ill. 204, 93 N. E. 158, 139 Am. St. 319; *Pagames v. Chicago*, 111 Ill. App. 590; *Cordatos v. Chicago*, 129 Ill. App. 471; *Spencer v. Andrew*, 82 Iowa 14, 47 N. W. 1007, 12 L. R. A. 115n; *Labry v. Gilmour*, 121 Ky. 367, 28 Ky. L. 311, 89 S. W. 231; *Commonwealth v. Morrison*, 197 Mass. 199, 83 N. E. 415, 14 L. R. A. (N. S.) 194, 125 Am. St. 338n; *Henkel v. Detroit*, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464; *State v. St. Louis*, 161 Mo. 371, 61 S. W. 658; *Galloso v. Sikeston*, 124 Mo. App. 380, 101 S. W. 715; *Chapman v. Lincoln*, 84 Nebr. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400; *Cohen v. New York*, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. 506; *Branahan v. Cincinnati Hotel Co.*, 39 Ohio St. 333, 48 Am. Rep. 457; *Hites v. Dayton*, 8 Ohio Dec. 170, 6 W. L. Bul. 142; *Spencer v. Mahon*, 75 S. Car. 232, 55 S. E. 321; 2 *Elliott Rds. & Sts.* (3d ed.), § 828. In the case of *Vandalia R. Co. v. State*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. 370, it is said: "In granting a franchise to use its streets, alleys or public places, the city exercises its delegated legislative powers, and for that purpose could not by contract barter away its future legislative control over such highways and places."

by produce dealers or other merchants.²² A city does not, as a general rule, have the power to erect or authorize the erection of a market-house in a public street.²³ Nor does it, as a general rule, have power to lease space in its streets for fruit or lunch stands,²⁴ lunch wagons,²⁵ hack stands when not justified by public necessity or convenience,²⁶ nor for weighing scales.²⁷ Nor does it have the power to grant or lease a public street on which is to be constructed a railroad depot.²⁸ It is thus made obvious that a municipality does not have the right to authorize the erection of any permanent obstruction of any kind in a public street.²⁹ It

²² *Chapman v. Lincoln*, 84 Nebr. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400.

²³ *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Columbus v. Jaques*, 30 Ga. 506; *Savannah v. Wilson*, 49 Ga. 476; *Peters v. St. Louis*, 226 Mo. 62, 125 S. W. 1134; *St. John v. New York*, 3 Bosw. (N. Y.) 483; *Ely v. Campbell*, 59 How. Pr. (N. Y.) 333; *Pruden v. Cincinnati*, 1 Ohio N. P. 340; *Wilder v. Cincinnati*, 1 Ohio N. P. 347; *Hites v. Dayton*, 8 Ohio Dec. 170, 6 W. L. Bull. 142. It cannot even grant the use of a part of the street as a stand for huckster wagons. *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783. To same effect, *McDonald v. Newark*, 42 N. J. Eq. 136, 7 Atl. 855; *In re Fiegle*, 36 Misc. (N. Y.) 27, 72 N. Y. S. 438. Other authorities, however, lay down the rule that a municipality may grant the use of a street for a public market if the rights of the public and abutting owners are not materially interrupted. *Denehey v. Harrisburg*, 2 Pearson (Pa.) 330. To same effect, *Henkel v. Detroit*, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464; *Tomlin v. Cape May*, 63 N. J. L. 429, 44 Atl. 209.

²⁴ *Costello v. State*, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303; *Pagames v. Chicago*, 111 Ill. App. 590; *Galloso v. Sikeston*, 124 Mo. App. 380, 101 S. W. 715; *People v. Willis*, 9 App. Div. (N. Y.) 214, 75 N. Y. St. 619, 41 N. Y. S. 168; *People v. Keating*, 168 N. Y. 390, 61 N. E. 637. Such a stand, which interferes with the use of the

sidewalk, is a nuisance. *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117n. See, however, *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576.

²⁵ *Spencer v. Mahon*, 75 S. Car. 232, 55 S. E. 321. See, however, *Rex v. Bartholomew* (1908), 1 K. B. 554. See also, *Commonwealth v. Morrison*, 197 Mass. 199, 83 N. E. 415, 14 L. R. A. (N. S.) 194, 123 Am. St. 338.

²⁶ *Curry v. District of Columbia*, 14 App. D. C. 423; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 34 N. E. 825, 53 L. R. A. 223; *McCaffrey v. Smith*, 41 Hun (N. Y.) 117, 4 N. Y. St. 11; *Odell v. Bretney*, 38 Misc. (N. Y.) 603, 78 N. Y. S. 67; *Branahan v. Cincinnati Hotel Co.*, 39 Ohio St. 333, 48 Am. Rep. 457. See, however, *Masterson v. Short*, 7 Robt. (N. Y.) 299, 35 How. Pr. (N. Y.) 169.

²⁷ *Tell City v. Bielefeld*, 20 Ind. App. 1, 49 N. E. 1090; *Berry-Horn Coal Co. v. Scruggs-McClure Coal Co.*, 62 Mo. App. 93; *State v. Vandalia*, 119 Mo. App. 406, 94 S. W. 1009. See, however, *Spencer v. Andrew*, 82 Iowa 14, 47 N. W. 1007, 12 L. R. A. 115n.

²⁸ *Chicago &c. R. Co. v. People*, 222 Ill. 427, 78 N. E. 790; *Cooper v. Alden*, Harr. Ch. (Mich.) 72; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *State v. Jersey City*, 52 N. J. L. 65, 18 Atl. 586.

²⁹ See also, *People v. Clean Street Co.*, 225 Ill. 470, 80 N. E. 298, 9 L. R. A. (N. S.) 455n, 116 Am. St. 156; *Labry v. Gilmour*, 121 Ky. 367, 28 Ky. L. 311, 89 S. W. 231 (coal office and barn); *Caldwell v. George*, 96 Miss. 484, 50 So. 631 (warehouse); *State v. St. Louis*, 161 Mo. 371, 61 S.

has also been held that a board of education cannot lease a school house lot for the production of oil and gas, for the reason that such board cannot engage in business or make contracts outside its functions touching education.⁸⁰

§ 611. Leasing public property for private purposes—Enforcement of contract.—While it is true as a general rule that mandamus will not lie to enforce the obligation of a contract, yet where a corporation accepts a public franchise imposing certain duties toward the public in return for the rights conferred upon it, the performance of the duties so imposed is a public one which may be compelled by mandamus.⁸¹ It would also seem that one who contracts with the city cannot, in the performance of that contract, commit acts destructive of the comfort of the people residing in the vicinity and injurious to the public health. The city itself could not lawfully commit such an

W. 658 (waste paper boxes to be maintained by private individuals who are also to grant their use for advertising purposes); *State v. Franklin*, 133 Mo. App. 486, 113 S. W. 652 (street not to be used for livery stable); *People v. Ahearn*, 124 App. Div. (N. Y.) 840, 109 N. Y. S. 249 (structure to be used in connection with a restaurant). For an exhaustive note on the grant by a city of the right to use streets and sidewalks for a private purpose, see note in 125 Am. St. 343-354. See also, 2 Elliott Rds. & Sts. (3d ed.), § 836. As to the power of the legislature to authorize the building of obstructions see *In re Opinion of Justices* (Mass.), 94 N. E. 849, in which it is held that the legislature represents the people and at any time may enlarge or limit public rights acquired in a highway, having due regard to private rights of property secured by the constitution to all the people. "The Legislature, in consequence of its paramount control of the highways of a state and as the representative of the public at large, may, in the absence of any constitutional inhibition, authorize legitimate obstructions in the streets of a municipality which, without such sanction, might become nuisances, but enactments of that kind

are strictly construed." *Baker City Mut. Irr. Co. v. Baker City* (Ore), 113 Pac. 9, 14.

⁸⁰ See also, *Gottlieb-Knabe Co. v. Macklin*, 109 Md. 429, 71 Atl. 949, 31 L. R. A. (N. S.) 580 and note. *Herald v. Board of Education*, 65 W. Va. 765, 65 S. E. 102, 31 L. R. A. (N. S.) 588 and note. A municipality has been enjoined from permitting a school building to be used for theatrical performances as a business. *Sugar v. Monroe*, 108 La. 677, 32 So. 961, 59 L. R. A. 723. Nor under a charter provision did the village council or board of education have power to deed or lease without rent a high school building to a private corporation for its own emolument. *Sherlock v. Winnetka*, 68 Ill. 530. See also, *Brooks v. Brooklyn*, 146 Iowa 136, 124 N. W. 868, 26 L. R. A. (N. S.) 425, which holds that a municipality does not have the right to erect a theater. See, however, *Hopper v. Willcox*, 76 Misc. (N. Y.) 345, 135 N. Y. S. 384, holding that the city of New York may build a subway and then lease it.

⁸¹ See *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731, citing many cases, and 2 Elliott Rds. & Sts. (3d ed.), §§ 986, 1011, 1013, 1056.

act or authorize others to do so, and in the exercise of its police power to protect life and health it is not estopped by its contract and it could not abandon its duty in that respect even if it willed to do so.³²

§ 612. **Ratification.**—A contract which is within the scope of a municipal or other public corporation's powers, but which owing to some irregularity is not binding on the corporation may be ratified by it.³³ Thus, a contract which is irregular in that it was made by resolution instead of ordinance may be ratified by a subsequent ordinance without a new consideration.³⁴ Likewise a municipal or other public corporation may ratify the unauthorized contracts of its officers and agents which are within the scope of its corporate powers.³⁵ The same is true of a contract which has been improperly executed. It may be ratified by the departments which have general powers over such matters where the city has accepted with knowledge of the facts the benefit of the contract performed in good faith.³⁶ But a city official who had no original authority to make certain contracts, cannot by his subsequent acts give them life by his official recognition.³⁷ Nor can an official

³² *State v. St. Louis*, 207 Mo. 354, 105 S. W. 748, 123 Am. St. 376.

³³ *People v. Spring Lake Drainage &c. Dist.*, 253 Ill. 479, 97 N. E. 1042. "If there is legal authority for the contract, though it be illegal because of some irregularity or informality in the manner or time of its execution, and therefore incapable of enforcement, it may be ratified by an acceptance of the benefits of the contract by the corporation; but, if there be no legal authority for the contract, that authority cannot be created through the application of any doctrine, or of principle of estoppel, acquiescence, or ratification." *Gallup v. Liberty County (Tex.)*, 122 S. W. 291.

³⁴ *State v. Cowgill &c. Co.*, 156 Mo. 620, 57 S. W. 1008.

³⁵ *Moore v. Hupp*, 17 Idaho 232, 105 Pac. 209; *Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731; *Aspinwall-Delafield Co. v. Borough of Aspinwall*, 229 Pa. 1, 77 Atl. 1098. It must be borne in mind, however, that mere knowledge by the individual mem-

bers of the council or other board, acquired by conversations on the street, cannot be considered as knowledge of the principal. The municipality must act as a body, and cannot be bound by individual acts or knowledge brought home to the individual members. *Texarkana v. Friedell*, 82 Ark. 531, 102 S. W. 374.

³⁶ *Ida Grove v. Ida Grove Armory Co.*, 146 Iowa 690, 125 N. W. 866; *Johnson v. School Corporation*, 117 Iowa 319, 90 N. W. 713; *St. Louis v. Ruecking*, 232 Mo. 325, 134 S. W. 657; *North River Elec. &c. Co. v. New York*, 48 App. Div. (N. Y.) 14, 62 N. Y. S. 726. See also, *Taymouth v. Koehler*, 35 Mich. 22; *Darling v. Manistee*, 166 Mich. 35, 131 N. W. 450. Compare *Port Jervis Water Works Co. v. Port Jervis*, 151 N. Y. 111, 45 N. E. 388.

³⁷ *Commercial Wharf Corp. v. Boston (Mass.)*, 94 N. E. 805. See also, *London Guarantee &c. Co. v. Beaumont (Tex. Civ. App.)*, 139 S. W. 894.

who had no power to make the contract in the first instance ratify an unauthorized agreement entered into by another official.³⁸ It may be said generally that where a contract is invalid for any reason or irregularity that does not go to the subject-matter it may be the subject of ratification in so far as it has been executed.³⁹ In short, any merely voidable contract may be ratified.⁴⁰ But where a contract is utterly void, it is not within the power of the municipality to give any validity to the agreement whatever, by any recognition it may give such contract as legal.⁴¹ Thus parol acts of ratification and acquiescence in the unauthorized and void conveyance of the real property of a municipality can give no validity to the transaction.⁴² Nor can a contract which is truly ultra vires be ratified.⁴³ It cannot ratify an act which it would be positively unlawful for it to do.⁴⁴ Neither does the attempted

³⁸ *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195; *In re Niland*, 193 N. Y. 180, 85 N. E. 1012. In order to have ratification there must be some affirmative action by proper officers, or some negative action, which of itself would amount to an approval of the matter in question. Acquiescence by officials in the continuance of a service not in the scope of their duties does not bring the municipality within the operation of that rule which requires corporations as well as individuals to pay for what they have received the benefit of when the officers of the corporation having its management in charge have acquiesced in the benefit received by it. *Texarkana v. Friedill*, 82 Ark. 531, 102 S. W. 374.

³⁹ *Frederick v. People*, 83 Ill. App. 89.

⁴⁰ *Aspinwall-Delafield Co. v. Borough of Aspinwall*, 229 Pa. 1, 77 Atl. 1098.

⁴¹ *People v. Spring Lake Drainage & Co.*, 253 Ill. 479, 97 N. E. 1042; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. 931. To same effect, *Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743. "Ratification is only effective where there is authority to do the act which is subsequently ratified." *Smith v. Philadelphia*, 227 Pa. 423, 76 Atl. 221.

⁴² *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024.

⁴³ *Reed City v. Reed City & Co. Works*, 165 Mich. 599, 131 N. W. 385; *In re Niland*, 193 N. Y. 180, 85 N. E. 1012; *Horton v. Thompson*, 71 N. Y. 513; *Ellis v. Cleburne* (Tex. Civ. App.), 35 S. W. 495. Being entirely outside of the authority of the corporation, it cannot by subsequent confirmation make legal what it had no authority to do. See 1 *Elliott Rds. & Sts.* (3d ed.), § 599, citing *Roughton v. Atlanta*, 113 Ga. 948, 39 S. E. 316; *Murray v. Omaha*, 66 Nebr. 279, 92 N. W. 299, 103 Am. St. 702; *Hodges v. Buffalo*, 2 Denio (N. Y.) 110, and other cases. See also, *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. 31; *Sage v. Fargo Tp.*, 107 Fed. 383, 46 C. C. A. 361; *Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; *Watterson v. Nashville*, 106 Tenn. 410, 61 S. W. 782; *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. 636; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132.

⁴⁴ *Highway Comrs. v. Van Dusan*, 40 Mich. 429. The mandatory provision of the statute must be strictly followed and when this is not done no subsequent act of the officers of the municipality can make the contract effective. *San Diego Water Co. v. San Diego*, 59 Cal. 517; *Jefferson*

ratification of a void contract work an estoppel against the city.⁴⁵ The plea of ratification of a contract made in violation of a charter provision is of no avail unless the acts relied upon for a ratification would be sufficient to support a contract as an original matter.⁴⁶ Thus if an ordinance is necessary to the validity of a specified contract, it can only be ratified by ordinance.⁴⁷ It is not necessary, however, in all cases that there be a formal ratification, so where services are rendered at the request of the president of the board of trustees, if the corporation subsequently accepts and agrees to pay for such services, it will be bound.⁴⁸ An action of a city to enforce an assessment has been held a ratification of the contract upon which it is based⁴⁹ and so has the bringing suit on the original agreement.⁵⁰

§ 613. **Rescission.**—Contracts entered into by a municipal corporation are as a general rule governed by the principles applicable to other contracts, and when such a contract, within the scope of the corporation's authority is fairly made without fraud, bad faith or misconduct on the part of either the contractor or the city officials, and is not unreasonable, it cannot be repudiated by the city after performance or part performance by the con-

County v. Arrighi, 54 Miss. 668; Smith v. Newburgh, 77 N. Y. 130.

⁴⁵ Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863; Chittenden v. Lansing, 120 Mich. 539, 79 N. W. 797; Gallup v. Liberty Co. (Tex. Civ. App.), 122 S. W. 291. "The rule contended for by appellant, to the effect that neither party to a transaction will be permitted to take advantage of its invalidity while retaining the benefits, applies only to voidable contracts and not to a transaction that is absolutely void." Independent School Dist. v. Collins, 15 Idaho 535, 98 Pac. 857, 128 Am. St. 76, citing a number of authorities.

⁴⁶ Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. 931.

⁴⁷ Mulligan v. Lexington, 126 Mo. App. 715, 105 S. W. 1104. See also, McCracken v. San Francisco, 16 Cal. 591; Durand v. Pennington, 8 Colo. 257, 7 Pac. 14.

⁴⁸ Kent v. North Tarrytown, 50 App. Div. (N. Y.) 502, 64 N. Y. S. 178.

⁴⁹ Harrisburg v. Shepler, 190 Pa. St. 374, 42 Atl. 893. See also, May v. Gloucester, 174 Mass. 583, 55 N. E. 465; Aurora Water Co. v. Aurora City, 129 Mo. 540, 31 S. W. 946. This latter is a case where a contract was ratified by acquiescence therein after knowledge of all material facts. Since a contract to construct a levee is without the scope of corporate powers conferred upon incorporated towns, such a contract cannot be ratified by the town's acceptance of the work done under it nor can the town be estopped by permitting the work to be done and accepting the benefits thereof. Newport v. Batesville & B. R. Co., 58 Ark. 270, 24 S. W. 427.

⁵⁰ Worcester v. Worcester & Co. St. Ry. Co., 194 Mass. 228, 80 N. E. 232. But see Root v. Topeka, 63 Kans. 129, 65 Pac. 233.

tractor.⁵¹ After a contract has become binding it cannot be rescinded by one without the consent of the other party.⁵²

§ 614. *Ultra vires*.—The general subject of *ultra vires* contracts has already been treated in the chapters on Private and Public Corporations, and incidental reference thereto has been made in the present chapter on Municipal Corporations. Consequently but brief mention will be made of this subject at this point. It should be borne in mind that there are municipal contracts that are illegal and therefore void that cannot be classified with *ultra vires* contracts. An *ultra vires* contract is one which concerns a subject-matter beyond the general power of the corporation to contract. Thus, ordinarily, a municipal corporation cannot engage in the buying and selling of real estate,⁵³ the manufacture of bricks,⁵⁴ the moving of houses for private individuals,⁵⁵ the operation of stone quarries,⁵⁶ the plumbing business,⁵⁷ nor agree to forever abdicate its police power;⁵⁸ and when it attempts so to do in the absence of valid legislative authority its contracts in relation thereto would be *ultra vires* and void. A contract in violation of a statute or contrary to public policy would be equally void because illegal, though not *ultra vires*.⁵⁹ In case the contract is *ultra vires* in the strict sense of the term it is void, and cannot be ratified so as to create a liability upon the contract itself.⁶⁰ In case the contract is not void on its face the authority of the municipal corporation to enter

⁵¹ Little Falls Elec. &c. Co. v. Little Falls, 102 Fed. 663.

⁵² Hudson Elec. Light Co. v. Hudson, 163 Mass. 346, 40 N. E. 109. See also, Sanitary Dist. v. Ricker, 91 Fed. 833, 34 C. C. A. 91; Stanley v. Board &c. of Passaic County, 60 N. J. L. 392, 38 Atl. 181; 2 Elliott Rds. & Sts. (2d ed.), § 1050.

⁵³ Hayward v. Red Cliff, 20 Colo. 33, 36 Pac. 795. See also, Hunnicutt v. Atlanta, 104 Ga. 1, 30 S. E. 500; Bloomsburg Land Imp. Co. v. Bloomsburg, 215 Pa. 452, 64 Atl. 602. See, however, Delaney v. Salina, 34 Kans. 532, 9 Pac. 271.

⁵⁴ Attorney-General v. Detroit, 150 Mich. 310, 113 N. W. 1107, 121 Am. St. 625.

⁵⁵ Wheeler v. Sault Ste. Marie, 164 Mich. 338, 129 N. W. 685, 35 L. R. A. (N. S.) 547n.

⁵⁶ Donalbe v. Harrisonburg, 104 Va. 533, 52 S. E. 174, 2 L. R. A. (N. S.) 910, 113 Am. St. 1056.

⁵⁷ Keen v. Waycross, 101 Ga. 588, 29 S. E. 42.

⁵⁸ State v. St. Paul &c. R. Co., 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298.

⁵⁹ Field v. Shawnee, 7 Okla. 73, 54 Pac. 318. For an example of a case that fails to draw this distinction, see Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 120 Am. St. 621.

⁶⁰ People v. Spring Lake Drainage Dist., 253 Ill. 479, 97 N. E. 1042; Spitzer v. Blanchard, 82 Mich. 234,

into it will be presumed, and the defense of ultra vires must be pleaded.⁶¹

§ 615. **Estoppel.**—As a general rule municipal corporations may be estopped by their own act in the exercise of their business powers much the same as any other person or corporation.⁶² A municipal corporation may be estopped to deny the validity of a contract as against an innocent party when it has retained the benefit of such contract, it being invalid not because of want of power on the part of the municipality but because such power was improperly exercised.⁶³ Thus, where a municipality had power to sell a certain tract of land for the price at which it was sold, and the only departure from the statute consisted in making a deed before all the purchase-money was paid, the municipality was held estopped to claim that it was authorized to sell for cash only where the contract had been executed by the

46 N. W. 400. See ante, § 612, Ratification, also, 1 Elliott Rds. & Sts. (3d ed.), § 599.

⁶¹ Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503. The defense of ultra vires will not be upheld unless there is shown some provision of the charter, absolutely or by necessary implication prohibiting it from so contracting. *Tone v. Tillamook City*, 58 Ore. 382, 114 Pac. 938. The following cases are a few illustrations of instances in which contracts were held ultra vires. *Beebe v. Little Rock*, 68 Ark 39, 56 S. W. 791 (the giving away or exchange of the city's streets or other property); *Fulton v. Northern Ill. College*, 158 Ill. 333, 42 N. E. 138 (making loans and donations to colleges); *Myers v. Jeffersonville*, 145 Ind. 431, 44 N. E. 452 (borrowing money to pay expenses of a contested election in regard to the removal of the county seat); *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. 822 (the offering of a reward).

⁶² *Des Moines v. Welsbach Street Lighting Co.*, 110 C. C. A. 540, 188 Fed. 906; *Marshall v. Schenck*, 5 Wall (U. S.) 772, 18 L. ed. 556. For a statement of the rule in a slightly restricted form see *Union Depot Co. v. St. Louis*, 76 Mo. 393, which states

that such corporation may be estopped by a contract which it has authority to make. *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316. It has been held that a municipal corporation is bound by payment made to one of its officers not authorized by law to receive the same, although he fails to turn the sum collected into the treasury, the city having permitted him to make such collections for a long term of years, since it had, in effect, made him agent for that purpose. *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, 24 L. R. A. (N. S.) 1275.

⁶³ *Des Moines v. Welsbach Street Lighting Co.*, 110 C. C. A. 540, 188 Fed. 906; *Chicago v. Norton Milling Co.*, 196 Ill. 580, 63 N. E. 1043; *Chicago v. Pittsburg & C. R. Co.*, 244 Ill. 220, 91 N. E. 422, 135 Am. St. 316; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Nebraska Bituminous Co. v. Omaha*, 84 Nebr. 375, 121 N. W. 443; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Aspinwall-Delafield Co. v. Borough of Aspinwall*, 229 Pa. 1, 77 Atl. 1098; *Robbins v. Chicago*, 4 Wall. (U. S.) 657, 18 L. ed. 427. "The courts have not been inclined to favor defenses

parties.⁶⁴ A municipal corporation may even be estopped to set up that the statute under which it acted is unconstitutional where it appears that the subject-matter of the contract is not *ultra vires*, illegal nor *malum prohibitum*.⁶⁵ In the absence of collusion or fraud a city may also estop itself from alleging breach of contract after it has accepted and paid for the work performed thereunder with full knowledge of all the facts.⁶⁶ But, where the contract is for any reason absolutely void, complete performance thereof on the part of the other party will not prevent the municipal corporation from pleading its lack of power to execute or the illegality of the contract;⁶⁷ nor will acceptance of the benefit by the municipality change the rule.⁶⁸ Nor will it be affected

to honest demands based upon mere irregularities and informalities, and in meritorious cases the city has been estopped from availing itself of its own irregularities in the exercise of its powers, where innocent parties have parted with their property and expended their money in absolute reliance that all legal formalities had been observed. * * * But where the defense goes to the question of power a different situation is presented than one of mere irregularity." *Moriarity v. New York*, 59 Misc. (N. Y.) 204, 110 N. Y. S. 842.

⁶⁴ *Book v. Polk*, 81 Ark. 244, 98 S. W. 1049. In the above case it is said: "A municipal or other corporation may be estopped to avail itself of *ultra vires* contracts where the contracts are executed, and the contract itself is over a matter within the corporate power to contract."

⁶⁵ *Mount Vernon v. State*, 71 Ohio St. 428, 73 N. E. 515, 104 Am. St. 783. See also, *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321, and cases there cited; *Busenbark v. Clements*, 22 Ind. App. 557, 53 N. E. 665; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071; 2 *Elliott Rds. & Sts.* (3d ed.), §§ 735, 736.

⁶⁶ *St. Louis v. Ruecking*, 232 Mo. 325, 134 S. W. 657. To same effect, *Matheney v. El Dorado*, 82 Kans. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980n.

⁶⁷ *Dawson v. Dawson Water Works Co.*, 106 Ga. 693, 32 S. E. 907; *Ed-*

wards Hotel &c. R. Co. v. City of Jacksonville, 96 Miss. 547, 51 So. 802; *Unionville v. Martin*, 95 Mo. App. 28, 68 S. W. 605; *La France Fire Engine Co. v. Syracuse*, 33 Misc. (N. Y.) 516, 68 N. Y. S. 894; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588.

⁶⁸ *Horkan v. Moultrie*, 136 Ga. 561, 71 S. E. 785; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406; *McNay v. Lowell*, 41 Ind. App. 627, 84 N. E. 778; *Newport v. Schoolfield* (Ky.), 134 S. W. 503; *Floyd County v. Owego Bridge Co.*, 143 Ky. 693, 137 S. W. 237; *Mealey v. Hagerstown*, 92 Md. 741, 48 Atl. 746; *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219. The above case suggests that there might be a recovery on the quantum meruit. *Perry Water &c. Co. v. Perry* (Okla.), 120 Pac. 582; *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601. "The appellant urges that the defendants, having received the grant which they sought, are estopped to deny the validity of their undertaking which they gave in consideration of such grant. But we think the doctrine of estoppel has no just application here. A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts en-

by the fact that the contract repudiated has been acted on by the municipality for a number of years, and was the result of a compromise agreement.⁶⁹ No estoppel can arise from an act of a municipal corporation when done in violation or without authority of law.⁷⁰ It has also been held that a municipality is not liable for services rendered by employes where their appointments were void under the law,⁷¹ and that a county is not estopped by an illegal compromise of an action at law.⁷² Nor will a county be estopped to recover illegal payments merely because they were made on the advice of the county attorney.⁷³ It would seem as a general rule that no estoppel can grow out of dealings with public officers of limited authority when the contract is in excess of the powers conferred upon them.⁷⁴ On the other hand, it has been held that a county official who has expended money for a legal purpose, but in an illegal manner, will not be required to refund the same, the county being estopped to recover the money so expended, if the official made the expenditure in good faith, for an authorized purpose, and the county has received the benefit.⁷⁵

tirely beyond the range of the municipal authority. 'If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it. * * *

We cannot apply the doctrine of estoppel to such a case as this.' *City Council v. Montgomery & Co.*, 31 Ala. 76." In this case the party contracting with the municipality, and not the municipality, set up the invalidity of the contract. *City of Arcata v. Green* (Cal.), 106 Pac. 86. See also, *Edison Electric Co. v. City of Pasadena*, 178 Fed. 425, 102 C. C. A. 401.

⁶⁹ *State v. Minnesota Transfer R. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

⁷⁰ *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 110 Pac. 392, 113 Pac. 9.

⁷¹ *Shaw v. City and County of San Francisco* (Cal.), 110 Pac. 149.

⁷² *Tucker v. State*, 163 Ind. 403, 71 N. E. 140.

⁷³ *Caldwell v. Boone County*, 41 Ind. App. 40, 83 N. E. 355; *Hennepin County v. Dickey*, 86 Minn. 331, 90 N. W. 775.

⁷⁴ *Moss v. Sugar Ridge Township*, 161 Ind. 417, 68 N. E. 896; *Lee v. York School Township*, 163 Ind. 339, 71 N. E. 956; *Daily v. Daviess County*, 165 Ind. 99, 74 N. E. 977; *Hord v. State*, 167 Ind. 622, 79 N. E. 916. "There seems to be little dissent from the view that an ultra vires contract made with the agents of the city cannot operate as an estoppel on the city." *Edwards Hotel & C. R. Co. v. Jackson* (Miss.), 51 So. 802.

⁷⁵ *Flowers v. Logan County*, 138 Ky. 59, 127 S. W. 512, 137 Am. St. 347. In the above case the court said: "If it is made to appear that the expenditure was in good faith, and the public has got that which it was entitled to, good conscience forbids the recovery. The law therefore denies it." To same effect, *Clark v. Logan County*, 138 Ky. 676, 128 S. W. 1079.

The foregoing indicates that the principle that the state and its subdivision, the county, are immune from estoppel is giving way to the doctrine that they may be estopped when the act done is not prohibited by the charter or statute creating it, or is one which either the state or county had authority to perform, but in the performance thereof failed to follow the directory provisions of the statute, because of which the position of the other party has been changed to his detriment and the state or county has received the benefits of the act.⁷⁶

§ 616. The borrowing of money and the issuance of negotiable papers.—It is generally conceded that a private corporation, constituted with a view to pecuniary profit, has, by implication, when not in this respect particularly and especially restricted, the power to borrow money. There is a conflict of authority as to whether or not this power resides in a municipal corporation. The rule which seems to be supported by the weight of authority is that the power to borrow money does not necessarily belong to a municipal corporation as an incident of its creation.⁷⁷ However, other cases either hold or assume that a munic-

But if the money is illegally expended, and nothing of value was received in return for the money so expended, it may be recovered. *Buyck v. Buyck*, 112 Minn. 94, 127 N. W. 452, 140 Am. St. 464.

⁷⁶ The principles of estoppel, as applied to municipal corporations and to counties, may have a slightly different application because of the difference existing between the two corporations. "Municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them.

"Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for; * * * the latter is superimposed by a sovereign and paramount authority.

"A municipal corporation proper is created mainly for the interest,

advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large." *Hamilton County v. Mighels*, 7 Ohio St. 109. It thus appears that the county is a subdivision of the state, while the municipal corporation is not. For a valuable note on this subject, see 137 Am. St. 354, 376.

⁷⁷ "To be possessed it (the power to borrow money) must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidence of such indebtedness may be given to the public creditors. But they must look

ipal corporation has the incidental or implied power to borrow money.⁷⁸ It is, of course, competent for the legislature to confer upon a municipal corporation the power to borrow money for any public purpose, whenever it may be deemed expedient so to do.⁷⁹ It has been held that a clause in the city charter which provided that it "may do all other acts as natural persons" must be restrained to such other acts as are authorized by its charter or the statute of the state applicable to the city, and that it could not be construed to confer an express power to borrow money or issue commercial papers.⁸⁰ The power to borrow money, incur indebtedness, and the like, is essentially a legislative power to be exercised by the legislature, or to be delegated to municipal or quasi municipal corporations, to be exercised free from every restriction not expressly imposed by the constitution of the state or the inalienable rights of man.⁸¹ It would also seem that municipal corporations, other than cities, such as counties or townships, are much more limited in their powers of borrowing money than cities.⁸²

The power to issue negotiable paper is closely connected with the power to borrow money. Consequently the same line of cleavage continues. There is an irreconcilable conflict among the authorities as to the power to issue bonds or other commercial papers.⁸³ It is admitted that the power to borrow money,

to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation." *Nashville v. Ray*, 19 Wall. (U. S.) 468, 22 L. ed. 164. Also *Allen v. La Fayette*, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497; *Coquard v. Oquawka*, 192 Ill. 355, 61 N. E. 660; *Brown v. Newburyport*, 209 Mass. 259, 95 N. E. 504; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Wells v. Salina*, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759n.

⁷⁸ *Austin v. Colony Tp.*, 51 Iowa 102, 49 N. W. 1051; *State v. Babcock*, 22 Nebr. 614, 35 N. W. 941; *Bank of Chillicothe v. Chillicothe*, 7 Ohio (pt. 2) 31, 30 L. R. A. 185n; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721, 8 Am. Law Reg. 693; *Clark v. Janesville*, 10 Wis. 136. See also, *Richmond v. McGirr*, 78 Ind. 192.

⁷⁹ *Heinl v. Terre Haute*, 161 Ind.

44, 66 N. E. 450; *Corliss v. Highland Park*, 132 Mich. 416, 93 N. W. 254, 610, 95 N. W. 416; *Mitchell v. Burlington*, 4 Wall. (U. S.) 270, 18 L. ed. 350; *Larned v. Burlington*, 4 Wall. (U. S.) 275, 18 L. ed. 353. See also *Charlotte v. American Trust Co.* (N. Car.), 74 S. E. 1054.

⁸⁰ *Gause v. Clarksville*, 5 Dill. (U. S.) 165, approved in *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. 441.

⁸¹ *Seward County v. Aetna Life Ins. Co.*, 90 Fed. 222, 32 C. C. A. 585.

⁸² *Brown v. Board*, 108 Ky. 783, 57 S. W. 612, 22 Ky. L. 483.

⁸³ It is settled in England that no corporation, whether municipal or private, has the incidental right to make commercial paper. *Queen v. Lichfield*, 4 Q. B. 893; *Bateman v. Mid-Wales R. Co.*, L. R. 1 C. P. 499;

whether express or implied, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor, and that such evidences issued to the lender or creditor may be in the form of notes, warrants, and perhaps more generally in that of a bond.⁸⁴ But there would seem to be a marked legal distinction between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in open market a bond, as a commercial security, with immunity in the hands of a bona fide holder for value from equitable defenses.⁸⁵ The power to issue evidences of indebted-

Broughton v. Manchester &c. Water-works, 3 B. & Ald. 1; Bramah v. Roberts, 3 Bing. N. C. 963; Peruvian R. Co. v. Thames &c. Ins. Co., L. R. 2 Ch. 617. See also, the following cases, denying that a municipality has the implied power to issue negotiable bonds. Cleveland School Furn. Co. v. Greenville, 146 Ala. 559, 41 So. 862; Coquard v. Oquawka, 192 Ill. 355, 61 N. E. 660; Swanson v. Ottumwa, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860n; State v. Lafayette, 49 La. Ann. 1748, 22 So. 756; Parsons v. Monmouth, 70 Maine 262; Brown v. City of Newburyport, 209 Mass. 259, 95 N. E. 504; Knapp v. Hoboken, 39 N. J. L. 394; Robertson v. Breedlove, 61 Tex. 316; Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. 559.

⁸⁴ Merrill v. Monticello, 138 U. S. 673, 687, 34 L. ed. 1069, 11 Sup. Ct. 441; Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. ed. 164. A bond implies that an obligor is bound to do what is agreed shall be done. Charlotte v. American Trust Co. (N. Car.), 74 S. E. 1054; State v. Madison, 7 Wis. 582; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721.

⁸⁵ Merrill v. Monticello, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. 441. The fundamental difference is illustrated by Justice Bradley in delivering the opinion of the Supreme Court of the United States in Police Jury v. Britton, 15 Wall. (U. S.) 566, as follows: "That a municipal corporation which is expressly authorized to make expenditures for

certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement or rescission in whole or in part, that may be just and proper in consequence of irregularities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case (bonds issued for the purpose of funding a previous indebtedness). The bonds and coupons on which a recovery is now sought are commercial instruments payable at a future day and transferable from hand to hand. *

* * The power to issue such paper has been the means in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of bona fide holders. * * * It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and valid-

ness for money borrowed is one thing, and the power to make them of such character as to cut off equitable defenses is quite another. This is the view taken by the Supreme Court of the United States.⁸⁶

§ 617. **No right of action on void bonds.**—When a municipal corporation sells bonds which are void and receives the money, it may be compelled to restore it in an action for money had and received. So when it is authorized to purchase property for any purpose, or to contract for the erection of public buildings or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done in negotiable securities, which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. But suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void; and if negotiable paper is uttered without authority of law a suit cannot be maintained thereon for any purpose.⁸⁷

ity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements."

⁸⁶*Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. 559, and cases cited, overruling *Mitchell v. Burlington*, 4 Wall. (U. S.) 270, 18 L. ed. 350 and *Rogers v. Burlington*, 3 Wall. (U. S.) 654, 18 L. ed. 79. See also, 2 *Elliott R. R.* (2d ed.), §§ 839, 875. Other cases hold that the express power to borrow money includes power to issue negotiable bonds or other securities to the lender. *Schmutz v. Little Rock &c. School Dist.*, 78 Ark. 118, 95 S. W. 438; *Griffin v. Inman, Swann & Co.*, 57 Ga. 370; *Sheffield v. Andress*, 56 Ind. 157; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 1; *Commonwealth v. Williamstown*, 156 Mass. 70, 30 N. E. 472; *Douglass v. Virginia City*, 5 Nev. 147; *Tucker v. Raleigh*, 75 N. Car. 267; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Snyder v. Kautner*, 196 Pa. St. 440, 42 Atl. 884;

Clarke v. School Dist. No. 7, 3 R. I. 199.

⁸⁷*Dodge v. Memphis*, 51 Fed. 165; *Mayor v. Ray*, 19 Wall. (U. S.) 468, 22 L. ed. 164; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Little Rock v. Merchants' National Bank*, 98 U. S. 308, 25 L. ed. 108; *Wall v. Monroe County*, 103 U. S. 74, 26 L. ed. 430; *Hill v. Memphis*, 134 U. S. 198, 33 L. ed. 887, 10 Sup. Ct. 562; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. 441. See, however, *White v. City of Chatfield*, 116 Minn. 371, 133 N. W. 962, in which it is said: "Conceding that the bonds were illegal, a court of equity should not enjoin their payment when the city has received and retains the money paid by the holders." If the municipality had power to borrow money or incur an indebtedness for the purposes for which the bonds were issued, an action for money had and received may be maintained against the municipality. *Louisiana City v. Wood*, 102 U. S. 274. *Marsh v. Fulton County*, 10 Wall.

§ 618. **Defenses available against bona fide holders.**—An entire want of power to issue the bonds renders them invalid even in the hands of a bona fide holder.⁸⁸ The conditions under which a municipal corporation may issue bonds, and other evidences of indebtedness and the manner of issuing the same are generally prescribed by statute, and all persons taking the same are chargeable with knowledge of such express provisions of law, and it is generally obligatory upon them to see whether there has been a compliance with the same.⁸⁹

§ 619. **Bona fide holder—Bond containing no recitals.**—The bona fide holder for value of a bond containing no recitals, apparently one of a series issued under authority of an act of the legislature of the state but actually in excess of the number of bonds authorized by that act, and as security for the personal debt of a fiscal officer of the corporation to the holder, has been held not entitled to recover.⁹⁰ A municipal bond which on its face

(U. S.) 676 (giving the reason for the rule).

⁸⁸ *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644, 21 L. ed. 328; *Merchants Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 29 L. ed. 430, 6 Sup. Ct. 88. Where the act authorizing the issue of bonds imposes upon the officers signing them the duty to determine whether there has been a compliance with its terms and provisions, and the recitals state such a compliance, the corporation is estopped as against an innocent purchaser to claim that the bonds are invalid on any other ground than that upon their face they appear to have been issued in violation of some constitutional or statutory restriction. *Washington Tp. v. Coler*, 51 Fed. 362, 2 C. C. A. 272, 4 U. S. App. 622. See also, 2 Elliott R. R. (2d ed.), §§ 897, 900; *Presidio County v. Noel-Young Bond & Co.*, 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. 237. But compare *Brown v. Newburyport*, 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B, 495; *Daviess County v. Dickinson*, 117 U. S. 657, 664, 29 L. ed. 1026, 6 Sup. Ct. 897; 2 Elliott R. R., §§ 899, 900.

⁸⁹ *National Bank & c. v. St. Joseph*, 31 Fed. 216, 24 Blatchf. (U. S.) 436;

Pana v. Lippincott, 2 Ill. App. 466; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. Rep. 554; *Cagwin v. Hancock*, 84 N. Y. 532; *Barnett v. Denison*, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. 819; *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129. See also, *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *George v. Oxford*, 16 Kans. 72; *Lewis v. Bourbon*, 12 Kans. 186; *Bates v. Winters*, 97 U. S. 83, 24 L. ed. 933; *LaMoille Valley R. Co. v. Fairfield*, 51 Vt. 257; *Veeder v. Lima*, 19 Wis. 298.

⁹⁰ *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 29 L. ed. 430, 6 Sup. Ct. 88. See also, *In re The Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. ed. 169, 7 Ct. Cl. (U. S.) 65; *Marsh v. Fulton*, 10 Wall. (U. S.) 676, 19 L. ed. 1040. Recitals in bonds protect by estoppel against such irregularities as the failure of the common council to declare by formal resolution the expediency of borrowing money and the conduct of the election bondholders who are innocent purchasers. *White v. Chatfield*, 116 Minn. 371, 133 N. W. 962. As to when recitals may work an estoppel against the municipality, see also, *State v. School Dist. No. 50*, 18 N. Dak. 616, 120 N. W. 555, 138 Am.

refers to the statute under which it purports to be issued, and is so numbered as to make it apparent, from an examination of the statute and proceedings thereunder, that it was issued without authority, is void; nor can one holding it claim to be a bona fide purchaser for value.⁹¹

§ 620. Limitation of indebtedness—Limitation on power to create municipal indebtedness.—There are limitations on the power to create municipal indebtedness growing out of the inherent limitations on the power of such corporations, and limitations placed upon such power in the constitution, or statutes made in pursuance thereof. The power to raise money by taxation is conferred for the purpose of defraying public expendi-

St. 787; *Knox Co. v. Aspinwall*, 21 How. (U. S.) 539. When officers who are invested with authority to determine whether precedent conditions have been performed declare the contingency to have happened on the occurrence of which the authority to issue the bonds was complete, their recitals are a decision beyond which a bona fide purchaser is not bound to look for evidence of the existence of things in pais. *Steamboat Rock &c. Dist. v. Stone*, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. 84; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579. See, however, *Evans v. McFarland*, 186 Mo. 703, 85 S. W. 873, holding that self-serving narration binds no one. See also, *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 439; *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685, stating the New York rule as to recital.

⁹¹ *Thompson v. Mamakating*, 37 Hun (N. Y.) 400. See also, *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138. Bonds which purport to have been issued in conformity with a specified act but which were in fact not issued until after its repeal and were antedated in order to make it appear that they were issued before its repeal have been held void even in the hands of an innocent purchaser. *Lehman v. San Diego*, 83 Fed. 669, 27 C. C. A. 668. The purchase of school-district bonds charges the purchaser with knowledge of the financial condition of the

district in so far as it affects the constitutional power of the district to issue the bonds. *Nesbit v. Independent School Dist.*, 25 Fed. 635. The holder of municipal bonds who took them knowing that conditions had not been complied with by the railroad company in whose favor they were issued is not a bona fide holder, and the fact of non-compliance with the conditions may be set up by the municipality in his suit against it. *Mobile Sav. Bank v. Oktibbeha*, 24 Fed. 110. Where a city has, by ordinance, granted a franchise to S and his assigns for thirty years, to construct and maintain water-works, purchasers of bonds issued by the assigns of S, and secured by a mortgage on the water-works, franchise, contracts, &c., though they purchase in good faith, acquire no rights, as against the city, which will deprive it of a right to rescission of the contract, to which it would have been entitled as against S or his assigns, since they purchased the bonds knowing that the city was not a party to them, and that they were subject to a compliance with the terms of the ordinance, of which they were bound to take notice. *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. 316. In a suit on municipal bonds fraudulently issued, plaintiff must show himself a bona fide holder for value. *Tracey v. Town of Phelps*, 22 Fed. 634.

tures, and is to be exercised only for the purpose of meeting such expenditures, and the limitation on this power is effected by limiting the objects for which the money may be expended. The power of taxation is one of the highest attributes of sovereignty, and, as a municipality seeking to exercise it must find express authority from the legislature, so its power to disburse the public moneys, being correlative to the power of taxation, must equally find express authority for its exercise.⁹² A person dealing with a municipal corporation is chargeable with notice of the limitations placed upon its power to incur indebtedness,⁹³ and where a city is indebted to the extent of its constitutional limit, such person is charged with notice of such fact and cannot maintain an action on commercial paper issued to him in contravention of its constitutional or statutory authority limit, even when a bona fide holder.⁹⁴ Contracts creating an indebtedness in excess of the

⁹² *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682. Where the constitution prohibits the incurring of any indebtedness by a municipality except for city purposes, the indebtedness must be confined strictly to such purposes. *In re Jensen*, 28 Misc. (N. Y.) 378, 59 N. Y. S. 653. Thus where the expenses incurred by an official in successfully defending against a wrongful removal from office or malfeasance in office are audited and allowed it is an appropriation of public funds for private uses. *In re Fallon*, 28 Misc. (N. Y.) 748, 59 N. Y. S. 849. This would be true independently of any constitutional provision.

⁹³ *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. 167; *Jutte & Foley Co. v. Altoona*, 94 Fed. 61, 36 C. C. A. 84.

⁹⁴ See *Brenham v. German American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. 559; *Young v. Clarendon Tp.*, 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. 107; *Lake v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. 654; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 29 L. ed. 430, 6 Sup. Ct. 88; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. 360; *Hoff v. Jasper Co.*, 110 U. S. 53, 28 L. ed. 68, 3 Sup. Ct. 476; *Ogden v. Daviess County*, 102 U. S. 634, 26 L. ed. 263;

South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; *County of Bates v. Winters*, 97 U. S. 83, 24 L. ed. 933; *East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Lehman v. San Diego*, 83 Fed. 669, 27 C. C. A. 668; *Chisholm v. Montgomery*, 2 Woods C. C. 584, Fed. Cas. 2686; *Cleveland School Furn. Co. v. Greenville*, 146 Ala. 559, 41 So. 862; *Lindsey v. Rottaken*, 32 Ark. 619; *Hancock v. Chicot*, 32 Ark. 575; *Dist. No. 3 v. Fogleman*, 76 Ill. 189; *Bissell v. Kankakee*, 64 Ill. 249, 21 Am. Rep. 554; *Williamson v. Keokuk*, 44 Iowa 88; *McPherson v. Foster Bros.*, 43 Iowa 48, 22 Am. Rep. 215; *Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423; *Cecil v. Board of Liquidation*, 30 La. Ann. 34; *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294; *Bailey v. Tompkins*, 127 Mich. 74, 86 N. W. 400; *Jefferson County v. Arrighi*, 54 Miss. 668; *State v. Macon County Court*, 68 Mo. 29; *Cagwin v. Hancock*, 84 N. Y. 532; *Halstead v. New York*, 3 N. Y. 430; *Citizens' Sav. Bank v. Greenburgh*, 60 App. Div. (N. Y.) 225, 70 N. Y. S. 68; *Galbraith v. Knoxville*, 105 Tenn. 453, 58 S. W. 643; *Compare Evansville v. Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. 613; *Block v. Commissioners*, 99 U. S. 686, 25 L. ed. 491; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355, 21 L. ed. 170;

constitutional limit are void,⁹⁵ and cannot be rendered valid by a curative act.⁹⁶ Nor when void from the beginning because of lack of power in the municipality to issue them, is the municipality estopped from asserting the invalidity by reason of any subsequent act of its officers or agents or by reason of any supposed ratification by them.⁹⁷ Such limitations are mandatory and cannot be avoided.⁹⁸ By the ordinary rules of construction they are not retroactive.⁹⁹ But a contract is not void by reason of limitation as to the amount which provides for payment of the contract price from money in the treasury and an assessment against property benefited although it is subsequently determined that the assessments cannot be enforced.¹

§ 621. Indebtedness depending on popular vote.—Where a constitution limits the indebtedness of a municipality to a certain amount without the assent of its voters, a municipality has no power to become indebted in excess of the amount fixed unless the electors give their assent thereto.² And it has been held

Slifer v. Howell's Admr., 9 W. Va. 391; *Fisk v. Kenosha*, 26 Wis. 23. A note by a city for property it is not authorized to purchase, is not binding. *Cleveland School Furn. Co. v. Greenville*, 146 Ala. 559, 41 So. 862. See also, *Gamewell Fire Alarm Tel. Co. v. Laporte*, 96 Fed. 664.

⁹⁵ *Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743.

⁹⁶ *Mitchell County v. City Nat. Bank*, 15 Tex. Civ. App. 172, 39 S. W. 628. See also, *Long Beach v. Boynton* (Cal. App.), 119 Pac. 677 (holding that the legislature may not by curative act legalize bonds which are violative of the provisions of the city charter).

⁹⁷ *Sage v. Fargo Tp.*, 107 Fed. 383; *Swanson v. Ottumwa*, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860. But see, where there is authority but mere irregularity. *Bates County v. Winters*, 97 U. S. 83, 24 L. ed. 933; *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996; 2 Elliott on Railroads (2d ed.), § 894.

⁹⁸ *Dunbar v. Canyon County*, 5 Idaho 407, 49 Pac. 409.

⁹⁹ *Davenport Gas &c. Co. v. Davenport*, 13 Iowa 229; *Scott v. Daven-*

port, 34 Iowa 208; *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543; *Moultrie v. Rockingham &c. Bank*, 92 U. S. 631, 23 L. ed. 631. A constitutional amendment adopted pending the execution of a contract for a drainage system prohibiting the increase of a city's debt does not apply to a debt already incurred and put into judgment. *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. 44. But it has been held that a constitutional limitation against indebtedness renders invalid a claim for services already rendered. *Helena v. Mills*, 94 Fed. 916, 36 C. C. A. 1. Compare *Jonesboro City v. Cairo & St. L. R. Co.*, 110 U. S. 192, 28 L. ed. 116, 4 Sup. Ct. 67, with *Williams v. People*, 132 Ill. 574, 24 N. E. 647.

¹ *Addyston Pipe &c. Co. v. Corry*, 197 Pa. 41, 46 Atl. 1035, 80 Am. St. 812.

² *Byrns v. Moscow* (Idaho), 121 Pac. 1034 (assent of two-thirds required); *Brown v. Board of Education*, 108 Ky. 783, 22 Ky. L. 483, 57 S. W. 612 (assent of two-thirds of the voters required); *Perry Water &c. Co. v. Perry* (Okla.), 120 Pac. 582; *Keller v. Scranton*, 200 Pa. St.

that where an indebtedness beyond a fixed limit is made to depend upon the consent of two-thirds of the voters voting at an election held for that purpose it means two-thirds of the electors actually voting at the election and not two-thirds of those that vote on the question of indebtedness.³ But it has been held that a contract for water supply for twenty years without the assent of two-thirds of the legal voters, where payments are to be semi-annual, may be good as a contract from year to year so long as neither party repudiates it.⁴ Where voters have given their consent to the creation of an indebtedness an ordinance authorizing the borrowing of the money for such purpose is legal although at the time there has been no ordinance specifically providing for the expenditure.⁵ Bonds issued by authority of a vote of the district are part of the indebtedness of the district.⁶ An election to validate bonds relates to the time the bonds were issued.⁷

§ 622. Indebtedness limited by a per cent. of valuation.—

Very frequently there is a limit placed upon the power to create

130, 49 Atl. 781, 86 Am. St. 708. On the submission to the voters of the question of issuing bonds for three different purposes, the failure to indicate the amount to be used for each purpose and to submit the different propositions separately renders the election illegal and the bonds invalid. *Ross v. Lipscomb*, 83 S. Car. 136, 65 S. E. 451, 137 Am. St. 794. See also, *Winston v. Wachovia Bank & Trust Co.* (N. Car.), 74 S. E. 611. Compare, however, with *Williamson v. Graham* (Va.), 74 S. E. 393. As to the necessity of following the formalities prescribed for the holding of the election see *Williamson v. Graham* (Va.), 74 S. E. 393; *Murphy v. Spokane*, 64 Wash. 681, 117 Pac. 476. See also, *Manhattan Co. v. Ironwood*, 74 Fed. 535, 20 C. C. A. 642; *Canandaigua v. Hayes*, 90 App. Div. (N. Y.) 336, 85 N. Y. S. 488.

³ *Long Beach v. Boynton* (Cal. App.), 119 Pac. 677; *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014; *Belknap v. Louisville*, 99 Ky. 474, 18 Ky. L. 313, 36 S. W. 1118, 34 L. R. A. 256. To the same effect is *McGoodwin v. Franklin*, 18 Ky. L. 752, 38 S. W. 481; *Bryan v. Lincoln*, 50 Nebr. 620,

70 N. W. 252, 35 L. R. A. 752; *State v. Benton*, 29 Nebr. 460, 45 N. W. 794. Contra, holding that such a provision means two-thirds or the required majority of those voting on the proposition in question. *Murphy v. Long Branch* (N. J.), 61 Atl. 593; *Fox v. Seattle*, 43 Wash. 74, 86 Pac. 379, 117 Am. St. 1037.

⁴ *City Council v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907.

⁵ *Barr v. Philadelphia*, 191 Pa. St. 438, 43 Atl. 335. See also, *Slocum v. North Platte*, 192 Fed. 252 (construing Nebraska statute).

⁶ *Stanley v. McGeorge*, 17 Wash. 8, 48 Pac. 736.

⁷ *West v. Chehalis*, 12 Wash. 369, 41 Pac. 171, 50 Am. St. 896. It has been held that warrants issued in payment of a city indebtedness were rendered valid by a vote of the people at a time the city was within its debt limit, even though that limit was unlawfully exceeded when such debts were originally attempted to be incurred. *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873. A general system of water-works in Michigan requires the consent of two-thirds of the electors (see laws of 1895). Sav-

an indebtedness in excess of a specified per cent. of the assessed valuation of the municipality's taxable property. Where the constitution or a valid statute so limits the indebtedness, an indebtedness in violation of these restrictions is void.⁸ But where the annual taxation is limited to a certain per cent. of the valuation, it does not prohibit the incurring of an indebtedness maturing annually though the aggregate exceeds the limit, as in such case the indebtedness of each year is measured by the assessment for the year or preceding year, as the case may be.⁹ In determining the amount on an assessment basis the assessment for state and county purposes is generally the basis,¹⁰ but it has been held that the valuation which governs is the valuation for city purposes,¹¹ and when there is an assessment limitation, it means the assessment as equalized by the board of review.¹²

§ 623. Preliminary provisions for a sinking fund.—Other constitutional, and sometimes charter provisions, prohibit the creating of a municipal indebtedness without precedent provisions being made for a sinking fund to meet the interest, as it accrues and the principal at its maturity.¹³ A provision for the payment for electric lights at an annual rental not exceeding the amount the city is authorized to collect and appropriate for such purpose each year, payment to be made only on the performance of the services provided for, is not in contravention of the constitutional inhibition against the creation of a debt without making provision

idge v. Spring Lake, 112 Mich. 91, 70 N. W. 425.

⁸ John Hancock &c. Ins. Co. v. Huron, 80 Fed. 652, affd. 100 Fed. 1001, 40 C. C. A. 683; Lewis v. Brady, 17 Idaho 251, 104 Pac. 900, 28 L. R. A. (N. S.) 149. (State debt.) See also, the above case and note in 28 L. R. A. 149 as to what time the assessed valuation is to be taken. People v. Chicago &c. R. Co., 253 Ill. 191, 97 N. E. 310; Voss v. Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201.

⁹ Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558. See also, City of Laporte v.

Gamewell &c. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. 359; South Bend v. Reynolds, 155 Ind. 70, 57 N. E. 706; Valparaiso v. Gardner, 97 Ind. 1.

¹⁰ Todd v. Laurens, 48 S. Car. 395, 26 S. E. 682.

¹¹ Dupont v. Pittsburg, 69 Fed. 13.

¹² State v. Common Council &c. of Tomahawk, 96 Wis. 73, 71 N. W. 86.

¹³ John Hancock &c. Ins. Co. v. Huron, 80 Fed. 652, affd. 100 Fed. 1001, 40 C. C. A. 683. Compare with Murphy v. Spokane (Wash.), 117 Pac. 476.

for the collection of a sum to pay interest and provide a sinking fund for the payment of the principal.¹⁴

§ 624. **Aggregate indebtedness—How determined—Refunding and sinking fund bonds.**—The great difficulty is to determine when the aggregate municipal indebtedness is in excess of the constitutional limit. What indebtedness is to be included in ascertaining the aggregate? To classify and arrange the cases will be the purpose of this section. Bonds for the purpose of refunding existing indebtedness are not to be included in the limitation.¹⁵ Municipal warrants issued for the ordinary, necessary and current expenses, which are within the limit of current revenue, and such special taxes as legally and in good faith might have been intended to be levied therefor, and the issue of bonds for the funding thereof, are not within the constitutional limitations, since such bonds would not increase the indebtedness.¹⁶ Negotiable refunding bonds, legally issued, under valid laws, in exchange for valid outstanding indebtedness, in the hands of purchasers for value, before maturing, will be presumed not to have increased the indebtedness.¹⁷

¹⁴ *Dallas Electric Co. v. Dallas*, 23 Tex. Civ. App. 323, 58 S. W. 153.

¹⁵ *Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970; *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31; *Kelly v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; *Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764; *Bank of Savings v. Grace*, 102 N. Y. 313, 7 N. E. 162; *Brooke v. Philadelphia*, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781; *Bruce v. Pittsburg*, 166 Pa. 152, 30 Atl. 831; *National Life Ins. Co. &c. v. Mead*, 13 S. Dak. 37, 82 N. W. 78, 48 L. R. A. 785; *In re State Warrants*, 6 S. Dak. 518, 62 N. W. 101, 55 Am. St. 852; *Western Town Lot Co. v. Lane*, 7 S. Dak. 599, 65 N. W. 17; *Mitchell v. Smith*, 12 S. Dak. 241, 80 N. W. 1077; *Huron v. Second Ward &c. Bank*, 57 U. S. App. 593, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534; *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341.

¹⁶ *Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970; *Cedar Rapids v. Bechtel*, 110 Iowa 196, 81 N. W. 468; *Grant*

v. Davenport, 36 Iowa 396; *French v. Burlington*, 42 Iowa 614; *Tuttle v. Polk*, 92 Iowa 433, 60 N. W. 733; *Creston Waterworks Co. v. Creston*, 101 Iowa 687, 70 N. W. 739; *Sioux City v. Weare*, 59 Iowa 95, 12 N. W. 786; *Edmundson v. Independent School Dist.*, 98 Iowa 639, 67 N. W. 671, 60 Am. St. 639; *Thompson v. Independent School Dist.*, 102 Iowa 94, 70 N. W. 1093; *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209; *Morris v. Taylor*, 31 Ore. 62, 49 Pac. 660; *Kelly v. Minneapolis*, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

¹⁷ *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Lake County v. Standley*, 24 Colo. 1, 49 Pac. 23; *Hamilton Co. v. Montpelier Saving Bank &c. Co.*, 157 Fed. 19, 84 C. C. A. 523; *Lyon County v. Keene &c. Bank*, 100 Fed. 337, 46 C. C. A. 391; *Kane v. Charleston*, 161 Ill. 179, 43 N. E. 611; *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31; *Cedar Rapids v. Bechtel*, 110 Iowa 196, 81 N. W. 468; *Marion v. Harvey*, 26 Kans. 181; *Gaulbert v. Louisville*, 30 Ky. L. 50,

§ 625. **Indebtedness payable annually or monthly.**—Where there is a limitation in the amount of indebtedness a city is authorized to incur, the weight of authority as well as reason favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary for a term of years and may stipulate for the payment of an annual or monthly rental for the gas or water furnished each year, notwithstanding the aggregate or rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter, for the reason that the debt for each year or month does not come into existence until it is earned.¹⁸ If by reason of the limitation the city is unable to erect the necessary improvements of its own, and if it is debarred from contracting with another party who stands ready to incur the large expense necessary to the erec-

97 S. W. 342; Opinion of Justices, 81 Maine 602, 18 Atl. 291; Palmer v. Helena, 19 Mont. 61, 47 Pac. 209; Barnum v. Sullivan, 137 N. Y. 179, 33 N. E. 162; Blanton v. McDowell, 101 N. Car. 532, 8 S. E. 162; Morris v. Taylor, 31 Ore. 62; McCreight v. Camden, 49 S. Car. 78, 26 S. E. 16; Williamson v. Aldrich, 21 S. Dak. 13, 108 N. W. 1063; Tyler v. Jester (Tex. Civ. App.), 74 S. W. 359, affd. 97 Tex. 344, 78 S. W. 1058; Miller v. School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879. Compare with Doon Township v. Cummins, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. 220.

¹⁸ Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Denver v. Hubbard, 17 Colo. App. 346, 68 Pac. 993; Columbia Ave. Sav. & Co. v. Dawson, 130 Fed. 152; Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Voss v. Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201; Crowder v. Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Grant v. Davenport, 36 Iowa 396; Burlington Water Co. v. Woodward, 49 Iowa 58; Creston Water-Works Co. v. Creston, 101 Iowa 687, 70 N. W. 739; Blanks v. Monroe, 110 La. 944, 34 So. 921; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558; Saleno v. Neosho, 127 Mo. 627, 30 S. W. 190,

27 L. R. A. 769, 48 Am. St. 653; Lamar Water & Co. v. Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157; Weston v. Syracuse, 17 N. Y. 110; Territory v. Oklahoma, 2 Okla. 158, 37 Pac. 1094; Wade v. Oakmont, 165 Pa. St. 479, 30 Atl. 959; Brown v. Corry, 175 Pa. St. 528, 34 Atl. 854; Dallas Elec. Co. v. Dallas, 23 Tex. Civ. App. 323, 58 S. W. 153; Tyler v. Jester (Tex. Civ. App.), 74 S. W. 359, affd. 97 Tex. 344, 78 S. W. 1058; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77; Merrill & Co. v. Merrill, 80 Wis. 358, 49 N. W. 965; Connor v. Marshfield, 128 Wis. 280, 107 N. W. 639. But see, contra, Chicago v. McDonald, 176 Ill. 404, 52 N. E. 982, explaining and qualifying East St. Louis v. East St. Louis Gas Light & Co., 98 Ill. 415, 38 Am. Rep. 97; Baltimore & C. Co. v. People, 200 Ill. 541, 66 N. E. 148; Ramsey v. Shelbyville, 119 Ky. 180, 83 S. W. 116, 1136, 26 Ky. L. 1102, 27 Ky. L. 141, 68 L. R. A. 300; Beard v. Hopkinsville, 95 Ky. 239, 15 Ky. L. 756, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. 222; Niles Water-Works v. Niles, 59 Mich. 311, 26 N. W. 525; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; Humphreys v. Bayonne, 55 N. J. L. 241, 26 Atl. 81; Read v. Atlantic City, 49 N. J. L. 558, 9 Atl. 759; Salem Water Co. v. Salem, 5 Ore. 29.

tion and equipment of a plant relying upon annual payments, the maturity and payment of which are based upon services to be performed, it is readily seen that serious disaster might ensue. There would seem to be no doubt that if the city proposed to purchase outright, or establish a system of waterworks of its own, the limitation would apply even where the bonds issued therefor were payable in the future.¹⁹ An ordinance for the payment of an annual rental for water hydrants does not of itself create an indebtedness. If it merely establishes a maximum rate, subject to review by the courts, it is a regulation.²⁰ A contract by a city for water supply at a stipulated rental, together with such preferred expenses as are provided for by statute and which do not in the aggregate exceed the total income of the city for each year the contract is in force, is valid.²¹ A contract payable in monthly rentals, based on the number of hydrants in good condition, creates no present indebtedness.²² And it has been held that a contract with annual payments extending over several years is legal.²³ But in Wisconsin it has been held that a contract to pay for waterworks as rentals until paid for is void.²⁴

§ 626. **Valid indebtedness only included.**—The indebtedness included in the limitation includes any indebtedness created by the legislature and indebtedness created by the municipality, which is valid,²⁵ but does not include warrants illegal and nonenforcible,²⁶ or illegal bonds.²⁷ In determining whether municipal bonds outstanding are to be included in the indebtedness of the city at the time a subsequent issue is made,

¹⁹ *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Beard v. Hopkinsville*, 95 Ky. 239, 15 Ky. L. 756, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. 222; *Read v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Coulson v. Portland, Deady (U. S.)* 481, Fed. Cas. No. 3275; *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279.

²⁰ *Danville v. Danville Water Co.*, 180 Ill. 235, 54 N. E. 224.

²¹ *Webb City & Co. v. Carterville*, 153 Mo. 128, 54 S. W. 557; *Lamar*

Water & Co. v. Lamar, 140 Mo. 145, 39 S. W. 768.

²² *Keihl v. South Bend*, 76 Fed. 921, 44 U. S. App. 687, 36 L. R. A. 228.

²³ *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

²⁴ *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. 886.

²⁵ *Martin v. Territory*, 5 Okla. 188, 48 Pac. 106.

²⁶ *Keene & Co. Sav. Bank v. Lyon*, 90 Fed. 523, 97 Fed. 159, affg. 100 Fed. 337, 40 C. C. A. 391.

²⁷ *Ashuelot Nat. Bank v. Lyon*, 81 Fed. 127, affd. in 87 Fed. 137, 30 C. C. A. 582.

the test of validity is whether they are legally enforceable and not whether they were recognized as valid by the officers, or were subsequently paid without their legality being questioned.²⁸ Warrants for current expenses after the limit has been reached, but in anticipation of a tax levied, are legal.²⁹ Warrants are valid where the city has on hand or in prospect funds with which to meet them, although the funds may be thereafter wrongfully applied to other purposes.³⁰ The general rule is that the warrants outstanding which there is money in the treasury to meet do not constitute indebtedness within the meaning of the limitation.³¹

§ 627. Includes implied as well as express liability.—Where the constitution limits the incurring of indebtedness to the income and revenue for the current year it applies to implied liability as well as express.³²

§ 628. Current expenses not included.—It would seem that in estimating the indebtedness with a view of determining the limit, the ordinary warrants for money actually in the treasury, and contracts for ordinary current expenses, within the current revenue, should be excluded.³³ It has been held, however, that a city having an indebtedness in excess of the constitutional limit is powerless to create an indebtedness even for its ordinary and current expenses.³⁴ A municipal corporation indebted to

²⁸ *German Ins. Co. &c. v. Manning*, 95 Fed. 597.

²⁹ *Shannon v. City of Huron*, 9 S. Dak. 356, 69 N. W. 598.

³⁰ *Phillips v. Reed*, 107 Iowa 331, 76 N. W. 850, 77 N. W. 1031.

³¹ *German Ins. Co. &c. v. Manning*, 95 Fed. 597.

³² *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612; *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612; *People v. May*, 9 Colo. 80, 10 Pac. 641; *Eddy Valve Co. v. Crown Point*, 166 Ind. 613, 76 N. E. 536, 3 L. R. A. (N. S.) 684, and note; *Windsor v. Des Moines*, 110 Iowa 175, 81 N. W. 476, 80 Am. St. 280; *Litchfield v. Ballow*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. 820. See also, *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279.

³³ *Dawson v. Dawson Water Works Co.*, 106 Ga. 696, 32 S. E. 907; *South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795 (rent of suitable city offices); *McGrath v. Grout*, 171 N. Y. 7, 63 N. E. 547 (salaries of sheriff, register and clerk); *In re appeal of Erie*, 91 Pa. St. 398; *Addyston Pipe &c. Co. v. Corry*, 197 Pa. St. 41, 46 Atl. 1035, 80 Am. St. 812; *Tyler v. Jester* (Tex. Civ. App.), 74 S. W. 359, affd. 97 Tex. 344, 78 S. W. 1058 (salaries due aldermen); *Hull v. Ames*, 26 Wash. 272, 66 Pac. 391, 90 Am. St. 743 (salaries of policemen, city treasurer and marshal); *State v. Common Council &c. of Tomahawk*, 96 Wis. 73, 71 N. W. 86.

³⁴ *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982. This decision is based

the limit fixed by the constitution is required to carry on its corporate operations while so indebteded upon a cash basis and not upon credit to any extent or purpose.⁸⁵

§ 629. **Debts payable out of special fund—Special assessment—Optional debts.**—Indebtedness payable out of a special fund is not to be included in estimating the amount of permissible indebtedness.⁸⁶ Claims under laws providing for special assessments on abutting owners or on property benefited by the improvement, payable in instalments are not to be deemed indebtedness of the city.⁸⁷ But, although a municipality may have a right to levy a special assessment for maintaining and operating an electric light plant it may not, therefore, anticipate its future general revenues in order to erect such plant.⁸⁸ An option to

upon the theory that the question is one of indebtedness simply and not of insolvency. See also *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Fuller v. Chicago*, 89 Ill. 282; *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *Beard v. Hopkinsville*, 95 Ky. 239, 15 Ky. L. 756, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. 222; *State v. Helena*, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336, 81 Am. St. 453.

⁸⁵ *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201; *Butler v. Andrus*, 35 Mont. 575, 60 Pac. 785; *Brooke v. Philadelphia*, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. 886.

⁸⁶ *State v. Great Falls*, 19 Mont. 518, 49 Pac. 15; *Brockenbrough v. Charlotte Water Comrs.*, 134 N. Car. 1, 46 S. E. 28; *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888. See also, *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481; *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; *United States v. Mason*, 99 U. S. 582, 25 L. ed. 331. But compare *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800; *State v. Fayette Co.*, 37 Ohio St. 526.

⁸⁷ *Denny v. Spokane*, 79 Fed. 719, 25 C. C. A. 164; *Mankato v. Barber Asphalt Pav. Co.*, 142 Fed. 329, 73 C. C.

A. 439; *McGilvery v. Lewiston*, 13 Idaho 338, 90 Pac. 348; *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, 2 N. E. 478; *Board &c. of Switzerland County v. Reeves*, 148 Ind. 467, 46 N. E. 995; *Board &c. of Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124; *Grunewald v. Cedar Rapids*, 118 Iowa 222, 91 N. W. 1059; *Corey v. Fort Dodge*, 133 Iowa 666, 111 N. W. 6; *Adams v. Ashland*, 26 Ky. L. 184, 80 S. W. 1105; *Lansing v. Van Gorder*, 24 Mich. 456; *State v. Neosho*, 203 Mo. 40, 101 S. W. 99; *Atkinson v. Great Falls*, 16 Mont. 372, 40 Pac. 877; *Kronsheim v. Rochester*, 76 App. Div. (N. Y.) 494, 78 N. Y. S. 813; *Vallely v. Grand Forks Park Comrs.*, 16 N. Dak. 25, 111 N. W. 615, 15 L. R. A. (N. S.) 61n; *Ladd v. Gambell*, 35 Ore. 393, 59 Pac. 113; *Little v. Cogswell*, 20 Ore. 345, 25 Pac. 727; *State v. Rogers*, 22 Ore. 348, 30 Pac. 74; *Continental Ins. Co. v. Rigen*, 31 Ore. 336, 48 Pac. 476; *Strickland v. Geide*, 31 Ore. 373, 49 Pac. 982; *Addyston Pipe &c. Co. v. Corry*, 197 Pa. 41, 46 Atl. 1035, 80 Am. St. 812; *Gable v. Altoona*, 200 Pa. St. 15, 49 Atl. 367; *Galveston v. Heard*, 54 Tex. 420; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365.

⁸⁸ *Windsor v. Des Moines*, 110 Iowa 175, 81 N. W. 476, 80 Am. St. 296; *Grant v. Davenport*, 36 Iowa 396; *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *Earles v. Wells*, 94

purchase or a debt which it is entirely optional with the city to pay does not come within the constitutional limitation.³⁹

§ 630. Diverted money—License money—Miscellaneous.—Among the miscellaneous decisions and rulings on various phases of the general subject are the following: An indebtedness paid with money diverted from a fund raised for another purpose must be considered as still existing.⁴⁰ Where a city diverts funds from a paving assessment and applies them in payment of other paving debts, it increases the indebtedness to that extent.⁴¹ License money received during the year is not to be considered in determining the question of limitation.⁴² Park certificates which do not exceed the assessments for park purposes on which the city is liable only to the extent of money collected, do not create an indebtedness within the limitation,⁴³ nor does the bonded debt of a school district, though co-extensive with the city,⁴⁴ nor an assessment for damages for opening a highway payable from taxes levied for that purpose;⁴⁵ and so when a contractor accepts bonds payable from a special fund in satisfaction for work done, it is not within the limitation.⁴⁶ Bonds in payment of a judgment do not create a new indebtedness.⁴⁷ The fact that a city had the necessary funds to pay when the indebtedness

Wis. 285, 68 N. W. 964, 59 Am. St. 886. It may, however, purchase the plant by piecemeal. *Overall v. Madisonville* (Ky.), 102 S. W. 278, 12 L. R. A. (N. S.) 433, and note.

³⁹ *Centerville v. Fidelity & Co.*, 118 Fed. 332, 55 C. C. A. 348; *Fidelity Trust and Guaranty Co. v. Fowler Water Co.*, 113 Fed. 560; *South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706; *Windsor v. Des Moines*, 110 Iowa 175, 81 N. W. 476, 80 Am. St. 296; *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57.

⁴⁰ *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341.

⁴¹ *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532.

⁴² *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341. But when the licenses are paid, and the fines assessed are collected, the uncertainty which is the sole obstacle to carrying them into the city's income for the year is

eliminated. *Overall v. Madisonville* (Ky.), 102 S. W. 278, 12 L. R. A. (N. S.) 433.

⁴³ *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600.

⁴⁴ *Todd v. Laurens*, 48 S. Car. 395, 26 S. E. 682. See also, *Campbell v. Indianapolis*, 155 Ind. 186, 57 N. E. 920. But compare *Wilcoxon v. Bluffton*, 153 Ind. 267, 54 N. E. 110.

⁴⁵ *Commissioners of Highways v. Jackson*, 165 Ill. 17, 45 N. E. 1000.

⁴⁶ *Clinton v. Walliker*, 98 Iowa 655, 68 N. W. 431; *Thompson v. Independent School Dist.*, 102 Iowa 94, 70 N. W. 1093.

⁴⁷ *Lake County v. Platt*, 79 Fed. 567, 25 C. C. A. 87. A vote of the people for free turnpikes is not an increase of indebtedness beyond constitutional limits. *Maysville & C. Road Co. v. Wiggins*, 104 Ky. 540, 20 Ky. L. 724, 47 S. W. 434.

accrued does not render valid a contract which was made at a time when it was indebted exceeding its limit.⁴⁸ The agreement of a water company to pay the debt of the city upon bonds does not extinguish the indebtedness as a municipal debt.⁴⁹ Where bonds are to be delivered on the completion of a road the date for determining the indebtedness of the county is the time when the bonds are to be delivered—at the completion of the road.⁵⁰ A judgment creditor has a right to have his judgment included in the tax roll even if it increases the levy beyond the limit allowed where the right to have the judgment placed in the roll matured before the annual budget was made up, the city being required in such case to take notice of the judgment and limit its levy accordingly.⁵¹ The proof, it is said, in all cases of excess must be clearly shown.⁵²

§ 631. Evasion of constitutional limitations.—There have been frequent attempts to evade the constitutional limitations imposed upon municipal indebtedness, some of which have been sustained by the courts and some have not. There is considerable conflict among the authorities as to the limitations in municipal charters prohibiting the incurring of indebtedness in excess of a specified amount and where the bonds issued therefor are payable in the future. There can be no doubt that where a city proposes to purchase outright and establish a system of waterworks of its own the limitation applies, though bonds were issued therefor made payable in the future.⁵³ It has been held that the municipi-

⁴⁸ *Laporte v. Gamewell & Co.*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. 359; *City of Valparaiso v. Gardner*, 97 Ind. 1.

⁴⁹ *Gold v. Peoria*, 65 Ill. App. 602.

⁵⁰ *State v. Common Council of Tomahawk*, 96 Wis. 73, 71 N. W. 86. See also, *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722.

⁵¹ *State v. Wharton*, 103 Wis. 307, 79 N. W. 253. A municipality cannot set up as a defense to an action ex delicto that it has already reached its limit of indebtedness. *People v. May*, 9 Colo. 404, 12 Pac. 838; *Bloomington v. Perdue*, 99 Ill. 329; *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; *Rice v. Des Moines*, 40 Iowa 638;

Conner v. Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. 314; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588; *Torence v. Bean*, 18 Wash. 36, 50 Pac. 582.

⁵² *Roe v. Philippi*, 45 W. Va. 785, 32 S. E. 224.

⁵³ *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Beard v. Hopkinsville*, 95 Ky. 239, 15 Ky. L. 756, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. 222; *Read v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Coulson v. Portland, Deady (U. S.)* 481, Fed. Cas. No. 3275; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Spilman*

pality cannot evade the constitutional restriction by subscribing for stock in a corporation organized for the purpose of furnishing light and water.⁵⁴ Nor by purchasing and taking over as its property the waterworks plant subject to a mortgage thereby creating against itself, at least, an implied liability or indebtedness within the intent of the constitution notwithstanding the fact that the municipal corporation did not personally obligate itself to pay said incumbrance.⁵⁵ Nor by consenting that judgment be taken against it on an open demand.⁵⁶ There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum if the aggregate amount payable under such agreement exceeds the amount limited by the charter.⁵⁷ But the great weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water, or gas, or like necessity, for a term of years, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter.⁵⁸ It has been held that a city may legally contract for a light plant in piecemeal; i. e., buying only what it could pay for, and as it could pay for it.⁵⁹ Where a city is limited in its indebtedness by the constitution the fact that, by entering into a contract for the construction and maintenance of an electric light plant, it did not obligate itself to pay more than it had previously paid for lighting alone, is no justification for entering into the contract.⁶⁰ A city hall to be paid for in thirty

v. Parkersburg, 35 W. Va. 605, 14 S. E. 279.

⁵⁴ Voss v. Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201.

⁵⁵ Eddy Valve Co. v. Crown Point, 166 Ind. 613, 76 N. E. 536, 3 L. R. A. (N. S.) 684, and note.

⁵⁶ Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. 167.

⁵⁷ Niles Water-Works v. Niles, 59 Mich. 311, 26 N. W. 525; Humphreys v. Bayonne, 55 N. J. L. 241, 26 Atl. 81; Salem Water Co. v. Salem, 5 Orc. 29.

⁵⁸ Walla Walla v. Walla Walla Wa-

ter Co., 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77; Ante § 625.

⁵⁹ Overall v. Madisonville (Ky.) 102 S. W. 278, 12 L. R. A. (N. S.) 433. See also Addyston Pipe & Co. v. Corry, 197 Pa. 41, 46 Atl. 1035, 80 Am. St. 812.

⁶⁰ Prince v. Quincy, 128 Ill. 443, 21 N. E. 768; Windsor v. Des Moines, 110 Iowa 175, 81 N. W. 476, 80 Am. St. 280; Davis v. Des Moines, 71 Iowa 500, 32 N. W. 470; Clinton v. Walliker, 98 Iowa 655, 68 N. W. 431; Anderson v. Orient Fire Ins. Co., 88 Iowa 579, 55 N. W. 348; Tuttle v. Polk, 92 Iowa 433, 60 N. W. 733;

years by assessments of taxes is an indebtedness, though it may have the semblance of a lease.⁶¹

In some states it has been held that when a city has reached the limit of its permissible indebtedness it may anticipate the collection of its revenue by drawing warrants against the taxes levied, but not collected, which in effect is an assignment of the amount to the holder of the warrant.⁶² But in order to do so the tax not only must have been levied, but the warrant must be drawn payable out of a particular fund, and be such in legal effect as to discharge the municipality from all indebtedness thereon.^{62a} A contract for an annual rental for a number of years is not obnoxious to a statute prohibiting the creation of a debt of a specified amount without a vote of the electors.⁶³

§ 632. Indebtedness in excess of limit not a defense when.

—It has been held that a city cannot defend against a contract creditor on the ground that it levies taxes to the full constitutional limit and has no surplus after paying government expenses to be applied on the debt under a statute which provides that a city may be compelled by mandamus to levy a tax for the payment of a judgment against it, and that the whole amount raised under it within the constitutional limit may be applied in satisfaction of such debt, except such amount as may be necessary to pay sal-

Allen v. Davenport, 107 Iowa 90, 77 N. W. 532; *Phillips v. Reed*, 107 Iowa 331, 76 N. W. 850, 77 N. W. 1031; *Beard v. Hopkinsville*, 95 Ky. 239, 15 Ky. 756, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. 222; *Read v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *State v. Fayette County*, 37 Ohio St. 526; *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279. The time of payment of debts for the erection of an electric light plant being extended or postponed to a later date does not exclude such debts from the constitutional limitations. *Windsor v. Des Moines*, 110 Iowa 175, 81 N. W. 476, 80 Am. St. 296. A contract by a city which had already reached its debt limit providing for the lighting and maintenance of 7,000 street lamps at a definite price per lamp per annum payable monthly creates an indebtedness in

excess of the constitutional limit and the city may be enjoined from paying the money. *Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731; *Thompson Houston Electric Co. v. Newton*, 42 Fed. 723; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Lake v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. 651.

⁶¹ *Reynolds v. Waterville*, 92 Maine 292, 42 Atl. 553.

⁶² *Koppikus v. State Capitol Comrs.*, 16 Cal. 248; *Law v. People*, 87 Ill. 385; *Springfield v. Edwards*, 84 Ill. 626; *French v. Burlington*, 42 Iowa 614.

^{62a} *People v. May*, 9 Colo. 404, 12 Pac. 838; *Fuller v. Chicago*, 89 Ill. 282; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. 201.

⁶³ *Cunningham v. Cleveland*, 98 Fed. 657, 39 C. C. A. 211.

aries allowed by law to specified officers, where it has expended money for other purposes than those enumerated.⁶⁴ And where it did not appear that if a contractor had examined the city treasury he would have found no money on hand and that the condition of the city's finances was such that the obligation exceeded the limitation and he has complied with his contract and furnished an engine under the contract, it was held that the city will not be permitted to plead *ultra vires* and will be liable.⁶⁵

§ 633. Construction of constitutional provisions.—The rule for construing the provisions of constitutions limiting indebtedness of municipal corporations has been stated as follows: If directed to the legislature, they do not operate as a repeal of the existing powers of those corporations. But if directed to the municipalities, they have, in themselves, the effect of repealing any inconsistent provisions contained in the charters.⁶⁶ The constitutional provisions for submission to voters of questions as to indebtedness as well as those limiting the exercise of the taxing power of municipal corporations in North Carolina have reference only to the contracting of debts, the pledging of municipal faith, the loan of municipal credit, and the levying and collecting of taxes after they became operative, and not to antecedent obligations or the use of the means necessary to their discharge.⁶⁷ It has been held that if the municipal indebtedness has reached

⁶⁴ *Crebs v. Lebanon*, 98 Fed. 549.

⁶⁶ *Arbuckle-Ryan Co. v. Grand Ledge*, 122 Mich. 491, 81 N. W. 358, Under Nebr. Stat., ch. 14, art. 2, §§ 39-42, the payment for coal alleged to have been furnished the poor of a city cannot be recovered. *Kearney v. Downing*, 59 Nebr. 549, 81 N. W. 509; *Perry Water &c. Co. v. Perry*, 29 Okla. 593, 120 Pac. 582 (construing Oklahoma law recovery not permitted). Construction of Oregon laws of 1893 in regard to indebtedness of Klamath Falls. *Klamath Falls v. Sachs*, 35 Ore. 325, 57 Pac. 329, 76 Am. St. 513. Construction of Pennsylvania constitution, art. 9, § 8, limiting taxation. *Houston v. Lancaster*, 191 Pa. St. 143, 43 Atl. 83. Construction of Pennsylvania act of June 9, 1891, concerning indebtedness

of cities. *Barr v. Philadelphia*, 191 Pa. St. 438, 43 Atl. 335.

⁶⁷ *List v. Wheeling*, 7 W. Va. 501.

⁶⁷ *Street v. Craven County*, 70 N. Car. 644. See also, *Brothers v. Currituck*, 70 N. Car. 726. As to the rules for computing indebtedness, see *Waxahachie v. Brown*, 67 Tex. 519, 17 Am. & Eng. Corp. Cas. 348; *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *People v. Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280, 23 Am. & Eng. Corp. Cas. 39; *Wilkinson v. Van Orman*, 70 Iowa 230, 30 N. W. 495; *Potter v. Douglass County*, 87 Mo. 239, 13 Am. & Eng. Corp. Cas. 656; *Grant v. Lake*, 17 Ore. 453, 21 Pac. 447; *Durant v. Iowa County*, 1 Woolw. (U. S.) 69, Fed. Cas. No. 4189.

the constitutional limit, a city cannot enter into an agreement to pay a stated sum as rent for a market-house if its annual revenues are insufficient, over and above the interest of its indebtedness and the ordinary expenses of the city, to meet the rent proposed to be paid.⁶⁸ Under the provision in the constitution of Missouri that "no county * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year," a county warrant issued in payment for books bought by a county clerk which he is required to provide by statute is void, if at the time of its issuance the revenue for that year has already been consumed.⁶⁹ In an action against a county on warrants given in satisfaction of a judgment, an answer which alleges that at the time the judgment was rendered the county debt exceeded the constitutional limit, without stating that such debt exceeded the limit at the time of making the contract on which the judgment was rendered, has been held demurrable.⁷⁰ The constitution of Nebraska provides that county authorities shall never assess taxes, the aggregate of which shall exceed a certain limit, except for the payment of indebtedness existing at the adoption of the constitution, unless authorized by a vote, etc. It has been held that, in determining whether a proposed levy of taxes will exceed the constitutional limit, taxes to provide for bonded indebtedness contracted before the adoption of the constitution for internal improvements were not to be considered.⁷¹ Refunding bonds

⁶⁸ In re appeal of Erie, 91 Pa. St. 398. Where the limit of indebtedness has been reached, contracts have been held invalid as creating unauthorized debts. *French v. Burlington*, 42 Iowa 614 (for grading streets); *Hebard v. Ashland County*, 55 Wis. 145, 12 N. W. 437 (by a county for the building of a court-house); *People v. Johnson*, 6 Cal. 499 (for the construction of a wagon road); *Book v. Earl*, 87 Mo. 246 (for remodeling and building additions to a court-house); *In Baltimore v. Gill*, 31 Md. 375, a transaction by which the city pledged railroad stock belonging to it as security for an advance was held, notwithstanding the lender stipulated to look for its payment only to the stock

pledged, and the city was not to be responsible for any deficit, to be the incurring of a debt.

⁶⁹ *Barnard & Co. v. Knox*, 105 Mo. 382, 16 S. W. 917, 13 L. R. A. 244, overruling *Potter v. Douglas County*, 87 Mo. 239, 13 Am. & Eng. Corp. Cas. 656. The reason for this is that a debt of that kind is as much within the constitutional prohibition as a debt contracted for any other purpose by the county court.

⁷⁰ *Wilder v. Rio Grande County*, 41 Fed. 512.

⁷¹ *Bonnell v. Nuckolls County*, 32 Nebr. 189, 49 N. W. 225, affg. 28 Nebr. 90, 43 N. W. 1145. See also, *Baird v. Todd*, 27 Nebr. 782, 43 N. W. 1143.

issued by a county for the purpose of taking up a prior valid indebtedness of the county are not rendered invalid by the fact that they exceed the constitutional limitation on the indebtedness of counties and other municipalities.⁷²

§ 634. **Special statutory provisions.**—When the charter of a municipal corporation authorizes a contract to be made by the corporate body only in a certain mode its officers and agents cannot bind it in any other manner.⁷³ Where a statute provides that no contract shall be binding on a city unless an appropriation sufficient to pay the same be previously made by the council, it has been held that, when an appropriation was made sufficient at the time to pay the contract in full, a subsequent diversion of the same to other objects by the city left it liable as though such diversion had not been made.⁷⁴ Nor does such a provision repeal the obligation imposed upon councils to raise annually the amount required by commissioners for the erection of public buildings, and councils are bound to levy the tax or otherwise raise the amount.⁷⁵ If an appropriation has been made under such a provision in the charter of a city for a specific purpose, and the proper department incurs liabilities sufficient to exhaust it, it can make no further contracts binding on the city for that purpose.⁷⁶ A municipal corporation may be bound upon implied contracts made by its agents and to be deduced from corporate acts without a vote of the governing body, provided the contract is within the scope of the corporate powers and is not one which the charter or law governing the corporation requires to be made in a particular way or manner.⁷⁷

⁷² *Aetna Life Ins. Co. v. Lyon*, 44 Fed. 329.

⁷³ *Keeney v. Jersey City*, 47 N. J. L. 449, 1 Atl. 511, 11 Am. & Eng. Corp. Cas. 309. "A township or other municipality can only act by the mode prescribed by law. Any other rule leaves the taxpayer at the mercy of the officers of the township and contractor, and would render all statutory provisions of limitation of power nugatory." *Perry Water & Co. v. Perry* (Okla.), 120 Pac. 582.

⁷⁴ *McGlue v. Philadelphia*, 10 Phila. (Pa.) 348, 32 Leg. Int. (Pa.) 188.

⁷⁵ *Perkins v. Slack*, 86 Pa. St. 270. See also, *Donovan v. New York*, 44 Barb. (N. Y.) 180; *In re Tatham's Appeal*, 80 Pa. St. 465.

⁷⁶ *Kingsland v. New York*, 5 Daly (N. Y.) 448. See also *People v. Kelly*, 76 N. Y. 475, 5 Abb. N. C. (N. Y.) 383, 468.

⁷⁷ *Kramrath v. Albany*, 127 N. Y. 575, 28 N. E. 400. A corporation, like an individual, is liable on the quantum meruit when it has enjoyed the benefit of the work performed or goods purchased, when no statute forbids or limits its power to make a contract

§ 635. **Other special provisions.**—It has been held that the provisions of the charter of a city prohibiting it from entering into a contract for a work or improvement at a price exceeding \$500, "until the assessment therefor has been confirmed," did not apply to the board of park commissioners, but only had reference to contracts made by the regular officers of the municipal government, and not to those made by its separate independent departments.⁷⁸ Where the power of the commissioners of public works to incur liability for materials used in the construction of sewers was limited to \$100,000, it was held that a contract for sewer materials exceeding that amount was not binding on the city, at least for the excess. But a contractor who had in good faith furnished the materials, which had been received by the city, could recover therefor where the legislature had subsequently validated the contract.⁷⁹ It has been held that a statute, prohibiting municipal corporations from contracting any debt or pecuniary liability without adopting an ordinance and providing in it the means of paying the principal and interest of the debt contracted, was not applicable to a demand for gas supplied to a city.⁸⁰ Under the Georgia act limiting the power of a city to levy taxes imposed for the purpose of defraying "ordinary current expenses," expenses incurred in erecting and fitting up necessary municipal offices, such as police headquarters, council chamber, courtroom, clerk's office, town hall and engine-house, have been held to be included therein.⁸¹

therefor. *Peterson v. New York*, 17 N. Y. 449; *Harlem Gaslight Co. v. New York*, 3 Robt (N. Y.) 100, *affd.* 33 N. Y. 309; *Nelson v. New York*, 63 N. Y. 535; *McCloskey v. Albany*, 7 Hun (N. Y.) 472.

⁷⁸ *Bork v. Buffalo*, 127 N. Y. 64, 27 N. E. 355, 37 N. Y. St. 332.

⁷⁹ *Nelson v. New York*, 63 N. Y. 535, *revg.* 5 Hun (N. Y.) 190, followed in *People v. Denison*, 19 Hun (N. Y.) 137, *affd.* 80 N. Y. 656, distinguished in *Bigler v. Mayor*, 5 Abb. N. C. (N. Y.) 51, limited in *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144, *affg.* 1 Hun (N. Y.) 719, 4 Thomp. & C. (N. Y.) 177; *Smith v. Newburgh*, 77 N. Y. 130.

⁸⁰ So in *Laycock v. Baton Rouge*, 35

La. Ann. 475, for the reason that this demand was one of the current expenses of the city and payable out of the current revenues of the year in which the liability was contracted. As to different rulings and modifications, see *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785, 2 Am. & Eng. Corp. Cas. 66; *Springfield v. Edwards*, 84 Ill. 626; *Sackett v. New Albany*, 88 Ind. 473.

⁸¹ *Mayor &c. of Rome v. McWilliams*, 67 Ga. 106. But in *Hudson v. Marietta*, 64 Ga. 286, it was held that an election under the law was necessary to authorize a city to incur a debt under the provisions of the constitution of that state in exchanging an old fire engine for a new

§ 636. **Indebtedness for water and lights.**—The establishment by the city of a water department for the supply of water to the city and its inhabitants is a “city purpose”, within the meaning of a constitutional provision that “no county, city, town or village shall * * * be allowed to incur any indebtedness except for county, city, town or village purposes.”⁸² A section of the act “to establish and maintain a water department in and for the city of Syracuse” provided for the issue of bonds by the city of Syracuse in aid of the establishment and maintenance of a water department, and made the bonds payable more than twenty years from the date of their issue, but provided for no sinking fund for their retirement at maturity. It was held that such section was not in violation of the constitution of New York, which provides that “no county containing a city of over one hundred thousand inhabitants, or any such city, shall be allowed to become indebted * * * to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate subject to taxation,” and that such section “shall not be construed to prevent the issue of bonds to provide for the supply of water, but the terms of” such bonds “shall not exceed twenty years, and a sinking fund shall be created on the issuing of such bonds for their redemption,” it not affirmatively appearing that Syracuse contained more than one hundred thousand inhabitants and that its existing indebtedness exceeded ten per centum of the assessed valuation of its real estate subject to taxation.⁸³ The construction and operation by a city of a plant for the supply of electric light to the city and its inhabitants is a city purpose, within the meaning of the constitution of New York, prohibiting cities from incurring indebtedness except for city purposes.⁸⁴ The act of a town in

one. And in *Spann v. Webster County*, 64 Ga. 498, it was held that a vote of citizens was necessary to authorize the purchase of iron safes for the county. The levy of a tax for expenses of jails was, however, held to be valid, being equivalent to a levy to maintain and support prisoners, which was in the power of the commissioners.

⁸² *Comstock v. Syracuse*, 5 N. Y. 874, 25 N. Y. St. 611 (subnomine, *In re Comstock*).

⁸³ *Comstock v. Syracuse*, 5 N. Y. 874, 25 N. Y. St. 611 (sub nomine, *In re Comstock*).

⁸⁴ *Hequembourg v. Dunkirk*, 49 Hun (N. Y.) 550, 18 N. Y. St. 570, 2 N. Y. S. 447.

authorizing its selectmen to make a contract with a water company for a supply of water, for fire and other purposes, for a term of years at a certain sum per year, to be paid annually, the payments to be made out of moneys annually granted by the town and raised by taxation, is not the incurring of a debt within the meaning the statute of Massachusetts relative to municipal indebtedness, as the statute does not apply to contracts for current expenses payable out of current revenues.⁸⁵ Where the mayor and council of a town have the power to contract an annual indebtedness for lighting the town, they will not be enjoined, under the provision in the constitution of Georgia that a debt cannot be incurred by a town without the approval of two-thirds of the voters, from carrying out a ten-years' contract for lighting, by the terms of which two thousand dollars is to be paid annually, so long as such payments are made as they become due.⁸⁶ A debt arising from a breach of contract to pay cash is not within the constitutional provisions of the state of Georgia limiting indebtedness.⁸⁷

§ 637. **Effect of exceeding the limit.**—Where bonds are issued at different times to pay for improvements, under an act limiting the total amount to be issued, it is held that the fact that bonds are issued beyond the limit does not invalidate such bonds as were issued and sold before the limit was reached.⁸⁸ In an action on such bonds the petition need not allege that there was not an overissue, it being a matter of defense if there was.⁸⁹ And even if it were necessary to allege that there was not an overissue, an allegation that the bonds were “duly” issued would be sufficient.⁹⁰ Where a district voted to build a schoolhouse to cost not more than two thousand dollars, and the directors borrowed part of the money necessary and gave an order therefor, and in erecting the house paid more than the amount authorized, it was held, in an

⁸⁵ *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782.

⁸⁶ *Lott v. Waycross*, 84 Ga. 681, 11 S. E. 558.

⁸⁷ *Conyers v. Kirk*, 78 Ga. 480, 3 S. E. 442.

⁸⁸ *Catron v. Lafayette County*, 106 Mo. 659, 17 S. W. 577. See also, *Daviess v. Dickinson*, 117 U. S. 657, 29

L. ed. 1026, 6 Sup. Ct. 897; *Columbus v. Woonsocket Inst.*, 114 Fed. 162, 52 C. C. A. 118; *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049.

⁸⁹ *Catron v. La Fayette County*, 106 Mo. 659, 17 S. W. 577.

⁹⁰ *Catron v. La Fayette County*, 106 Mo. 659, 17 S. W. 577.

action upon the order, that where the money was used in paying an indebtedness incurred before the authorized limit was reached the district was liable.⁹¹ It has been held that a contract, by which a city, in a territory whose assessed valuation was five million dollars, agreed to pay fifteen thousand dollars a year for twenty years, could not be considered as falling within an act of congress prohibiting municipal corporations in the territories becoming indebted to an amount exceeding four per cent. of the valuation.⁹² Where the indebtedness of a city incurred under a contract already exceeds the constitutional limit, and the fund appropriated for the purpose of the contract is exhausted, damages cannot be recovered for a breach of the contract by the city.⁹³

⁹¹ Austin v. Colony Tp., 51 Iowa Mont. 502, 13 Pac. 249, 8 Mont. 467, 102, 49 N. W. 1051.

⁹² Davenport v. Kleinschmidt, 6 ⁹³ Dhrew v. Altoona City, 121 Pa. St. 401, 15 Atl. 636.

